

Form B

Commonwealth of Australia
Trade Practices Act 1974 ---- Sub-section 88(1)
**AGREEMENTS AFFECTING COMPETITION:
APPLICATION FOR AUTHORISATION**

To the Australian Competition and Consumer Commission:

Application is hereby made under sub-section 88(1) of the *Trade Practices Act 1974* for an authorisation under that sub-section

- to make a contact 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 Act.
- 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 that Act.
- (Strike out whichever is not applicable)

(PLEASE READ DIRECTIONS AND NOTICES ON BACK OF FORM)

1. (a) Name of Applicant THE AUSTRALIAN PENSIONERS' LEAGUE OF WESTERN AUSTRALIA (INC)

(See Direction 2 on the back of this Form)

(b) Short description of business carried on by applicant An association that is a registered charitable organisation whose purpose and function is to benefit the elderly.

(c) Address in Australia for service of documents on the applicant C/- McCallum Donovan Sweeney, 16 Irwin Street, Perth WA 6000

2. (a) Brief description of contract, arrangement or understanding and, where already made, its date Agreements to provide concessional rates for funeral services between the Western Australian Funeral Directors' Association (Incorporated) ("the WAFDA") and certain non-WAFDA funeral directors.

(b) Names and addresses of other parties or proposed parties to contract, arrangement or understanding The WAFDA of 180 Hay Street, East Perth WA 6004 and funeral directors who are not members of the WAFDA who enter into agreements with the applicant for the provision of a fixed concessional rate for funeral services.
(See Direction 4 on the back of this Form)

3. Names and addresses (where known) of parties and other persons on whose behalf application is made The applicant's members, present and future.

4. (a) Grounds for grant of authorisation

See attached written submissions.

(b) Facts and contentions relied upon in support of those grounds

See attached written submissions.

(See Notice 1 on the back of this Form)

ACCC

- 5 JAN 2001

PERTH

5. This application for authorisation may be expressed to be made also in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the above mentioned contract, arrangement or understanding.

(a) Is this application to be so expressed? Yes

(b) If so, the following information is to be furnished:

(i) the names of the parties to each other contract, arrangement or understanding N/A

(ii) the names of the parties to each other proposed contract, arrangement or understanding which names are known at the date of this application The applicant and funeral directors who are not members of the WAFDA but who will in the future enter into contracts to provide fixed concessional rates for funeral services. The names of those funeral directors are not yet known. (See section 4J of the *Trade Practices Act 1974*)

6. (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Trade Practices Act 1974*)
No.

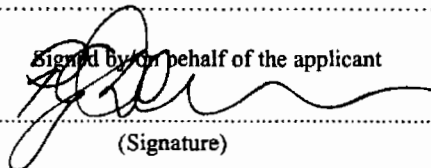
(b) If so, are any other applications being made simultaneously with this application in relation to that joint venture
N/A.

(c) If so, by whom or on whose behalf are those other applications being made
N/A.

7. Name and address of person authorised by the applicant to provide additional information in relation to this application.....
Paul Donovan, McCallum Donovan Sweeney, 16 Irwin Street, Perth WA 6000.

Dated 5 January 2001, 18

Signed by/on behalf of the applicant



(Signature)

McCallum Donovan Sweeney

(Full Name)

Solicitors for the Applicant

(Description)

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- 5 JAN 2001

PERTH

**APPLICATION BY THE AUSTRALIAN PENSIONERS' LEAGUE OF
WESTERN AUSTRALIA (INC) TO THE ACCC FOR AUTHORIZATION OF
FUNERAL FUND AGREEMENTS WITH THE WESTERN AUSTRALIAN
FUNERAL DIRECTORS' ASSOCIATION (INC) AND
OTHER FUNERAL DIRECTORS**

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- 5 JAN 2001

PERTH

**APPLICATION BY THE AUSTRALIAN PENSIONERS' LEAGUE OF
WESTERN AUSTRALIA (INC) TO THE ACCC FOR AUTHORISATION OF
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AND OTHER FUNERAL DIRECTORS**

INDEX

<u>Section</u>	<u>Subject</u>	<u>Page Number</u>
1.	INTRODUCTION	1
	• The operations of the APL	3
	• The operations of the WAFDA	4
	• Non-WAFDA funeral directors	5
2.	THE APL FUNERAL FUND SCHEME	5
3.	THE MARKET	11
4.	PREVIOUS AUTHORISATION DECISIONS	17
5.	PUBLIC BENEFIT	21
6.	PUBLIC BENEFIT -V- ANTI-COMPETITIVE EFFECT	26
7.	APPLICATION FOR INTERIM AUTHORISATION	28
8.	CONCLUSION	29

