

Draft Determination

Application for Authorisation

Lodged by

**Clay Brick and Paver Institute for itself and on behalf of the
Concrete Masonry Association of Australia**

In respect of

*An agreement between the CBPI and CMAA members to impose training levies on
the sale of clay bricks and pavers and concrete masonry products sold in NSW, SA,
WA, QLD and the ACT*

Date: 21 April 2004

Commissioners:

Authorisation no. A90895

Public Register no. C2004/22

Sylvan
Martin
McNeill

Executive Summary

On 18 December 2003, the Clay Brick and Paver Institute (CBPI) lodged an application for authorisation (A90895), for itself and its members on behalf of the Concrete Masonry Association of Australia (CMAA) and its members, with the Australian Competition & Consumer Commission (the Commission)

The CBPI and CMAA seek authorisation for an agreement between their members to impose two levies, one on the price of clay bricks and one on the price of concrete masonry blocks sold in the states of NSW, SA, QLD, WA and the ACT. These levies entail \$2.00 per thousand clay bricks and 10c per square metre of concrete masonry blocks sold in those states. The levies are to be matched by CBPI and CMAA members as voluntary industry contributions.

The levies are to be used to fund an apprentice bricklayer training scheme. The training scheme will use group training companies to facilitate the placement of apprentice bricklayers with host employers. The objective of the proposed arrangements is to increase the number of skilled bricklayers in the building and construction industry, in an attempt to alleviate a national skill shortage.

The arrangements are based on similar arrangements currently in place in NSW and which were authorised by the Commission on 23 October 2002 (A90676).

The Commission considers that the anticompetitive detriment generated by the proposed arrangements is likely to be minimal. In particular the Commission does not consider that the proposed levy will significantly impact on the price of building homes. Further, the Commission does not consider that the use of the levy to fund industry run group training programs will significantly negatively impact on competition for the provision of these services. If anything the Commission considers that the proposed arrangements will improve the quality of these services.

The Commission is satisfied that the proposed arrangements are likely to generate a public benefit. Specifically, the Commission considers that the proposed arrangements will lead to an increase in the number of apprentice bricklayers, which will improve the quality of workmanship across the industry and reduce construction times and costs.

Overall, the Commission is satisfied that the public benefit flowing from the proposed arrangements is likely to outweigh any anti-competitive detriment. Therefore, the Commission proposes to **grant** authorisation A90895 as sought by the CBPI and CMAA, for three years.

The applicants have noted that in the event that this application is granted, there will be a need to revoke authorisation A90830, granted to CBPA on 23 October 2002. The need to revoke stems from the fact that the CBPA will become a party to the new arrangements described in the current application.

The Commission will now seek further submissions from interested parties. In addition, the CBPI and CMAA or any interested party may request that the Commission hold a pre-determination conference pursuant to section 90A of the *Trade Practices Act 1974* (TPA).

List of Abbreviations

CPBA	Clay Brick and Paver Association of New South Wales
CBPAV	Clay Brick and Paver Association of Victoria
CBPI	Clay Brick and Paver Institute
CMAA	Concrete Masonry Association of Australia
HIA	Housing Industry Association
MBA	Master Builders Association
MBAWA	Master Builders Association of Western Australia
TPA	<i>Trade Practices Act 1974</i>
VBBTF	Victorian Brick and Blocklaying Training Foundation Ltd
WAGTS	West Australian Group Training Scheme Inc.

TABLE OF CONTENTS

1.	INTRODUCTION	1
	Authorisations	1
	This Application.....	2
	Chronology	2
2.	BACKGROUND TO APPLICATION	4
	Authorisation A90676.....	4
	Current Application	6
	Related Application	6
	The Market for Bricklaying	7
	Shortage of Bricklayers.....	8
	The existing NSW arrangements	10
3.	THE ARRANGEMENTS	13
	Group Training Companies.....	13
	Host employers	14
	Focus of the training scheme	14
4.	SUBMISSIONS RECEIVED BY THE COMMISSION.....	15
	Submission from the Applicants	15
	Submissions from Interested Parties	16
5.	THE PUBLIC BENEFIT TEST.....	20
	Definition of public benefit and anti-competitive detriment.....	21
	Future with-and-without test.....	21
	Whether arrangements breach the TPA	21
	Term of authorisation.....	22
6.	COMMISSION EVALUATION	23
	This application for authorisation	23
	Market definition	23
	Future with-and-without test.....	24
	Relationship with Authorisation A90830	25
	Revocation of authorisation A90830	25
	Effect on Competition	26
	General increase in the cost of clay bricks and concrete masonry blocks and a subsequent increase in the cost of building	26
	Potential for collusive anticompetitive conduct beyond that authorised.....	26
	Potential that the proposed training scheme will result in a ‘doubling-up’ of resources..	27
	Existing Group Training Companies being placed at a competitive disadvantage.....	27
	Conclusion	28
	Public Benefit	28
	Conclusion	30
	Balance of public benefit and detriment.....	31
	Term of Authorisation.....	32
7.	DRAFT DETERMINATION	33
	The Application	33
	The Statutory Test.....	33
	Conduct for which the Commission proposes to grant authorisation	33
	Further submissions	34

1. INTRODUCTION

Authorisations

- 1.1 The Australian Competition and Consumer Commission (the Commission) is the Commonwealth agency responsible for administering the *Trade Practices Act 1974* (the TPA). A key objective of the 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.
- 1.2 The TPA, however, allows the Commission to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the Commission for what is known as an ‘authorisation’.
- 1.3 Broadly, the Commission may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.4 The Commission conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.
- 1.5 Upon receiving an application for authorisation, the Commission invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.6 The TPA requires that the Commission then issue a draft determination in writing proposing to either grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the Commission will take into account any submissions received from interested parties.
- 1.7 This document is a draft determination in relation to the application for authorisation A90895 lodged with the Commission by the Clay Brick and Paver Institute (CBPI) and the Concrete Masonry Association of Australia (CMAA).
- 1.8 Once a draft determination is released, the applicant or any interested party may request that the Commission hold a conference. A conference provides interested parties with the opportunity to put oral submissions to the Commission in response to a draft determination. The Commission will also invite interested parties to lodge written submissions on the draft.
- 1.9 The Commission then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a written final determination. Should the public benefit outweigh the public detriment, the Commission may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefit or reduce the public detriment.

This Application

- 1.9 On 18 December 2003, the CBPI for itself and its members and on behalf of the CMAA and its members, lodged an application for authorisation A90895 with the Commission. The application was made under section 88(1) of the TPA¹ for authorisation:
- To make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA; and
 - To give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.
- 1.10 The CBPI and the CMAA applied for authorisation for an agreement between their members for two levies to be placed on the price of clay bricks and concrete masonry blocks sold in South Australia (SA), New South Wales (NSW), Queensland (QLD), Western Australia (WA) and the Australian Capital Territory (ACT). These levies entail \$2.00 per thousand clay bricks and 10c per square metre of concrete masonry blocks sold in those states. The levies are to be matched by CBPI and CMAA members as voluntary industry contributions.
- 1.11 The levies are to be used to fund an apprentice bricklayer training scheme. The training scheme will use group training companies to facilitate the placement of apprentice bricklayers with host employers and will subsidise employment and administration costs to such employers. In addition, the scheme will provide specialist skill training courses for apprentice bricklayers in order to improve their skill levels so that they can perform effectively and productively for host employers. The objective of the proposed arrangements is to increase the number of skilled bricklayers in the building and construction industry, in an attempt to alleviate a national skill shortage.
- 1.12 On 1 March 2004, the applicants made minimal amendments to their application clarifying the intent of the proposed arrangements.

Chronology

- 1.13 Below is a chronology of significant dates in the consideration of the application.

DATE	ACTION
18 December 2003	Application for authorisation A90895 received by the Commission.
23 December 2003	The Commission sought submissions from interested parties.
16 January 2004	Closing date for submissions from interested parties.

¹ The application has also been considered as an application under the *Competition Code* of each of the relevant participating Australian jurisdictions.

1 March 2004	Amended application for authorisation A90895 received by the Commission.
8 April 2004	The Commission sought further information from the applicants.
15 April 2004	The Commission received additional information from the applicants.
21 April 2004	Draft determination issued.

