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DATE 15 November 1993

TO Mr J P O'Neill
Trade Practices Commission
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FROM Alan Limbury
Minter Ellison Morris Fletcher Sydney
Our reference ALL:10097131

SUBJECT **Trade Practices Act 1974**
Application for Authorisation lodged by The Proprietary M 'icines Association of Australia Inc. No. A90549

Please see attached.

NOTE
If you do not receive 8 page(s) including this one, please telephone MINTER ELLISON MORRIS FLETCHER (02) 210 4809 as soon as possible.

IMPORTANT

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15 November 1993

Mr J P O'Neill
Senior Assistant Commissioner
Adjudication
Trade Practices Commission
Benjamin Offices
Chan Street
BELCONNEN ACT 2617

Dear Mr O'Neill

Trade Practices Act 1974
Application for Authorisation lodged by The Proprietary Medicines Association of Australia Inc. No. A90549

1. The PMAA has asked me to respond to your letter of 1 November 1993 enclosing the Commission's draft determination. PMAA would prefer not to seek a s.90A conference but wishes to make a submission that the proposed conditions be modified. We understand (after some contradictory statements made to us) that the Commission takes the view that it cannot modify the terms of a draft determination unless it holds a conference. Accordingly, PMAA seeks a s.90A conference so as to ensure that the submission which follows is taken into account by the Commission in making its final determination.

2. The main purpose of this letter is to seek to persuade the Commission to modify some of the conditions attached to the proposed authorisation. We also seek to clarify another condition and to ensure the authorisation applies to a living code as amended from time to time.

3. The conditions sought to be modified are those relating to clauses 5.2 and 6.1.1 and to appeals.

A. Clause 5.2

4. The particular provision which has aroused the Commission's concern applies to comparative advertisements. It says:

> 'No Advertisement will unfairly denigrate or attack any other product, goods or services."

5. In its draft determination, the Commission proposes, as a condition of authorisation, that this passage be removed or clarified. Its reasoning appears in paragraphs 4.10 to 4.18 and especially 4.17.

6. We respectfully submit that such a condition should not be imposed because:

   6.1. the Commission has not applied the proper test;

   6.2. if the proper test were applied, the condition would be unnecessary;

   6.3. the condition would be futile in any event.

The Commission has not applied the proper statutory test

7. The requirement of sub-section 90(6) is that likely public benefit outweighs

> 'the detriment to the public constituted by any lessening of competition that would result, or be likely to result ...' (emphasis added).

8. It is clear from 4.17 that the Commission has taken into account lessening of competition that could result or may result (emphasis added).

If the proper test were applied, the condition would be unnecessary

9. Paragraph 4.18 concludes that 'the public benefits of the code would outweigh the anti-competitive detriments if clauses 5.2 and 6.1.1 were either deleted or suitably modified'. The Commission has not addressed the question whether the public benefits would outweigh the anti-competitive detriments if those clauses remained. Unless the Commission determines this question in the negative, it is unnecessary to consider amendment or removal of those clauses.

10. Once potential anti-competitive detriment is properly excluded from consideration, as s.90(6) requires, we submit the public benefits would be seen to outweigh the likely anti-competitive detriments because the following factors will militate against clause 5.2 being interpreted in an anti-competitive way:

    10.1. The proposed composition of the complaints panel;

    10.2. The circulation to the complaints panel and the marketing and ethics committee of monthly summaries of all complaints received and their disposition. (PMAA is

willing to provide copies of these summaries to the Commission also);

10.3. the process of annual review of the code, involving outside participation;

10.4. the Commission's power to revoke authorisations due to changed circumstances;

10.5. the highly regulated environment in which the products of the industry are scrutinised for safety and efficacy and are currently promoted, which distinguishes those products from others and which requires a high degree of responsibility and ethical behaviour towards consumers from industry participants.

The condition would be futile in any event

11. Clause 4.3 of the PMAA code requires members to comply with the Media Council of Australia's Advertising Code of Ethics. Clause 11 of that code was authorised by the Trade Practices Tribunal on 2 December 1988 (Re Media Council of Australia (No 3)(1989) ATPR 40-933 at p 50, 143, where it appears as clause 10).

12. The clause reads:

> 'Advertisements shall not disparage identifiable products, services or competitors in an unfair or misleading way.'

13. The Tribunal described the provisions of that code (including this clause) as 'broadly acceptable' (at p 50, 126).

14. If the concern of the Commission expressed in para 4.17 of the draft determination turns upon a perceived distinction between 'denigrating' and 'disparaging', PMAA is prepared to consider substituting the latter word for the former in clause 5.2. In the absence of any meaningful distinction, the Commission's concerns are overridden, we submit, by the obligation of members under 4.3 to abide by the MCA code. The proposed condition would therefore be futile.

B. Clause 6.1.1

15. All the comments we have made concerning clause 5.2 apply equally to this clause, including the reference to the MCA Advertising Code of Ethics, insofar as clause 11 of that code applies to competitors.

16. It should be noted that the aim of clause 6.1.1, as of the code as a whole, is to safeguard consumers from acting inappropriately, through misunderstanding or otherwise, in relation to the use of medicines not required to be prescribed by a medical practitioner. Neither over-use nor under-use are to be encouraged. Lack of confidence in or discredit upon the industry could lead to over or under-use. Seen in this light, it is not correct to describe this clause (or 5.2 for that

matter) as lacking 'obvious nexus with the code's principles and objectives' (draft 4.17).