ACCC

- 5 JAN 2001

PERTH

**APPLICATION BY THE AUSTRALIAN PENSIONERS' LEAGUE OF
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AND OTHER FUNERAL DIRECTORS**

SUBMISSIONS

I. INTRODUCTION

1. The Australian Pensioners' League of Western Australia (Inc) ("the APL") is an association incorporated pursuant to the *Associations Incorporation Act, 1987 (WA)* and has been operating in Western Australia since 1931. The APL is a registered charitable organisation whose purpose and function is to benefit the elderly. The APL is an organisation through which pensioners' issues (both individually and as a collective) can be canvassed, and, wherever necessary, action taken so as to improve the personal, social and economic conditions of the elderly in Western Australia.
2. The APL, as part of its operations, conducts a funeral fund ("the funeral fund") whereby members of the APL are able to pre-pay funerals that are provided, as a consequence of agreements between the APL and funeral directors, at a substantially reduced cost.
3. Pursuant to section 88(1) of the *Trade Practices Act, 1974* ("the TPA") the APL applies to the Australian Competition and Consumer Commission ("the ACCC") for authorisation of:
 - 3.1 an agreement between the APL and the Western Australian Funeral Directors' Association (Incorporated) ("the WAFDA"). This agreement provides for the provision of funeral directors' services (as defined in the contract) in consideration of a fixed sum payable by the funeral fund on behalf of the member who has contributed to that fund and for

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- 5 JAN 2001

PERTH

whom the funeral director service have been provided (a copy of this agreement is annexed hereto and marked with the letter "A");

- 3.2 funeral agreements between the APL and non-WAFDA funeral directors. Those agreements, as provided in section 88(13) of the TPA, will be in similar terms to the contract referred to in paragraph 2.1 above in that the contracts between the APL and the non-WAFDA funeral directors will provide for the supply of funeral directors' services in consideration of a fixed sum payable from the funeral fund on behalf of the member who has contributed to that fund for and for whom the funeral services have been provided.
4. The authorisation sought by the APL in paragraph 2 above is applied for on an indefinite basis. Further, pending determination of the application, the APL seeks interim authorisation of the contracts referred to in paragraph 2.
5. Whilst the APL is of the view that the contracts that are now presented for authorisation by the ACCC comply with the TPA, the APL recognises that there might be a possibility that some of the provisions relating to the pricing of the supply of funerals might be regarded as amounting to a contract, arrangement or understanding in relation to the fixing of prices within the terms of section 45A of the TPA and consequently amount to a breach of section 45(2) of the TPA. Whilst the APL is not in competition with the other parties to the contracts referred to in paragraph 2 above the funeral directors and the members of the WAFDA concerned are in competition and the APL does not wish to be accessorially liable within the terms of section 75B of the TPA with respect to any price fixing or otherwise involved in a contravention of section 45(2) of the TPA. Therefore, out of an abundance of caution, the APL wishes to apply for authorisation of the conduct concerned on the basis that the fixing of prices in the relevant contracts provides public benefit that outweighs any anti-competitive effect of the conduct for the reasons set out in detail in the body of these submissions.

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- 5 JAN 2001

PERTH

The operations of the APL

6. The APL presently has in excess of 18,000 members, and operates 67 branches throughout suburban and rural Western Australia. 13,000 of these members are actively involved in the operations of the association.
7. The functions performed by the APL, for the benefit of the elderly, include:
 - 7.1 administration of a reduced price funeral fund;
 - 7.2 assisting, and protecting, the interests of all seniors;
 - 7.3 providing residential care for the elderly by provision of a hostel, which hostel is owned and operated by the APL;
 - 7.4 provision of a competitive insurance scheme specifically designed for pensioners which includes provision for Seniors Personal Accident Insurance Cover;
 - 7.5 provision of meeting facilities for members of the Australian Pensioners League;
 - 7.6 provision of a weekly podiatry clinic for the elderly, including provision of regular sessions for diabetic podiatry patients;
 - 7.7 provision of discounts to pensioners by means of the "over 50s" member reward scheme;
 - 7.8 provision of housing, both self-funded and rental, for the elderly;
 - 7.9 access to legal services for pensioners; and

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~ 5 JAN 2001

PERTH

- 7.10 acting in an advisory capacity on most seniors' issues, including involvement in legislating for reforms or amendments which are relevant to seniors.
8. Some of the benefits which the APL has achieved for the elderly, through its direct involvement and contribution, have included:
- 8.1 the implementation of the Western Australian Seniors Card, a card possession of which entitles seniors to many commercial benefits and discounts;
- 8.2 the implementation of subsidised rental accommodation;
- 8.3 the implementation of a \$50.00 spectacle subsidy for members;
- 8.4 the implementation of concessional travel for pensioners, including a free rail and bus trip each year;
- 8.5 the introduction of free public transport on Sundays and public holidays for pensioners.