2. BACKGROUND TO APPLICATION

Authorisation A90676

- 2.1 On 23 September 1998, the Clay Brick and Paver Association of New South Wales (CBPA) lodged an application for authorisation (A90676) with the Commission. The CBPA sought to impose on its members a levy of \$1.00 per thousand bricks sold in NSW. The levy was to be passed on to consumers in the cost of purchasing clay bricks and pavers and was to appear as a separate item on all invoices. As a secondary component of the arrangement CBPA members were to match the levy as voluntary industry contributions.
- 2.2 Money raised from the levy, and related contributions, was to be used to fund an industry operated training scheme for apprentice bricklayers. The main objective of the scheme was to relieve the shortage of skilled bricklayers in NSW, particularly in the housing sector.
- 2.3 As a part of the CBPA's training initiative, it proposed to set up a group training company, whereby apprentice bricklayers would receive basic skills and on-the-job training in order to become trades qualified bricklayers. On-site training was proposed to be conducted through placements to host employers, facilitated and administered by the industry run group training company.
- 2.4 The levy was to be used to subsidise training costs, including costs to host employers operating within NSW. It was proposed that host employers would pay the award wage for their apprentice and that this money would be paid to the group training company. The levy would then be used to subsidise extra costs such as workers compensation, annual leave and loading, sick leave, public holidays, apprentices' tools insurance, TAFE college fees, payroll tax, superannuation, MEND Rehabilitation fees and down-time caused through bad weather. Apprentices would then be required to pay any outstanding costs.
- 2.5 It was estimated that a minimum of 100 extra placements for trainees would be created under the proposed scheme.
- 2.6 The Commission assessed the CBPA's application for authorisation and concluded that while the levy would have the effect of increasing the price of bricks sold to consumers, this potential increase in price was likely to be minimal.
- 2.7 The Commission considered that the proposed levy would result in public benefits as it was likely to:
 - alleviate the shortage of skilled workers in the NSW bricklaying trade;
 - alleviate cyclical fluctuations in the laying rates of bricks; and
 - reduce construction times.
- 2.8 The Commission concluded that the imposition of the training levy was likely to result in a net public benefit and on 11 May 1999 granted authorisation to the CBPA for a period of three years commencing from 2 June 1999.

- 2.9 The levy commenced in March 2000 and the CBPA has since incorporated the Brick Industry Group Training Company Pty Ltd, which it wholly owns and administers, to administer the levy and training scheme.
- 2.10 On 2 May 2002, CBPA applied to the Commission for the revocation and substitution of authorisation A90676 with an agreement in exactly the same terms as authorisation A90676, for a further period of three years. The CBPA also sought interim authorisation for the substitute arrangements.
- 2.11 Authorisation A90676 was due to expire on 11 May 2002. Therefore CPBA lodged the above applications so that the levy arrangements could continue to be afforded immunity from the relevant provision of the TPA and thereby continue to operate.
- 2.12 On 9 May 2002, the Commission granted interim authorisation to the CBPA for the substitute arrangements, on the basis that maintenance of the status quo was preferable while the Commission was assessing CBPA's substantive revocation and substitution application (A90830).
- 2.13 The effect of the interim authorisation was to suspend the operation of A90676, and substitute interim authorisation for the proposed substitute arrangements.
- 2.14 After assessing CBPA's substantive application, the Commission concluded that the levy arrangements had not resulted in a major increase in the costs of building to consumers and that the related training scheme had been successful in increasing the number of bricklayers in NSW. In addition the Commission was of the view that the continuation of the levy under the same terms, was likely to continue to increase the numbers of apprentice bricklayers entering the trade.
- 2.15 It was considered by the Commission that this was likely to lead to further reductions in the costs of bricklaying, reductions in construction times and to improve the quality of workmanship across the industry: all likely to produce a net public benefit.
- 2.16 Thus on 23 October 2002, the Commission revoked authorisation A90676 and granted substitute authorisation A90830 for a period of three years, from 14 November 2002.
- 2.17 Authorisation A90830 is due to expire on 14 November 2005. The applicants note that in the event that the Commission authorises the current application, there will be a need to revoke² authorisation A90830. This stems from the fact that the CPBA will become a party to the new arrangements authorised in respect of the current application.

² Under section 91B of the TPA the Commission may revoke an authorisation either on its own initiative or at the request of a person to whom authorisation was granted if, amongst other grounds, there has been a material change in circumstances since the authorisation was granted.

Current Application

- 2.18 The current application (A90895) was lodged by the CBPI for itself and its members and on behalf of the CMAA for itself and its members for authorisation of similar arrangements as those outlined above. The current application is largely modelled on authorisation A90830, however it is to apply more broadly. Further details of the application are outlined in section 3 of this draft determination.
- 2.19 The CBPI is an industry body, which undertakes research for the clay brick industry in Australia and produces technical literature on design and construction for specifiers and builders in the field. In addition, it coordinates lobbying and promotion of issues affecting the clay brick industry. CBPI members consist of clay brick manufacturers, who supply an excess of 99% of the total clay brick market in Australia.
- 2.20 Similarly, the CMAA is an industry body that represents concrete masonry block manufactures Australia-wide. CMAA members supply approximately 80% of the market for concrete masonry products sold in Australia.

Related Application

- 2.21 The Commission is currently assessing a request for revocation and substitution lodged by the Victorian Brick and Blocklaying Training Foundation Ltd (VBBTF) for itself and its members and on behalf of the Clay Brick and Paver Association of Victoria (CBPAV) and its members, for an agreement on substantially similar grounds as the current application by the CBPI and CMAA.
- 2.22 On 12 December 2000, the Commission granted authorisation to an agreement between CBPAV members to impose a levy of \$1.00 per thousand bricks sold in Victoria (A90738). This levy was to be paid for by consumers in the cost of purchasing bricks and would be voluntarily matched by CBPAV members, as industry contributions.
- 2.23 On 4 December 2003, the VBBTF and the CBPAV applied to the Commission to revoke Authorisation A90738 and substitute it with a new authorisation on the same terms except for an increase of \$1.00 per thousand bricks, from the levy arrangements previously authorised by the Commission.
- 2.24 In addition, the VBBTF and CBPAV applied for interim authorisation for the levy arrangements, whilst the application for revocation and substitution was being assessed by the Commission. The Commission granted interim authorisation on 4 December 2003.
- 2.25 Concurrent with the release of this draft determination, the Commission has released a draft determination proposing to grant the CBPAV and VBBTF's application for revocation and substitution.

The Market for Bricklaying

- 2.26 Bricklaying forms a part of the general construction industry. According to the Building and Construction Working Group, the building and construction industries ‘are the engine room of the Australian economy...[leading] national economic activity and build[ing] the infrastructure within which value creation occurs’³.
- 2.27 Approximately 210,000 firms operate in the building and construction industry Australia-wide, with the majority of firms being small businesses. An average of \$35 billion of work is completed annually by the industry⁴.
- 2.28 Collectively the industry contributes 11.3% of GDP, greater than agriculture, mining, gas, electricity and water facilities.⁵
- 2.29 The building and construction industry consists of three main groups⁶:
- Commercial
 - Industrial
 - Housing
- 2.30 Housing forms the largest group and is a sector that has seen dramatic growth and demand in recent years as a part of the housing boom.
- 2.31 The applicants submit that CBPI members supply bricks into the housing and commercial markets and manufacture 1.8 billion bricks per annum, which represents at least 99% of clay bricks and pavers sold in the states of NSW, SA, WA, QLD and the ACT. The majority of product is sold for use in detached and multi residential dwellings.
- 2.32 In addition, the applicants submit that CMAA members manufacture and supply 2 million tons of concrete bricks and blocks per annum in to the respective states; which represents 80% of all concrete bricks and blocks sold in those states.
- 2.33 The focus of the arrangements the subject of this application is on the housing sector, as it is an area that is least likely to employ apprentice bricklayers and is the sector of highest demand at present.

³ Building and Construction Working Group, *Present and Future Skills Needs in the Building and Construction Industry – Draft report*, August 2001, available at www.skillsinitiative.gov.au, p 2.

⁴ Ibid, p 10.

⁵ Ibid.

⁶ Ibid, p 12.