C. Appeals

17. It should first be noted that the concern of the Commission is as to **possible** anti-competitive effect, rather than **likely** effect, as required by 90(6)(4.29). The Commission leaps from what **may** happen (4.29) to '**the**' anti-competitive detriment (4.31).

18. Unlike the APMA, PMAA does not have a history of appeals (there have been none), nor the resources with which to finance an appeal structure such as that considered appropriate for APMA. Although the publicity to be given to the PMAA complaints procedure, once authorised, could generate more complaints, with the possibility of appeals, PMAA does not accept that the cost of establishing an agency independent of the industry to handle appeals can presently be justified. The Commission's concerns as to transparency and objectivity may be accommodated in other ways.

19. PMAA believes the scope for the appeal mechanism to be administered in an arbitrary, capricious or anti-competitive way (4.31) may be overcome by the following means:

19.1. an independent trade practices lawyer (not having sat on the hearing before the complaints panel) participating in appeals to the committee of management and in consideration by the members in general meeting of suspension or expulsion recommendations;

19.2. quarterly reports on appeals to the Commission (which PMAA is happy to provide);

19.3. annual code review (which includes external participation);

19.4. the Commission's power to revoke.

D. Appropriate response

20. For these reasons, we submit that the conditions relating to clauses 5.2 and 6.1.1 and to appeals should not be imposed.

21. The Commission's concerns are, of course, proper concerns. However, they do not extend beyond the **capacity** of the code to operate anti-competitively. The Commission has no ground for concluding that anti-competitive operation would happen or be **likely**, the critical word in s.90(6).

22. On 5 November 1993 the Commission informed Amcor it would take no action over Amcor's proposed acquisition of APPM despite concerns of the Commission. The Chairman said:

> 'While the Commission's concerns remain, the Commission will actively monitor the ... market to assess whether

there is in fact any substantial lessening of competition as a result ...'.

23. We submit that active monitoring is an appropriate response in relation to the PMAA code, rather than the imposition of conditions designed to preclude the possibility of anti-competitive detriment.

E. Other conditions

24. PMAA has no difficulty with the remaining conditions proposed. It does wish to clarify one aspect relating to clauses 5.3.2.2 and 5.3.2.3.

25. As the Commission correctly stated at 2.10, PMAA has agreed to consider making these consistent with the APMA code. But the proposed condition adds the words 'and WHO ethical criteria'.

26. PMAA is of the view that to make its code consistent with the APMA code would meet WHO ethical criteria. The reference to those criteria should not be taken as extending the scope of the condition beyond the requirement of consistency with the APMA code. Perhaps this could be made clear in the final determination.

F. Form of authorisation

27. The PMAA code has much in common with the Therapeutic Goods Advertising Code and the Advertising Code of Ethics of the Media Council of Australia. Like those codes, the PMAA code will continue to be subject to periodic amendment. Indeed the annual reviews can be expected to prompt amendments.

28. In authorising the MCA codes, the Tribunal said (at p.50, 130):-

> 'While we have found it appropriate to formulate some precise conditions attaching to this authorisation, it by no means follows that there cannot be amendments made to the Codes as a whole by the Media Council itself in succeeding years. Indeed, if the Codes are to do their work, their detailed formulations and application must respond flexibly to the changing needs of Australian society and to deficiencies in the Code revealed in practice. We make it plain that our authorisation is of living codes, whose interpretation, application and amendment should be undertaken in accordance with the principles we have set down.'

29. We submit the Commission should take the same approach by making a similar explicit statement in its final determination, so as to avoid the necessity that PMAA seek authorisation each time it proposes to amend the code. PMAA will, of course, notify the Commission of any proposed amendments.

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J P O'Neill 15 November 1993

G. Minor corrections

30. We attach some suggested corrections to the draft, in the interests of accuracy.

Yours faithfully
MINTER ELLISON MORRIS FLETCHER

Alan L. Limbury

Alan L Limbury

SUGGESTED CORRECTIONS TO DRAFT DETERMINATION

Paras 1.4 and elsewhere	'PM' is not common usage. 'OTC' is the commonly accepted acronym.
1.6	Subscriptions are payable by 1 July annually.
1.6 line 3	'that' should be 'than'.
1.9 (page 2, penultimate dot point before 1.10)	this should read: '- at arm's length - on a particular issue'.
1.10 last line	this should read: 'twelve representatives of ordinary members of whom three are office bearers'.
1.15	Perhaps some reference to the Therapeutic Goods Act might be appropriate.
1.17 third sentence	To avoid any implication that OTC drugs are not tested etc, the word 'prescription' should be deleted.
1.21	The first sentence is incorrect. It should read: 'PMAA pre-clears radio and television advertising and, for members, print advertising'.
1.23 (page 5 under the heading 'Advertising of Schedule 3 items')	The penultimate sentence would be clearer if it began: 'However the PMAA code picks up ...'.
1.23 (page 6 under the heading 'Complaint handling')	The second reference to the MCA should be to the Advertising Standards Council.
1.23 (page 7 under the heading 'Appeal provisions')	The second dot point is inaccurate. After the words 'by the complaints panel and' should be inserted 'to members in general meeting against'.