The operations of the WAFDA

9. The WAFDA:
- 9.1 has 12 Perth metropolitan members (who operate 27 separate businesses throughout Perth and its suburbs);
- 9.2 has 16 country members (who operate 24 separate businesses throughout country Western Australia).
10. The WAFDA represents the largest providers of funeral services in Western Australia. The APL estimates, based on information provided to it by the WAFDA, that members of the WAFDA supply in excess of 80% of funeral

ACCC

- 5 JAN 2001

PERTH

director services in Western Australia. The Australian Bureau of Statistics records reveal that there were 10,664 deaths in Western Australia in 1998. The WAFDA has advised the APL that members of the WAFDA provided 9,610 funerals in 1998, representing a market share of 90.1%. Many members of the WAFDA who are based in the Perth metropolitan area have branches in other parts of Western Australia.

11. The WAFDA rules require that new members have been engaged in conducting a funeral director business for at least 5 years and to have a certain level of investment in, for example, hearses and premises. There is no entry fee to the WAFDA.

Non-WAFDA funeral directors

12. There are numerous non-WAFDA funeral directors in Western Australia, located in the Perth metropolitan area and throughout Western Australia. It is difficult for the APL to estimate exactly how many individual non-WAFDA operations conduct business in Western Australia. Many of these funeral directors conduct their businesses using more than one business name and many operations are small using the funeral service facilities of other directors or facilities available at hospitals.
13. Whilst non-WAFDA funeral directors generally conduct businesses that are smaller than those conducted by members of the WAFDA, the APL estimates that, in total, non-WAFDA funeral directors perform approximately 10% to 20% of funerals in Western Australia.

2. THE APL FUNERAL FUND SCHEME

14. The funeral fund is a funeral pre-payment scheme available to aged, invalid and widowed pensioners, as well as certain superannuants, all of whom must

ACC

- 5 JAN 2001

PERTH

be over the age of 55 years, for the purpose of allowing the elderly the benefit of prior planning of a dignified and decorous burial or cremation, at a substantially reduced cost saving to the funeral fund member.

15. The funeral fund is administered by the APL, and the level of prices and the extent of services is agreed between the APL, as trustee for the fund, and either the WAFDA or the individual non-WAFDA funeral directors concerned. The funeral director engaged by the executor or next-of-kin of the member of the funeral fund is responsible for the specific features and details of the funeral concerned and this is a matter that is discussed between the executor or next-of-kin and the relevant funeral director.
16. When members of the funeral fund join the fund they are required to enter into a funeral fund contract in the terms of the document that is annexed to these submissions and marked with the letter "B".
17. The funeral fund is audited voluntarily by the APL and the APL acts as the trustee of the fund.
18. The rules of the funeral fund are set out in the document published by the APL entitled "The Funeral Fund Scheme" that is annexed to these submissions and marked with the letter "C". Details of the funeral fund insofar as it relates to services provided by the WAFDA (including an identification of members of the WAFDA) are set out in a document entitled "Western Australian Funeral Directors' Association - WAFDA Funeral Fund Scheme". Details of the funeral fund insofar as it relates to non-WAFDA funeral directors (including an identification of the names of the non-WAFDA funeral directors who have thus far agreed to provide fixed concessional rate funerals to members of the fund) are set out in the document entitled "Independent Funeral Directors - IFD Funeral Fund Scheme". These explanatory documents are annexed to these submissions and marked with the letter "D".