Shortage of Bricklayers

- 2.34 It has been recognised by varying sources⁷ that the building and construction industry is suffering from a severe shortage of skilled bricklayers.
- 2.35 According to the National and State Skills Shortage Lists Australia 2003, the Bricklaying Trade has a national shortage of skilled tradesman.⁸ The states of Victoria, Queensland, Western Australia, Tasmania and the Northern Territory have particular problems, with state wide shortages, whilst the states of New South Wales and South Australia are suffering severe shortages in Metropolitan regions.⁹
- 2.36 The Productivity Commission recently supported this proposition in its draft report into first home ownership, where it reported that severe skills shortages have resulted in significant delays in construction times and added to the costs of building.¹⁰ These problems have been particularly prevalent in recent years, during the ‘housing boom’, and according to the Productivity Commission, this is a common occurrence during peak periods of demand.¹¹
- 2.37 There are several factors that have been highlighted as having contributed to a national shortage of skilled bricklayers. These include:
- the cyclical nature of the trade means that it is viewed by young people as lacking security;¹²
 - low wages in the industry make the trade unattractive to young people;¹³
 - the trade consists of a largely ageing population;¹⁴
 - training programmes are not flexible enough to cater for certain demographics;¹⁵

⁷ Department of Employment and Workplace Relations, *National and State Skill Shortage Lists Australia – 2003*, provided to the Commission by the applicant; Productivity Commission, *First Home Ownership – Productivity Commission Discussion Draft*, December 2003, Melbourne; Building and Construction Working Group, *Present and Future Skills Needs in the Building and Construction Industry – draft report*, August 2001, available at www.skillsinitiative.gov.au.

⁸ Department of Employment and Workplace Relations, *National and State Skill Shortage Lists Australia – 2003*, provided to the Commission by the applicant.

⁹ Ibid.

¹⁰ Productivity Commission, *First Home Ownership – Productivity Commission Discussion Draft*, December 2003, Melbourne, p 131

¹¹ Ibid.

¹² Ibid.

¹³ Building and Construction Working Group, n1, p 84.

¹⁴ Productivity Commission, n 8.

- certain employers prefer to hire skilled staff as opposed to untrained apprentices;¹⁶
- certain employers tend not to hire apprentices due to the added costs to their businesses and the added administrative work;¹⁷ and
- similarly, certain employers fear that if they hire an apprentice, the apprentice will abandon the employer for alternative employment at the completion of their apprentice training.¹⁸

2.38 According to a survey conducted by the Building and Construction Working Group in the preparation of its draft report, a majority of employers in the construction trades chose not to hire apprentices for the reasons outlined above.¹⁹ Those employers who do hire apprentices generally chose to use a group training company. According to the survey, there are three main reasons for this preference. Group training schemes offer:

- flexibility in employment;
- the ability for employers to have a choice of apprentice; and
- a reduction in workers' compensation claims.²⁰

2.39 As outlined in the background to this draft determination, the use of group training schemes to alleviate skills shortages has already been implemented by industry groups in Victoria and New South Wales, and there is evidence that such schemes operate independently of the CBPI and CMAA in other states of Australia.²¹

2.40 Information provided to the Commission by the applicant suggests that the CBPI has increased its intake of apprentice bricklayers in recent years, through its Brick Industry Group Training Company Pty Ltd. However these increases have been smaller than those which the CBPI predicted would result from the currently authorised arrangements. For example, the CBPA initially predicted an increase of 100 apprentices per annum as a result of the introduction of its training scheme. However, actual intakes have been less than half this number.

¹⁵ Building and Construction Working Group, n 1, p 19.

¹⁶ Ibid, p 83.

¹⁷ Ibid, p 78.

¹⁸ Ibid.

¹⁹ Ibid, p 79-80.

²⁰ Ibid.

²¹ Skill Hire and WAGTS, joint submission to the Commission, 13 February 2004.

- 2.41 The CBPI and CMAA state in their submissions in support of the current application that there is a paramount need to increase the numbers of apprentices attending group training companies, like the one currently running in NSW, in order to better meet market demands.
- 2.42 Consistent with this proposition, the Productivity Commission recently reported that skills shortages are forecast to increase over the next 7-10 years in the housing sector²² which, as stated above, represents the largest component of the construction industry²³.

The existing NSW arrangements

- 2.43 As noted at paragraph 2.18, the proposed arrangements are based on the existing levy training scheme operating in NSW. The NSW levy commenced in March 2000 and affected over 1000 brick purchasers. From that number only six purchasers raised concerns about the levy, however, after consultation with the CBPA, the purchasers agreed that the levy arrangements should apply.
- 2.44 The levy has applied continually since March 2000 and the Brick Industry Group Training Company presently employs 165 apprentices, all of whom are working with host contractors. The applicants state that the acceptance of the scheme is due to the fact that the majority of apprentices remain with the same contractor throughout the apprenticeship and at any one time there are 20 to 30 contractors who are looking to host an apprentice. In addition, 95% of the apprentices are hosted in the housing sector by small contracting teams, indicating that the scheme is economically viable for such entities.
- 2.45 The applicants note that the CBPA levy arrangements currently target the housing sector. This sector is the focus of the scheme because it is a sector that is dominated by small contracting teams of 2 to 3 bricklayers, who traditionally have not employed apprentices because of the associated costs, paper work and time involved in training them. In addition, small contractors are less inclined to employ an apprentice due to their lack of productivity, especially in their first year of employment.
- 2.46 The applicants state that the structure of the current NSW arrangements provides incentive for small contracting teams to take on apprentice bricklayers. The CBPI and CMAA argue that using the funds raised from the levies to subsidise apprentice on-costs has enabled the CBPA to open up an area of apprentice employment that has previously been unavailable. The applicants submit that the CBPA's Brick Industry Group Training Company has been more successful in increasing apprentice intake numbers than other group training companies in the NSW market because it offers a subsidy in the costs of employing apprentice bricklayers. It is argued that without this subsidy, small contracting teams that dominate the housing sector would not employ apprentice bricklayers.

²² Productivity Commission, n 8, p 131.

²³ Building and Construction Working Group, n 1, p 10.

- 2.47 Additionally, the CBPA's Brick Industry Group Training Company seeks to increase apprentice bricklayers numbers by entering into mentoring agreements with major builders in NSW. Currently the CPBA has agreements with the two major building companies in NSW, Mirvac and The Clarendon Group. The applicants state that the mentoring scheme has been successful in training quality bricklayers, for example one bricklayer who was trained through the Mirvac scheme completed his apprenticeship, set up his own bricklayer contracting team and now hosts apprentice bricklayers through his own company.
- 2.48 As stated above, the Brick Industry Group Training Company has 165 apprentices being hosted by contractors, which is well short of the target of 300 additional apprentice places that the CBPA predicted would be created in its submission in support of its original application. The CBPI and the CMAA contend that the reason for this target not being met is that the income derived from the \$1.00 levy is insufficient to subsidise the target number of apprentices.
- 2.49 The CBPI and CMAA state that since the levy arrangements were first introduced, the cost of workers compensation premiums payable by the CBPA has risen significantly beyond forecasts. The applicants state that the premiums have amounted to \$217,000 or 20% of the combined levy amount. The applicants further state that the re-assessed premium for 2003-04 is \$285,000.
- 2.50 The CBPI and CMAA state that the increase in workers compensation premiums has made it impossible for the CBPA to meet its target of subsidising the employment of 100 apprentices per annum, through its Brick Industry Group Training Centre. It is argued that the targeted figure of new apprentices would have been achievable with the \$1.00 levy on clay bricks, had workers compensation premiums not increased to such an extent.
- 2.51 The CBPI and CMAA state that at any one time there are generally between 20 to 30 contractors waiting to employ an apprentice through the CBPA's Brick Industry Group Training Company. They envisage that by applying a levy to \$2.00, as opposed to the \$1.00 levy currently applied in NSW, and by applying a levy to concrete masonry products, the CBPI and CMAA will be in a financial position to increase bricklayer numbers to meet market demands and to not be inhibited by the costs of workers compensation premiums.
- 2.52 The CBPI and CMAA state that in NSW, there are approximately 8000 licensed bricklayers operating. The applicants further state that there is an attrition rate of about 6% per annum through age or incapacity and that therefore to keep pace with normal industry needs the industry in NSW needs 500 new bricklayers completing the training system each year.
- 2.53 Further, the applicants state that in 2003 apprentices committing to training in the NSW TAFE system numbered 156, which combined with CBPA's 41 apprentices, amounts to 197 apprentice bricklayers completing training in that year. The CBPI and CMAA state that through these training systems there is a recognised drop out rate of approximately 40%. These apprentices generally do not complete their off site training but continue to work as an unlicensed bricklayer. These bricklayers are not included in the above figures. Taking all of the above groups in to account

there are about 280 new bricklayers entering the system and around 500 completing in NSW annually.

- 2.54 As noted above, it is envisaged by the CBPI and CMAA that by doubling the levy on clay bricks to \$2.00 and including the concrete masonry manufacturers it will have the opportunity to increase the number of apprentices to a level where the completion numbers from training are close to those of normal rates of attrition.

Administration of the levy funds

- 2.55 At the conclusion of each month the CBPA contacts each of its members to ascertain their sales figures for that month. The members provide these figures to the CBPA and it then prepares a tax invoice for the amount of levy payable for the amount contributed by the manufacturing member. The member then pays the invoice amount directly into the account of the Brick Industry Group Training Company, who then administers the funds. The Brick Industry Group Training Company acts as the employer of the relevant apprentices and pays the subsidy directly to host employers.
- 2.56 The subsidy to host employers covers the cost of annual leave and loading, sick leave, public holidays, and superannuation through the normal wages process. It also covers payment of workers compensation premiums, tool insurance and off-site training.
- 2.57 The Brick Industry Group Training Company is audited by an independent auditor. The CBPI and CMAA have provided the Commission with copy of the company's full audit report for the year 2002-2003.
- 2.58 The CBPA also keeps industry informed as to the progress of the group training scheme, by distributing a flyer to over 10,000 builders and contractors outlining the income and expenditure statements for that period. The applicants state that if any participant in the scheme requires further information with respect to the income and expenditure of the CBPA, the CBPA provides this information, in order to ensure a transparent process. The applicants have provided the Commission with a copy of the relevant flyer.

3. THE ARRANGEMENTS

- 3.1 The CBPI and CMAA seek authorisation for an agreement between their members to impose two levies, one on the price of clay bricks and pavers and one on the price of concrete masonry bricks and blocks sold in the states of NSW, SA, QLD, WA and the ACT. These levies entail \$2.00 per thousand clay bricks and 10c per square metre of concrete masonry blocks sold in these states. The levies are to be matched by CBPI and CMAA members as voluntary industry contributions.
- 3.2 The levies are to be used to subsidise the employment of apprentice bricklayers and to fund pre-vocational training and specialist skill training for apprentice bricklayers. The levies will be charged and appear as separate items on all invoices. The subsidies will be state specific in the sense that money raised by the levies in each state will only be used to subsidise the training of apprentices in that state.
- 3.3 It is envisaged that each state will introduce training schemes similar to that currently operating in NSW (as described in Section 3 of this draft determination). The schemes will entail pre-vocational training for potential apprentice bricklayers, leading to an offer of employment as an apprentice through a group training company, incorporated by the CBPI and the CMAA, or through group training companies already in existence in that state. The companies will be used to facilitate the placement of apprentices with host employers for on site training. As stated above, it is also envisaged that specialist skill training will be offered, similarly to training that is currently operating in NSW and which is discussed in section 2 of this draft determination.
- 3.4 In the event that purchasers refuse to pay the levies, manufacturers will not accept any order, nor make deliveries until payment of the levy has been made.

Group Training Companies

- 3.5 It is proposed that, as a part of apprentice bricklayer training, apprentices will be allocated by a group training company to work with a host employer in their state of residence. The relevant levies will then be used to subsidise apprentice wages, covering the following costs:
- Annual leave and annual leave loading;
 - Sick leave;
 - Public holidays;
 - Workers Compensation premiums and rehabilitation costs;
 - Apprentice tool insurance;
 - Superannuation; and
 - Off site training costs (TAFE or private provider).

- 3.6 The host employer will only pay for the time the apprentice works with them on site, (i.e. the award wage).
- 3.7 Apprentices will be obligated to remain with the group training company for the entirety of their apprenticeship (currently 4 years). It is proposed that the subsidy will be allocated on the following grounds:
- 1st year – 100% subsidy
 - 2nd year – 75% subsidy
 - 3rd year – 50% subsidy
 - 4th year – 0% subsidy
- 3.8 The above subsidy arrangements can be altered according to the needs of individual host employers.
- 3.9 The group training companies will employ staff to be on the ground in all states operating under the arrangements. The staff will supervise the employment and training of the apprentices. Any administration costs associated with apprentice training will be covered by the industry contributions.
- 3.10 All funds raised by the levy will be paid directly to the group training companies and these funds will be administered and allocated by such companies. It is envisaged that the levy funds will be administered and audited in the same manner as the current arrangements in NSW, as is outlined in more detail in section 2 of this draft determination.

Host employers

- 3.11 The position of host employer will be available to all employers in the building and construction industry operating in the states in which the scheme will operate; thus potential host employers will not be required to have an affiliation with the CBPI or CMAA to have access to the proposed subsidies.

Focus of the training scheme

- 3.12 Similarly to the current NSW arrangements, the focus of the training scheme will be on the housing sector, an area that is dominated by small contracting teams. It is envisaged that this sector will most gain from the use of group training companies, as small contract teams tend not to employ apprentice bricklayers due to associated costs and a general lack of productivity in apprentice bricklayers at the outset of their training²⁴. It is envisaged that such costs will be reduced if employers use a group training company to employ apprentice bricklayers; thus making the employment of an apprentice a more viable option and opening up a relatively untapped area for the employment of apprentice bricklayers.

²⁴ Building and Construction Working Group, n 1, p 79.

4. SUBMISSIONS RECEIVED BY THE COMMISSION

4.1 The CBPI and the CMAA provided a joint supporting submission with their application for authorisation. The Commission also sought submissions from some 30 interested parties, including industry groups, brick, paver and masonry block manufacturers, consumer groups, relevant government departments and other industry participants. It received submissions from the following interested parties:

- The Department of Education, Science and Training;
- Master Builders Australia (MBA);
- Pioneer Building Products (Qld) Pty Ltd (Pioneer);
- West Australian Group Training Scheme Inc.(WAGTS);
- Skill Hire Pty Ltd (Skill Hire);
- Master Builders Association of Western Australia (MBAWA);

4.2 Copies of all submissions were placed on the Commission's public register.

Submission from the Applicants

Claimed public benefits

4.3 In their supporting submission, the CBPI and CMAA state that in their view, the imposition of levies to fund apprentice bricklayers is likely to result in an increase in adequately trained, skilled bricklayers in the market. The CBPI and CMAA arguments in support of this contention are outlined in section 2 of this draft determination. The CBPI and CMAA argue that this increase in adequately trained, skilled bricklayers will have the following positive flow-on effects for consumers:

- the quality of bricklaying workmanship will vastly improve;
- cost surges in times of high demand will be alleviated;
- the current national skilled bricklayer shortage will be alleviated;
- construction times will be reduced; and
- levels of stress will be reduced to consumers and builders.

4.4 Further, the applicants are of the view that a levy will enable them to offer pre-vocational training to juniors and adults, with the opportunity to lead to an apprenticeship; thereby assisting the applicants to achieve the target increase of apprentice bricklayers and thus resulting in the above public benefits.

Anti-competitive detriment

4.5 The CBPI and CMAA submit that there is little anti-competitive detriment flowing from the conduct. They argue that while the levies are likely to result in an increase in the cost of construction across the market (due to the proportion of the market supplied by CBPI and CMAA members) of approximately \$30.00 per house, this cost is minimal in comparison to the entire cost of building a house and will be offset by cost savings brought about by the levies as outlined above.