ACCC
- 5 JAN 2001
PERTH

19. As at 1 December 2000 the funeral fund had 6,384 members in Western Australia, as well as funds held in trust of approximately \$9,090,000.00.
20. The funeral fund provides members with a reduced funeral price. The price will be reviewed annually by the WAFDA and will be reviewed regularly by the funeral directors who are involved with the fund who are not members of the WAFDA. Members of the funeral fund are entitled to the following funeral benefits:
 - 20.1 a vehicle for removal of the deceased member from the place of death to the funeral director's parlour within normal working hours;
 - 20.2 preparation of the deceased member for burial or cremation;
 - 20.3 provision of a coffin of good material and good workmanship stained and varnished with an inscribed nameplate and with one ornament on each side and the lid screwed with four one hundred millimetre thumb screws and with the inside sealed and trimmed;
 - 20.4 use of the funeral director's chapel for viewing;
 - 20.5 use of the funeral director's chapel for a funeral service;
 - 20.6 provision of a hearse to carry the deceased's members remains to the cemetery;
 - 20.7 a sedan mourning coach to convey four mourners to the cemetery from the funeral director's chapel and return them to the chapel after the funeral; and
 - 20.8 procurement of the death certificate.
21. The contract between the APL and the WAFDA or non-WAFDA funeral directors provides for prepayment of the funeral director's service fee in a fixed sum. The proposed fee for funerals provided by WAFDA members from

ACCC
- 5 JAN 2001
PERTH

1 July 2000 is \$1,710.50 (inclusive of GST), plus a one-off \$55.00 administration fee (also GST inclusive) and certain extra optional costs referred to in annexures "A" and "D". The proposed fee for funerals provided by non-WAFDA members from 1 July 2000 is \$1,677.50 (inclusive of GST) plus a one-off \$55.00 administration fee (also GST inclusive) and certain extra optional costs referred to in annexure "D". It should be noted that the APL's contracts with funeral directors and the WAFDA provide for certain specified extra costs for country funerals.

22. The stipulated fee can be paid by members to the funeral fund either as a lump sum or, more often, for the benefit of those members unable to make such a payment, by instalments. With respect to instalment payments, other than a minimum deposit of \$75.00, there are no restrictions set as to payment amounts or term. In the APL's submission, this represents a significant benefit to pensioners over, for example, other pre-pay funeral offers which generally require full payment at the outset, or within a very short time period.
23. The funeral contracts between the APL and the WAFDA or non-WAFDA members provide that for each funeral conducted for a member of the funeral fund, the funeral director will be paid by the APL a fee in accordance with that specified in the schedule to the agreements.
24. Any costs for services not covered by the funeral fund and referred to in the contracts are negotiable as between the funeral director and the member's next-of-kin. Such costs do not attract any concessional rate.
25. The criteria for membership of the funeral fund is set out in the rules of the funeral fund (annexure "C") and is referred to in the proposed funeral contract between the APL and the WAFDA (annexure "A"). Those criteria are that the member must be:

25.1 over the age of 55 years;

ACCC
- 5 JAN 2001
PERTH

- 25.2 in receipt of an aged, invalid or widows pension, and in receipt of fringe benefits within the meaning of the *Social Services Consolidation Act, 1947*; or
- 25.3 if a superannuant, a person who has been receiving superannuation payments for at least a one year period.
26. Members entering into a funeral fund contract are advised by the APL to inform their next-of-kin of their membership of the funeral fund, and to advise the next-of-kin of the nature and existence of the documentation relating to that membership.
27. Upon the death of a funeral fund member, then, if the next-of-kin retains a WAFDA funeral director or a non-WAFDA funeral director who has entered into a fixed fee agreement with the APL, that director arranges the member's funeral. Thereafter the funeral director renders an account to the APL for the amount agreed by the WAFDA or, in the case of non-WAFDA funeral directors, the funeral director concerned, to be the fixed price for the funeral fund members applicable at the time that the relevant funeral occurs. If the member of the funeral fund who has passed away was fully paid up then the APL forwards to the funeral director concerned the amount of the agreed fee. If the member of the funeral fund is not fully paid up then the APL will still pay to the funeral director concerned the full amount of the agreed fee and will bill the estate or next-of-kin of the deceased's member the difference between the monies held in the funeral fund and the cost of the funeral previously agreed between the APL and either the WAFDA or the non-WAFDA funeral director concerned. Should the funeral director who performs the relevant funeral provide any services over and above those covered by the agreement with the APL the funeral director who performs the funeral sends an account for those extra services directly to the deceased person's estate or his or her next-of-kin. Whenever an increase in the agreed cost of funeral services is negotiated between the APL and the WAFDA or an individual non-WAFDA

member, members of the fund are advised of any increase in price and are required to pay that extra amount into the funeral fund.

28. The estate or next-of-kin of a deceased member of the funeral fund have complete freedom as to who they choose to perform the funeral. Although members of the fund are entitled to indicate which funeral director they would prefer to use, the next-of-kin or estate is entitled to make the final decision as to exactly which funeral director is used.
29. There is absolutely no requirement that the estate or next-of-kin of a deceased member of the funeral fund use either a funeral director who is a WAFDA member or is a non-WAFDA funeral director who has entered into an agreement with the APL. The estate or next-of-kin are free to have a funeral director who has not agreed a fixed fee with the APL to perform the funeral. In such a case, the APL will forward to the funeral director concerned the amount of money held by the member in the funeral fund and the balance of any final charge rendered by the funeral director is paid by the estate or next-of-kin directly to that funeral director.
30. The APL does not encourage members, estates or next-of-kin to use any particular funeral director in preference to another, save that the APL provides details of which funeral directors have agreed to provide fixed price funerals to members of the funeral fund. Members and next-of-kin are advised that a funeral agreement exists between the APL and WAFDA funeral directors and individual non-WAFDA funeral directors and a list is given of all of those funeral directors who are covered by the relevant agreements, listed in alphabetical order based upon the location of their businesses.
31. There is no differentiation in the manner of payment by the APL of the account of a WAFDA or a non-WAFDA funeral director who is the subject of the fixed price agreement with the APL.

ACCC
- 5 JAN 2001
PERTH

3. THE MARKET

32. There is some difficulty in defining the appropriate market for the purposes of this application for authorisation. As Deane J stated in *Queensland Wire Industries Pty Ltd -v- Broken Hill Pty Ltd* (1989) 167 CLR 177:

"The identification of relevant markets and the definition of market structures and boundaries ... involves value judgments, about which there is some room for legitimate differences of opinion. The economy is not divided into an identifiable number of discreet markets into one or other of which all trading activities can be neatly fitted. One overall market may overlap with one or more others. The outer limits ... of a particular market are likely to be blurred"

33. The Australian Competition Tribunal said of the concept of "market" in *Re Media Council of Australia* (1996) ATPR 41-497:

"For trade practices adjudication, the market is the network of actual and potential transactions between buyers and sellers of goods and services that are, or could be, in close competition ... The choice of market definitions, ie the specification of relevant markets in the particular case, must depend upon the issues for determination. For the Tribunal's purposes it is the identification of a market or markets that best enables it to evaluate the likely effects of authorised conduct ..."

34. The Trade Practices Tribunal said of the concept of "market" in *Re Queensland Co-Op Milling Association Ltd and Defiance Holdings Ltd* (1976) ATPR 40 - 012 at p17,247:

ACCC
- 5 JAN 2001
PERTH

"We take the concept of the market to be basically a very simple idea. A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them ... Within the bounds of the market there is substitution - substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive ... Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance, and cost and price incentives."

35. The following comment about geographic dimensions made by Von Kalinowski in *Anti-Trust Laws and Trade Regulations* (Matthew Bender, New York, 1981), Volume 3, para 18-96, was cited in *Australia Meat Holdings Pty Ltd -v- Trade Practices Commission* (1989) ATPR 40-932:

"Any geographic market ... must be one that corresponds to the commercial realities of the industry and represents an economically significant trade area. Because the geographic market determination looks to actual trade patterns, it is not required that geographical boundaries be drawn with exactitude ..."

36. The relevant principles to apply in defining a particular market were set out by the Australian Competition Tribunal in *Re Tooth & Co Ltd; re Tooheys Ltd* (1979) ATPR 40-113. Those principles are as follows:

- It is first necessary to identify the areas of close competition relevant to the matter under consideration.
- The market should comprehend the maximum range of business activities and the widest geographic area within which, given a sufficient economic incentive, buyers can switch from one supply source to another and sellers from one production flow to another.

- The long-range substitution possibilities are important rather than the short-term transitory ones.
- At the extremities of the market there is such a break in substitution possibilities that firms within its boundaries would collectively possess substantial market power.
- Within the bounds of the market substitution possibilities may be more or less intense and more or less immediate; the field of substitution is not necessarily homogeneous but may contain within its submarkets such that their competitive relationship have a wider effect upon the function of the market as a whole.
- The market is a multi-dimensional concept - with dimensions of product, functional level, space and time.