Submissions from Interested Parties

The Department of Education, Science and Training

- 4.6 The Department agrees with the submission provided by the applicants. The Department concurs with the applicants' claimed public benefits and commends the programme as a proactive industry based approach to combating its national skills shortage.
- 4.7 The Department confirms that it has had discussions with industry representatives, including the Housing Industry Association (HIA) and Master Builders Association (MBA) and that industry is supportive of the levies.
- 4.8 The Department is of the view that in the case of NSW, the collection of a levy has had positive effects on the growth of bricklayer training and it encourages the creation of similar programmes in other states. In addition the Department notes that the use of levies to fund training programmes is a well established practice that is usually well received.
- 4.9 The Department recognises the skill shortages in the building and construction industry and commends the use of group training companies as a means to initiate the employment of apprentice bricklayers. The Department recognises that group training companies are valuable mechanisms, in that they result in reduced costs and administration to employers, thus allowing small and medium sized employers to get involved in the apprenticeship programmes.
- 4.10 In addition, the Department states that group training companies will be valuable inclusions in the future, as the building and construction industry undergoes structural changes, brought on by changing needs in the market. In other words, the Department notes that there is now greater reliance on specialised skills and the use of specialist sub-contractors in the building and construction industry and it is predicted that group training companies will be able to meet these demands by placing specialist employees where they are needed and thus rotating employees per demand.
- 4.11 The Department notes that CBPI and CMAA's proposal is compatible with the Department's Building and Construction Industry Task Force action plan, which was established to assist the industry meet its current and emerging skill needs.

Master Builders Association (MBA)

- 4.12 The MBA generally agrees with CBPI and CMAA's submission. The MBA considers that the proposed arrangements will be beneficial in the short term, but it considers that they are not a long term solution to the current problems of skill shortages.
- 4.13 The MBA states that there are numerous factors that compound the skill shortages in the construction industry. One such factor is a conflict between apprentice training and the changing needs of industry. The MBA notes that apprentices currently engage in long term traditional training, whereas the market is moving towards a greater use of specially skilled sub-contractors, performing short term

work. The MBA contends that a change to this training structure will be slow given resistance by certain industry participants and building unions.

- 4.14 With regard to the use of group training companies in the proposed arrangements, the MBA commends their use and ability to combat the changing structure of the industry. However, the MBA warns that although the idea of group training companies is commendable, that they have not resulted in an increase of apprentice numbers in accordance with industry demand.
- 4.15 In addition, the MBA submits that group training companies should not be allowed to become the exclusive training model for the construction industry and warns that there is a danger that such companies will become profit driven, similar to labour hire firms. In addition, the MBA envisages that increased operational costs have the potential to hamper money flow for training.
- 4.16 The MBA supports the use of group training companies in the short term because it anticipates that the building and construction industry will alter its training regime in the future, along the following lines:
- engaging school based apprentices will be permitted under industrial instruments;
 - more flexible training contracts will be available; and
 - contract periods will be reduced with advancements based on personal achievements, rather than time periods.
- 4.17 Although the MBA supports the CBPI and CMAA's proposal, it emphasises its preference that money raised from the training levies be used to subsidise training rather than being used to establish a new infrastructure for group training companies. It submits that existing group training companies should be used to facilitate apprentice training, as opposed to industry bodies incorporating their own training companies, and thus duplicating costs and procedures already in existence.

Pioneer Building Products (Qld) Pty Ltd (Pioneer)

- 4.18 Pioneer supports the CBPI's and CMAA's application for authorisation. It emphasises the need to address increasing skills shortages in the construction industry and in particular to attract young people to construction trades.
- 4.19 Pioneer further emphasises the detriment that will follow to consumers should current levels of skill shortages continue, including:
- reduced quality of product;
 - higher construction rates; and
 - construction delays.
- 4.20 In addition, Pioneer submits that, in its view, there is unlikely to be any detriment to competition, as both industry and consumers are likely to benefit.

West Australian Group Training Scheme Inc (WAGTS) and Skill Hire Pty Ltd (Skill Hire)
– joint submission

- 4.21 WAGTS and Skill Hire agree with the CBPI's and CMAA's proposal in the sense that it seeks to increase the numbers of skilled bricklayers in the building and construction industry, however they express several concerns.
- 4.22 Such concerns include:
- the levy will be insufficient in itself to overcome bricklayer shortages;
 - the proposed scheme involves unnecessary duplication of group training companies;
 - the proposed industry funded group training companies will be unfairly advantaged in the market, in comparison to independent group training companies such as WAGTS and Skill Hire;
 - the proposed arrangements are not likely to increase the numbers of bricklayers in the market; and
 - the proposed arrangements fail the public interest test.
- 4.23 WAGTS and Skill Hire submit that the underlying reasons for the current skill shortages in the bricklaying industry are more complex than outlined by the CBPI and the CMAA in their submission.
- 4.24 WAGTS and Skill Hire argue that in addition to insufficient funding and high workers compensation costs, recognised by CBPI and CMAA, the shortages of skilled bricklayers is also the result of community stigma against trades as a career choice. WAGTS and Skill Hire submit that trades are viewed in the community as being unattractive career choices for young persons.
- 4.25 WAGTS and Skill Hire submit that there should be greater focus on improving the industry's image and educating the public as to the benefits of a career in the construction industry; thus monies raised should be used for marketing purposes as well as training.
- 4.26 WAGTS and Skill Hire also submit that the proposed arrangements involve unnecessary duplication and will result in an unfair economic advantage to group training companies incorporated by CBPI and the CMAA.
- 4.27 It is submitted that there is no need to incorporate new group training companies to facilitate the placement of apprentice bricklayers with host employers, because such companies already operate. Therefore it is argued that funds raised by the levy could be better used.
- 4.28 In addition, WAGTS and Skill Hire argue that if new, industry funded, group training companies are permitted to be established in each state, such companies will be in a position of unfair economic advantage over existing companies such as WAGTS and Skill Hire for the following reasons:

- the proposed group training companies will have access to levy funds, which are not available to independent companies;
 - similarly, the group training companies will have access to other government subsidises that are currently available to most group training companies (apprenticeship subsidies from DEST and the Building and Construction Industry Training Fund WA), in addition to the proposed levies; and
 - the proposed group training companies will be able to reduce their charge out rates to host employers through funds raised by the levies, meaning that independent companies will not be able to compete fairly on price.
- 4.29 WAGTS and Skill Hire also argue that the proposed arrangements are not in the public interest. It is submitted that without access to the proposed levy funds, existing group training companies will be forced to reduce their annual intake of apprentice bricklayers, in order to remain economically viable, or alternatively may be forced to reduce intake numbers as clients favour the industry funded bodies because of the cost savings available in doing so. The WAGTS and Skill Hire submit that this is contrary to the public interest.
- 4.30 It is recommended by WAGTS and Skill Hire that if the proposed arrangements are authorised, that a condition be imposed on such an authorisation that funds raised by the proposed levies be allocated fairly, on a per head basis, to every apprentice in the industry so that such funds become available to all employers.

Master Builders Association of Western Australia (MBAWA)

- 4.31 The MBAWA shares similar views to WAGTS and Skill Hire. MBAWA submits that it agrees with a scheme to increase the numbers of skilled apprentice bricklayers in Australia, but it has certain concerns.
- 4.32 Similarly to WAGTS and Skill Hire, the MBAWA is of the view that the CBPI and CMAA's submission is too simplistic with regard to the reasons identified as having contributed to the current skills shortage. The MBAWA offers the same arguments outlined above in the submission by WAGTS and Skill Hire.
- 4.33 Specifically, the MBAWA submits that the proposed arrangements will result in duplication of existing practices, will result in the industry funded group training companies having an unfair commercial advantage over other existing group training companies and that the arrangements are contrary to the public interest.
- 4.34 Similarly to WAGTS and Skill Hire, the MBAWA is of the view that the proposed arrangements are a step in the right direction, but need to be applied more fairly, across the industry on a per head basis.

5. THE PUBLIC BENEFIT TEST

- 5.1 The Commission may only grant authorisation where the public benefit test in section 90 of the TPA is satisfied.
- 5.2 The CBPI and CMAA lodged an application for authorisation under sub-section 88(1) of the TPA to:
- make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of that TPA; and
 - give effect to a provision of a contract, arrangement or understanding where the provision has the purpose, or has or may have the effect of substantially lessening competition within the meaning of section 45 of the TPA.
- 5.3 In assessing an application made under sub-section 88(1) of the Act to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the Act, the relevant test that the applicants must satisfy for authorisation to be granted is outlined in sub-sections 90(6) and 90(7) of the Act.
- 5.4 Under section 90(6) of the TPA, the Commission may grant authorisation in respect of a proposed contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
- the contract, arrangement or understanding would be likely to result in a benefit to the public; and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.
- 5.5 Under section 90(7) of the TPA, the Commission may grant authorisation in respect of a contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
- the contract, arrangement or understanding would be likely to result in a benefit to the public; and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.
- 5.6 In deciding whether it should grant authorisation, the Commission must examine the anti-competitive aspects of the arrangements or conduct and the public benefits arising from the arrangements or conduct, weighing the two to determine which is greater. Should the public benefits or expected public benefits outweigh the anti-competitive aspects, the Commission may grant authorisation.

- 5.7 If this is not the case, the Commission may refuse authorisation or, alternatively, in refusing authorisation, indicate to the applicant how the application could be constructed to change the balance of detriment and public benefit so that authorisation may be granted.
- 5.8 Section 91(3) of the TPA allows the Commission to grant authorisation subject to conditions as a means of ensuring that the public benefit outweighs the anti-competitive detriment.

Definition of public benefit and anti-competitive detriment

- 5.9 Public benefit is not defined by the TPA. However, the Australian Competition Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.²⁵

- 5.10 Similarly, anti-competitive 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.²⁶

Future with-and-without test

- 5.11 The Commission also applies the ‘future with-and-without test’ established by the Australian Competition Tribunal to identify and weigh the public benefit and anti-competitive detriment generated by arrangements for which authorisation has been sought.
- 5.12 Under this test, the Commission compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the Commission to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the counterfactual.

Whether arrangements breach the TPA

- 5.13 As indicated above, the CBPI and CMAA’s application seeks to:

- make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA; and

²⁵ *Re 7-Eleven Stores; Australian Association of Convenience Stores Incorporated and Queensland Newsagents Federation* (1994) ATPR ¶ 41-357 at 42677

²⁶ *Ibid* at 42683.

- give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.

5.14 However, in assessing an application for authorisation, the Commission does not form a view about whether CBPI and CMAA's proposed arrangements contain provisions which breach section 45. It only determines whether the net public benefit test has been satisfied.

Term of authorisation

5.15 Section 91(1) of the TPA allows the Commission to grant authorisation for a specific period of time.

5.16 The Commission may authorise different aspects of conduct for which authorisation is sought for different periods.

6. COMMISSION EVALUATION

This application for authorisation

- 6.1 As discussed at Section 3 of this draft determination, the CBPI and CMAA seek authorisation to make and give effect to an agreement between their members to impose two levies, one on the price of clay bricks and one on the price of concrete masonry blocks sold in the states of NSW, SA, QLD, WA and the ACT. These levies entail \$2.00 per thousand clay bricks and 10c per square metre of concrete masonry blocks sold in these states. Following is a discussion of the anti-competitive detriment and public benefits that the Commission has identified as flowing from the proposed arrangements.

Market definition

- 6.2 The first step in assessing the competitive effects and the public benefit/detriment of the conduct for which authorisation is sought is to consider the relevant market(s) in which that conduct occurs.
- 6.3 However, depending on the circumstances, the Commission may not need to comprehensively define the relevant markets as it may be apparent that a net public benefit will or will not arise regardless of the scope of those markets.
- 6.4 The Commission did not receive any submissions from the applicant or interested parties in relation to market definition.
- 6.5 In its consideration of this application for authorisation, the Commission considers that it is not necessary to comprehensively define the relevant markets. In this respect, it is the Commission's view that its assessment will not be overly affected by the possible variation in precise market definition.
- 6.6 In considering this application the Commission has identified three relevant areas of competition, being those associated with:
- the supply of clay bricks and pavers in commercial and housing construction;
 - the supply of concrete masonry products in commercial and housing construction; and
 - the supply of bricklaying services in these sectors.
- 6.7 With respect to the markets for the supply of clay bricks and pavers masonry products, arguably there is some degree of substitutability between these products. Additionally, it is arguable that these markets could be delineated into separate markets for the supply of these products in each of the housing and commercial application sectors. In particular, the Commission notes that the arrangements in respect of this application relate specifically to the housing sector.
- 6.8 With regard to the geographical boundaries of these markets the Commission considers these boundaries to be, at their broadest, state based for the following reasons:

- interstate transportation costs are not economical;²⁷ and
 - it is more convenient to use local manufacturers/suppliers with regard to time and cost considerations.²⁸
- 6.9 With respect to the market for the supply of bricklaying services, again it could be argued that this market could be delineated into separate markets for the supply of these services for housing and commercial construction. Additionally, it could be argued that the placement of apprentice bricklayers is a sub-market to the broader market for the supply of these services.
- 6.10 With regard to the geographical boundaries of this market, the Commission considers these boundaries to be, at their broadest, state based for the following reasons:
- interstate transportation costs are not economical;
 - it is more convenient to use a local bricklayer with regard to time and cost considerations; and
 - consumers are more likely to support local bricklayers.
- 6.11 Again, as noted above, the Commission does not consider that its assessment of the proposed arrangements will be overly affected by possible variation in the precise definition of these markets.

Future with-and-without test

- 6.12 In order to identify and measure the public benefit and public detriment generated by the conduct for which authorisation is sought the Commission applies the ‘future with-and-without test’. This involves identifying a counterfactual, that is, making a prediction as to what will happen if authorisation is denied. The Commission will compare the public benefits and public detriment that will result in the future if authorisation is granted, with the counterfactual.
- 6.13 The Commission did not receive any submissions from the applicant or interested parties on what an appropriate counterfactual would be.
- 6.14 The Commission considers that the likely counterfactual is a situation where the proposed levies do not apply and thus where an industry funded apprentice bricklayer training scheme does not exist in the states of WA, QLD, SA and the ACT. With respect to NSW, the Commission considers that the scheme currently in place, and authorised by the Commission, will continue to operate. In this respect the Commission notes that the levy imposed under the current scheme is less than that proposed in the scheme the subject of this application. This is discussed in greater detail below.

²⁷ Building and Construction Working Group, above n 1, p 11.

²⁸ Ibid.

Relationship with Authorisation A90830

- 6.15 As stated earlier in this draft determination, the current application for authorisation by the CBPI and CMAA, is largely modelled on arrangements currently in place in NSW, and which were authorised by the Commission in October 2002 (A90830).
- 6.16 The arrangements outlined in authorisation A90830, impose a levy of \$1.00 per thousand bricks sold in the state of NSW. This differs from the current application which seeks to impose a levy of \$2.00 per thousand clay bricks sold and 10c per square metre of concrete masonry blocks sold.
- 6.17 It is the applicants' view that a \$1.00 levy is insufficient to subsidise training for the number of apprentices needed to address the current shortages in the industry. For example, the applicants submit that in NSW the industry needs at least 500 apprentices per annum to cover normal rates of attrition. It is argued that the industry loses approximately 6% of its 8000 licensed bricklayers per annum through age or incapacity and that there are only approximately 280 new bricklayers currently entering the market per annum.
- 6.18 The applicants submit that increasing the levy on clay bricks and the imposition of a levy on concrete masonry blocks, will provide the CBPI and CMAA with the opportunity to increase apprentice numbers to a level where the entry numbers from training come close to those of attrition.
- 6.19 In the case of the NSW arrangements, the CBPA predicted in its original application for authorisation, that the imposition of a \$1.00 levy was likely to provide sufficient funding for an intake of 100 apprentice bricklayers per annum in to its group training company. However it is noted in the current application that it has fallen well short of this target, with only half that number being employed per annum. It is argued that this shortage is the result of unanticipated rises in workers' compensation premiums payable by the CBPA, which has 'consumed' 20% of the funds raised by the \$1.00 levy, which in turn has meant that the CBPA has less funds with which to subsidise apprentice bricklayer employment.
- 6.20 The applicants feel that by increasing the levy on clay bricks by two fold and broadening the scope of the levy to include to CMAA members and their clients, the industry will be in a better position to meet its target production of apprentice bricklayers and to counter natural rates of attrition and to cover the costs of workers' compensation premiums.
- 6.21 Similarly, it is envisaged that broadening the scope of the arrangements to apply to consumers in SA, WA, QLD and the ACT, will also assist the applicants to better meet industry demand for skilled bricklayers Australia- wide

Revocation of authorisation A90830

- 6.22 The applicants note that in the event that the Commission authorises application A90895, there will be a need to revoke authorisation A90830. This stems from the fact that the CPBA will become a party to the new arrangements authorised in respect of this application.