37. The concept of submarkets was analysed in *Dowling -v- Dalgety Australia Ltd* (1992) ATPR 41-165:

*"The distinction between markets and submarkets can be merely one of degree. Submarkets are the more narrowly defined, typically registering some discontinuity in substitution possibilities. Where the defining feature of a market is the existence of close substitutes (whether in demand or supply) the defining feature of a submarket is the existence of still closer and more immediate substitutes. Submarkets may be especially useful in registering the short-run effects of change; but they may be misleading if used uncritically to assess long-run competitive effects. The indicia of submarkets listed in the American case *Brown Shoe Co Inc -v- United States* 370 US 294 (1962) are suggestive: 'The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production*

ACCC
 - 5 JAN 2001
PERTH

facilities, distinct customers, distinct prices, sensitivity to price changes, and specialised vendors.' But although it might be helpful to refer to such a list, it does not follow that it is exhaustive, nor that an area or product must meet all or a large number of these points to be classified as a submarket; Re Queensland Co-Operative Milling Association Ltd; Re Defiance Holdings Ltd (1936) 25 FLR 169 at 191; cited with approval in Queensland Wire Industries Pty Ltd -v- BHP Ltd (1989) 1674 FLR 177 at 199 per Dawson J."

38. There are difficulties inherent in applying the tests referred to in the authorities set out above with respect to the supply of funeral director services in Western Australia. In particular, the APL is not a direct participant in the market, whatever its definition, and does not know a number of the facts that would be necessary to make a more definitive assessment of the nature of the market or markets for the provision of funeral director services in Western Australia.
39. However, it is submitted by the APL, that whatever the determination of the appropriate market is, the proposed agreements as to the pricing of funerals to members of the funeral fund will not adversely effect competition within the relevant markets.
40. The APL believes that it is possible to argue, given the tests referred to in the authorities set out above, that a market encompassing all of Western Australia exists for the provision of funeral director services. This is particularly so given the fact that a number of funeral director businesses operate throughout most or all of Western Australia and presumably those businesses react on a state-wide basis to issues to competition between them. For example, it is assumed that changes in price or the delivery of funeral services by one large funeral director company would influence, on a state-wide basis, the provision of services by other large funeral directors who operate throughout the entire state or large portions of it. In the words of the Trade Practices Tribunal in *Re Queensland Co-Operative Milling Association Ltd and Defiance Holdings Ltd* (supra) at p 17,247, "the field of rivalry" between those large groups of funeral

ACCC
 - 5 JAN 2001
PERTH

directors is arguably throughout the state of Western Australia. However, it is also evident that many funeral directors do not operate throughout the state of Western Australia and are localised in the supply of their services. Arguably, the existence of those smaller operations illustrates the existence of a number of sub-markets made up of the Perth metropolitan area and the various country regions of Western Australia.

41. Alternatively, the significance of the activities of funeral director businesses in localised areas of Western Australia may in fact support the view that there exists a number of regional markets in Western Australia for the provision of funeral director services, with some of the larger funeral directors operating in more than one of those markets. Substitution possibilities in the funeral director industry, for practical purposes, only exist within the localised area within which the funeral directors operate. In the recent authorisation determination made by the ACCC in *The Estate Agents' Co-operative Ltd* (dated 26 April 2000. Authorisation No A90678) the ACCC considered the "practical field of rivalry" between real estate agents in respect to the applicant's multiple listing service. The ACCC concluded that the relevant market was much narrower than that claimed by the applicant. The ACCC regarded the field of rivalry between real estate agents as being highly localised. There were considerable practical constraints on the ability of these real estate agencies to compete across a wide geographic area. Vendors of residential property are unlikely to seek the marketing services of real estate agents that are located a long distance from their property. The ACCC noted that vendors are likely, therefore, to value highly the expertise of local real estate agents and are unlikely to seek the services of a real estate agent that has little experience selling property in the vendor's location. The ACCC found that a series of local markets existed and that before a state-wide market definition could be accepted, it would need to be convinced that, as a matter of commercial reality, real estate agencies across the state compete directly with each other for the listing and sale of residential properties. (See *Re The Estate Agents' Co-Operative Ltd* (supra) at pp 16 - 17). Whilst there is some

ACCC
- 5 JAN 2001
PERTH

evidence that some of the larger funeral director businesses in Western Australia compete directly with each other on a state-wide basis, there is also evidence that the field of rivalry between funeral directors is often localised. It is self evident that most consumers of funeral director services are unlikely to use funeral directors that are located a long distance from, in the case of pre-death funeral plans, their residence or, in the case of funerals arranged after a person has passed away, that person's place of death. For example, if a person has lived and died in Kalgoorlie it is unlikely that a consumer would use the services of a funeral director based in Broome.

42. Regrettably, it is impossible for the APL to comment upon the issue of the definition of the relevant market more authoritatively without it having greater knowledge of industry-sensitive information such as the exact nature of the competition between funeral directors, the basis upon which prices are set by those directors and the basis upon which changes are made by funeral directors to the level of services supplied to consumers.

43. Nevertheless, it is reiterated that the APL submits that the proposed contracts the subject of this application for authorisation would not have a substantial effect upon competition in the relevant market, whether or not that market is defined as being the whole of Western Australia or, alternatively, localised regions in the state. Records kept by the Bureau of Statistics show that in 1998, 10,664 persons died in Western Australia. Of that number 8,990 were persons over the age of 55 years. On that basis, 84.3% of persons who died in Western Australia in 1998 were over the age of 55 years. The APL funded 555 member funerals through the funeral fund in 1998. Accordingly, based upon available statistics concerning deaths in Western Australia in 1998, the number of member funerals funded by the APL in 1998 represents approximately 5.2% of the total funeral market in Western Australia and 6.2% of the funeral market with respect to persons over the age of 55 years. It is anticipated that these proportions would be similar whether or not they were considered on a state-wide basis or with reference to localised areas. Accordingly, there appears to be little adverse effect upon the market as a

ACCC
- 5 JAN 2001
PERTH

result of the operations of the APL's funeral fund and, consequently, no substantial effect upon competition, including no creation of any substantial barriers to entering the market. This issue is elaborated upon in section 6 of these submissions.

44. Further, it is the APL's submission that within the market for the delivery of funeral director services, whether that market be state-wide or localised, there are identifiable sub-markets, being the submarket that exists for the provision of funeral services to the elderly (defined as being persons over the age of 55 years), and, being the submarket that exists for the provision of funeral services to elderly pensioners. In *Dowling -v- Dalgety Australia Ltd* (supra) reference was made to the fact that boundaries of sub-markets may be determined by examining such practical indicia as industry or public recognition of the sub-market as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialised vendors. Funeral directors throughout Western Australia appear to recognise the existence of the elderly as a particular target group for the provision of funeral services. It is submitted that, for this reason, many funeral directors have introduced a system of pre-paid funerals that are advertised widely and usually directed to the elderly. The very existence of the APL funeral fund and the preparedness of funeral directors to target a package of services for the members of that fund (being elderly, invalid and widowed pensioners, as well as certain superannuants) illustrates the existence of a sub-market in relation to the provision of funeral services to elderly pensioners.

4. PREVIOUS AUTHORISATION DECISIONS

45. 45.1 In 1986 an application by the WAFDA for authorisation under section 88(1) of the TPA in respect to conduct which included an agreement

for the provision of funeral services to the APL funeral fund was granted by the Trade Practices Commission. (*Re Western Australian Funeral Directors' Association* (1988) ATPR (Com.) 50-129).

- 45.2 The Trade Practices Commission accepted that the arrangements the subject of that application provided a public benefit in that they would bring about a concessional funeral rate for a significant class of pensioners in Western Australia. The commission was of the view that this public benefit would be outweighed by anti-competitive detriment arising from these arrangements if funeral directors outside the arrangements were thereby precluded from offering their funeral services to members of the APL and another organisation the subject of the application. The Commission noted that funeral operators who are not members of the WAFDA appeared to have been important in bringing about a degree of competition in price and other matters in funerals in Western Australia. However, the Trade Practices Commission found that the freedom of APL members to choose a funeral director outside of the WAFDA was still maintained and was not infrequently made use of by members of the funeral fund. In broad terms therefore funeral directors who were not members of the WAFDA were still able to access this segment of the market and freedom of choice was accordingly preserved. The Commission believed it appropriate for there to be adequate instructions given to employees of the APL that there was a policy that there was no intention to preclude any non-WAFDA funeral director. Employees could then advise next-of-kin who requested advice from the APL that a freedom of choice was maintained. Employees could still specify price details that had been negotiated with the WAFDA and advise that members should be wary about paying more except for additional services. Such instructions would remove all doubt that the APL, through its officers, was excluding WAFDA non-members.