Effect on Competition

- 6.23 As discussed in Section 5, the Commission must assess the extent to which the proposed arrangements give rise to detriment to the public constituted by any lessening of competition that flows from the proposed arrangements.
- 6.24 Importantly, with respect to the proposed arrangements, the Commission notes that they place no restriction on the ability of CBPI and CMAA members to compete, beyond the common \$2.00 per 1000 bricks/10c per square metre concrete block levy charged.
- 6.25 The Commission's view on each of the potential anticompetitive detriments flowing from the proposed arrangements is discussed below.

General increase in the cost of clay bricks and concrete masonry blocks and a subsequent increase in the cost of building

- 6.26 As mentioned at paragraphs 2.31 and 2.32, CBPI and CMAA members supply a large proportion of product sold in the relevant markets.²⁹ If CBPI and CMAA members increase the price of their bricks and blocks as proposed, it is likely to result in a general increase in the cost of such products, across the market. In other words, the proposed arrangements will effectively fix an increase in the price of clay bricks and concrete blocks sold in the states of NSW, WA, QLD, SA and the ACT.
- 6.27 The Commission has accepted in the past that where proposed arrangements are likely to result in increased prices to consumers this can constitute an anticompetitive detriment. However, in this case, the Commission does not consider that the likely increase in the price of clay bricks and concrete masonry blocks, as a result of the proposed levies, will be at all significant or noticeable to the consumer.
- 6.28 The Commission notes that CBPI and CMAA have submitted that the impact of the levies on the cost of the average house is likely to be only \$30 per house. In comparison to the total cost of building a house, this is a negligible increase. Therefore, the Commission does not consider that the proposed arrangements will generate any significant anticompetitive detriment in the form of increased prices to consumers. Whether the proposed arrangements may actually reduce such prices in the long run is discussed below in respect of the public benefits the Commission considers will be generated by the proposed arrangements.

Potential for collusive anticompetitive conduct beyond that authorised

- 6.29 As noted above, the Commission does not consider that the collection of levies will adversely hinder ordinary competitive practices. However, the Commission would be concerned if, under the guise of the arrangement, any other issues, including pricing, were collectively determined between CBPI and CMAA members. However, in this regard the Commission notes that there is no evidence

²⁹ 99% of clay bricks and 80% of concrete masonry bricks and blocks.

to suggest that the levies have been or are likely to be utilised in any way contrary to that claimed in this application for authorisation.

Potential that the proposed training scheme will result in a 'doubling-up' of resources.

- 6.30 As stated previously in this draft determination, the CBPI and CMAA propose to use the funds raised by the relevant levies to fund group training companies to facilitate apprentice employment and training in the relevant states.
- 6.31 The Commission notes that there are already group training companies in existence in NSW, WA, QLD, SA and the ACT, who are capable of conducting such training. A question arises, therefore, of whether establishing further group training companies to conduct work that can be performed by existing companies is an economical use of resources?
- 6.32 Some existing group training providers have argued that funds raised through the levy should be directed to expanding existing training programs. The Commission is not in a position to assess the relative merits of one training program as opposed to another. However, the Commission notes that while alternative training suppliers exist to those proposed under these arrangements, the current shortage of apprentice bricklayers clearly indicates that existing training programs are not producing sufficient bricklayers to meet industry demand.
- 6.33 The purpose of the proposed arrangements is to provide additional training funding. It is intended that this funding be directed both to group training companies established under the scheme, and, where considered appropriate, existing group training companies.
- 6.34 It is proposed that funds raised by the levies will be paid directly to the group training companies, which would then be responsible for allocating the funds to appropriate areas. In this respect, the Commission considers that the CBPI, CMAA and their members, are likely to be sufficiently expert in the industry to determine the most appropriate training mechanism through which to distribute the levies so as to facilitate increases in the number of trained bricklayers.
- 6.35 However, the Commission would be concerned if under the guise of the arrangements, funds raised by the levies were used for purposes outside of the ambit of apprentice training. However, in this regard the Commission notes that there is no evidence to suggest that levies have been or are likely to be inappropriately managed or applied in an opaque manner.

Existing Group Training Companies being placed at a competitive disadvantage

- 6.36 While there is scope for funds raised by the levies to be directed to both existing and newly established group training companies, it is clear from the applicants' supporting submission that their intention is to direct the majority of funds raised toward the establishment and running of their own group training companies. To the extent that this does occur, the proposed arrangements are likely to place the industry run group training bodies in a position of price advantage over existing group training companies. In the sense that the proposed bodies will have access to

greater subsidies than existing group training bodies and thus will be able to offer a better deal to host employers/clients.

- 6.37 Whilst this may limit existing companies' abilities to compete to a degree, the Commission notes that it appears that, absent of initiatives such as the proposed levy and resultant subsidy to industry group training providers, the market run training programs are unable to provide sufficient trained apprentices to meet demand. The reasons for this are discussed in Section 2 of this draft determination.
- 6.38 In this context, the entrance of new industry run group training bodies is likely to be pro competitive. It is unlikely that the new training bodies will entirely 'crowd out' existing training providers. However, to the extent that they were able to do so, the Commission notes that this would indicate that industry demand for apprentice bricklayers was being met.

Conclusion

- 6.39 For the reasons outlined above, the Commission considers the anticompetitive detriment generated by the proposed arrangements is likely to be minimal. In particular, the Commission does not consider that the proposed levy will significantly impact on the price of building a home. Further, the Commission does not consider that the use of the levy to fund industry run group training programs will significantly negatively impact on competition for the provision of these services. If anything, the Commission considers that the proposed arrangements will improve the quality of these services.

Public Benefit

- 6.40 In order to grant authorisation the Commission must be satisfied that the proposed arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition arising from the arrangements.
- 6.41 The Commission considers the public is likely to benefit from the introduction of the proposed arrangements on several levels.
- 6.42 The Commission considers that it is likely that the levies will result in an increase in the numbers of skilled bricklayers in the building and construction industry.
- 6.43 The Commission notes that the small contracting teams that dominate the housing sector and which are the focus of this scheme have traditionally been reluctant to take on apprentices due to associated costs, time and administration burdens involved in doing so, and due to the general lack of productivity in their first years of training which is likely to have a far greater impact on the productivity of smaller contact teams than it would on larger teams. The Commission considers that these small contracting teams are more likely to take on an apprentice under the scheme as a result of the subsidy provided on employment costs, and the assistance offered by the scheme in the administration of apprentice training.
- 6.44 This is likely to open up a previously undeveloped area of apprentice employment and will result in a rise in bricklayers numbers. The applicants argue that the

scheme currently operating in NSW, which the proposed arrangements are based, has been successful in tapping into the small contractor market.

- 6.45 Although past examples of similar schemes have shown only slight increases in apprentice levels, the Commission considers that the \$2.00 and 10c levies are likely to result in a greater collection of funds by the CBPI and CMAA than past schemes, which the Commission considers is likely to assist the relevant bodies to increase the volume of apprentice bricklayers to a number more compatible with market demand.
- 6.46 In particular, the Commission notes that funding of the scheme currently in place in NSW has been hindered by unanticipated rises in workers' compensation premiums, which have accounted for 20% of the funds raised by the existing \$1.00 levy. The Commission considers that a \$2.00 levy on clay bricks and a 10c levy on concrete masonry blocks, matched by industry, will raise sufficient funds for the applicants to cover the costs of workers' compensation premiums and to subsidise bricklaying apprentices to a level more compatible with market demand.
- 6.47 There are likely to be several positive flow-on effects that result from an increase in skilled bricklayer numbers. These include:
- Improved quality of workmanship. In their supporting submission, the CBPI and CMAA state that there is a portion of bricklayers who do not complete their apprentice training and who currently work unlicensed. Therefore, increasing the numbers of adequately trained bricklayers is likely to improve the general quality of workmanship across the industry.
 - Reduced construction times. In their discussion draft paper into first home ownership,³⁰ the Productivity Commission noted, that skill shortages in the building and construction industry have resulted in building project delays in recent times. The Commission considers that this problem is likely to be alleviated if greater numbers of skilled bricklayers enter the market.
 - Reduction in construction costs. According to the Productivity Commission, skill shortages in the building and construction industry have severe impacts on construction costs and ultimately on housing affordability, especially in peak periods.³¹ The Commission considers that an increase in the levels of skilled bricklayers will assist to alleviate these problems because there will be less costs incurred by time delays and bricklayer charge out rates are likely to be more consistent, as a result of greater competition in the market.
 - Reduction in stress levels on consumers and builders. In their supporting submission, the CBPI and CMAA predicted that an increased availability of skilled bricklayers is likely to reduce construction times and construction

³⁰ Productivity Commission, above n 8, p 131.

³¹ Ibid.

costs, thereby alleviating stress on consumers and builders.³² The Commission agrees with the contention that the proposed arrangements may contribute to reduced construction times and to alleviate construction costs.

- 6.48 In addition, the Commission considers that the funds raised by the proposed levies will enable the CBPI and CMAA to better promote and market construction trades as viable career choices to the community and to schools. The likely positive effect of such promotion is a greater interest in the building and construction industry and thus further increases in apprentice bricklayer numbers. The current lack of promotion was an issue that was raised by the Building and Construction Working Group in their draft paper on skill needs in the building and construction industry.³³
- 6.49 Further, the Commission considers that the proposed arrangements are likely to attract and involve more companies as host employers of apprentice bricklayers. The Commission considers that the funds raised from the proposed levies and the corresponding subsidies, will attract smaller construction entities to become host employers.
- 6.50 The combination of the funds raised by the proposed levies and additional government apprenticeship subsidies (from DEST and the Building Industry Training Fund WA), will place the industry funded group training companies in a position where they can offer greater subsidies to employers than are currently available. Thus the Commission considers that smaller entities are more likely to become host employers under the proposed arrangements than at present, which again is likely to lead to an increase in apprenticeship numbers. In this respect, the Commission notes that 95% of apprentices hosted under the scheme as it currently operates in NSW, are hosted by small contracting teams (see paragraph 2.44).
- 6.51 In addition, the Commission notes the submissions of various interested parties regarding the conflict between apprentice training and the changing needs of the industry. Specifically, the long term nature of apprentice training compared to greater industry reliance of specially skilled sub-contractors performing short term work on demand.
- 6.52 To the extent that smaller entities are more likely to become host employers under the proposed arrangements, this will increase not only the number of host employers providing training, but also the range of host employers providing training. This is likely to increase the range of training provided to apprentices and better equip them to meet the changing needs of the industry.

Conclusion

- 6.53 Overall the Commission is satisfied that the proposed arrangements are likely to generate a public benefit. Specifically, the Commission considers that the proposed

³² CBPI and CMAA supporting submission, paragraph 13.

³³ Building and Construction Working Group, above n 1, p 20.

arrangements will lead to an increase in the number of apprentice bricklayers, and the breadth of training provided, which will contribute to improved quality of workmanship across the industry and reduced construction times and costs.

Balance of public benefit and detriment

- 6.54 The Commission may only grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangements are likely to result in a public benefit that will outweigh any public detriment constituted by any lessening of competition.
- 6.55 At paragraph 6.50, the Commission concluded that minimal public detriment is likely to flow as a result of the arrangements. Therefore in order for the Commission to grant authorisation, the public benefit likely to flow from the arrangements needs only be more than minimal. At paragraph 6.47, the Commission has concluded this is the case.
- 6.56 Given the Commission considers that the proposed arrangements meet the authorisation test set out in the TPA and discussed in section 5, the Commission is not, at this stage proposing to impose conditions on the authorisation. Conditions would only need to be imposed in the final determination if information was provided in response to this draft determination that warranted the Commission reviewing its conclusion that the proposed arrangements generate a public benefit likely to outweigh the public detriment by any lessening of competition.
- 6.57 The Commission notes interested parties' comments, such as:
- the concern raised by MBA, Skill Hire and WAGTS that the proposed arrangements will result in a duplication of services. The parties argue that the money raise from the proposed levy should not be used to set up an industry run group training body infrastructure. It is argued that such infrastructure already exists in the states to which this application applies, and that it might be more economical to use existing group training bodies (where possible) to facilitate apprentice placements.

In addition the parties argue that the money raised could be better spent on the promotion and marketing of the building and construction industry to schools and the community, and on further subsidising training.

- Further the MBA expressed concerns that if the CBPI and CMAA set up group training bodies in the respective states, that future increases in operational costs will hamper money flow from training and detract from the whole scheme. The Commission also notes the recommendation by the Building and Construction Working Group, that better incentive packages be created for apprentices.³⁴ For example the Working Group considered

³⁴ Building and Construction Working Group, above n 1, p 28.

that apprentices moving from regional or rural areas to metropolitan zones to train receive assistance to meet general costs of living.

- 6.58 The Commission notes that the suggestions made by interested parties may improve the operation and effectiveness of the proposed arrangements and therefore enhance the public benefits that flow from the arrangements. The Commission encourages the CBPI and CMAA to consider these proposals.

Term of Authorisation

- 6.59 The Commission proposes to grant authorisation as requested by the CBPI and CMAA for a period of 3 years from the date of the Final Determination. In general, authorising arrangements for a limited time period allows the Commission, at the end of the period of authorisation, to evaluate whether the public benefits upon which its decision is made actually eventuate in practice and the appropriateness of the authorisation in the current market environment.
- 6.60 In this respect, the Commission notes that in its original application of authorisation, the CBPA predicted that the proceeds from a \$1.00 levy would enable it to provide for an additional 100 apprentice bricklayers a year in NSW. The Commission notes that actual numbers of new apprentice bricklayers through its group training program have been approximately half this original estimate.
- 6.61 While this application seeks to broaden the scope of the existing arrangements to other states, it also seeks to in effect, double the levy used to fund training. The applicants argue that a higher levy should provide it with sufficient funds to achieve the necessary training numbers to meet market demand.
- 6.62 While the Commission has accepted that the proposed arrangements are likely to increase apprentice numbers, with the associated public benefits, it would be concerned if actual numbers of apprentices trained through the scheme continued to fall short of projections. If this were the case, the public benefits likely to flow from the arrangements would be reduced accordingly.
- 6.63 In this context, the Commission considers a three year authorisation appropriate so as to allow for an early review of the success of the scheme.

7. DRAFT DETERMINATION

The Application

7.1 On 18 December 2003, the Clay Brick and Paver Institute of Australia (CBPI) for itself and on behalf of the Concrete Masonry Association of Australia (CMAA) lodged an application for authorisation A90895 with the Australian Competition and Consumer Commission (the Commission). The application was made using Form B, Schedule 1 of the *Trade Practices Regulations 1974*. The application was made under sub section 88(1) of the *Trade Practices Act 1974* (TPA) and the *Competition Code* of each of the relevant participating Australian jurisdictions, and sought authorisation to:

- make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA; and
- give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.

7.2 The application relates to an agreement between CBPI and CMAA members to impose two levies, one on the price of clay bricks and one on the price of concrete masonry blocks sold in the states of NSW, SA, QLD, WA and the Act. These levies entail \$2.00 per thousand clay bricks and 10c per square metre of concrete masonry blocks sold in these states.

The Statutory Test

7.3 For the reasons outlined in section 5 of this draft determination, the Commission concludes that in all circumstances the provisions of the proposed arrangements would or be likely to result in a benefit to the public and that the 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 arrangements were made and the provisions concerned were given effect to.

Conduct for which the Commission proposes to grant authorisation

7.4 The Commission proposes, subject to any pre-determination conference requested pursuant to section 90A of the Act, to grant authorisation to application A90895 for a period of **three years**.

7.5 Pursuant to subsection 88(10) the proposed authorisation extends to future members of the CBPI and CMAA.

7.6 The proposed authorisation is in respect of the levies and training scheme as they stand at the time authorisation is granted. As a result, any amendments to the arrangements during the term of the authorisation would need to be the subject of an application for minor variation of the authorisation under section 91A of the

TPA, or revocation and substitution of the authorisation under section 91C of the TPA.

7.7 This draft determination is made on **21 April** 2004.

Further submissions

7.8 The Commission will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the Commission hold a pre-determination conference pursuant to section 90A of the TPA.