- 45.3 Ultimately, the Commission granted authorisation until 31 March 1989 with respect to the arrangement between the WAFDA and the APL to provide a concessional rate for funeral services to the APL funeral fund.
46. 46.1 In 1989 the WAFDA lodged a fresh application for authorisation with respect to agreements to provide concessional rates for funeral services to members of the APL funeral fund and another organisation (*Re Western Australian Funeral Directors' Association* (1990) ATPR (Com.) 50-095).
- 46.2 In that determination the Commission found that the relevant agreements under consideration raised two competition questions. Firstly, the Commission considered whether the agreements "shut out" non-WAFDA directors or at least adversely affected these directors who would like to compete for the supply of funeral services to funeral fund members. Secondly, the Commission considered whether the agreements prevented competition between WAFDA members - that is, might WAFDA members otherwise offer better terms or prices to fund members? The Commission found (at p 54,212) that the agreements did not "shut out" non-WAFDA directors, adversely affect these directors or prevent competition between WAFDA members. The agreements only covered a portion (3% to 4%) of the relevant market, and the least lucrative portion of the market at that. Any potential anti-competitive effect had to be seen in that context. Exclusion of non-WAFDA funeral directors from the part of the market covered by these arrangements would not exclude them from operating as funeral directors. The Commission was of the opinion that any exclusion did not result in a significant competitive detriment. The Commission was satisfied that the arrangements the subject of the application would not exclude non-WAFDA members from that section of the market affected by the arrangement. In broad terms,

ACCC
- 5 JAN 2001
PERTH

freedom of choice was preserved. The Commission expressed the view (at p 54,213) that the effect on competition caused by the agreement was so slight that it would not be concerned and would not itself take any action as long as other funeral directors were not stopped from participating.

46.3 However, the Commission also found (at pp 54,212 - 54,213) that there was no significant public benefit resulting from the agreements. The Commission was of the view that any benefit to fund management resulting from it being easier to manage the fund since the funds would know in advance what premiums to collect from members did not amount to significant public benefit. The Commission appears to have been substantially motivated in concluding that there was no public benefit by a finding (at p 54,211) that it did not believe that the agreements brought about a concessional funeral rate for a significant class of pensioners in Western Australia. From the enquiries the Commission had made into the industry the "concessional rate" did not appear to be a significant concession. To this extent, there seems to have been a major material difference between the factual findings with respect to public benefit made by the Commission in 1986 when it granted authorisation and in 1990 when it decided to dismiss the second application for authorisation. Whilst the Commission accepted that the agreements would bring about a concessional funeral rate when it considered the applications in 1986, it did not believe that any concession would be "significant" when the matter was considered in 1990.

47. It should also be noted that the Commission expressly noted when it considered the matter in 1990 that it would be concerned if there was price fixing as a consequence of the arrangements. Whilst the arrangement whereby a fixed concessional rate for the cost of funerals in the agreements considered by the Commission in 1990 appear to have been similar to the agreements for

ACCC
- 5 JAN 2001
PERTH

which authorisation is now sought, the issue of price fixing does not appear to have been addressed in any detail by the Commission or the parties in either 1986 or 1990. Whilst the APL reiterates that it is of the view that the proposed agreements the subject of this authorisation application do not breach the TPA, out of an abundance of caution the APL wishes to avoid any suggestion that it is involved in a breach of the TPA by way of price fixing and it has consequently made this application for authorisation.

5 PUBLIC BENEFIT

48. Section 90 of the TPA stipulates that the Commission shall not make a determination granting authorisation unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding for which authorisation is sought would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition.
49. The TPA does not define what amounts to "public benefit". However, in *Re 7 - Eleven Stores Pty Ltd* (1994) ATPR 41 - 357, the Tribunal explained the meaning of the term as follows:

"Public benefit has been, and is, given a wide ambit by the Tribunal as, in the language of QCMA ..., 'anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements (in the context of Trade Practices legislation) the achievement of the economic goals of efficiency and progress'. Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources. We bear in mind that (in the language of economics today) efficiency is a concept that is usually taken to encompass 'progress':

ACCC

- 5 JAN 2001

PERTH

and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency."

50. In *Hospital Benefit Fund of WA -v- ACCC* (1997) ATPR 41 - 569, at p 43,905 His Honour Justice Carr considered whether benefits to employees of a company were public or private and said:

"Whether a matter is to be regarded as a benefit to the public must surely be a question of degree. It involves assessments of the extent of the benefit and the relevant weight to be attached to it Given that there were 2,200 Amex employees throughout Australia who stood to benefit ...I do not think that as a matter of law, the [ACCC] erred in regarding that benefit as part of the likely benefit to the public to be derived from the conduct In other words, I do not consider that in making its assessment of likely public benefit, the Tribunal was obliged to ignore those benefits."

51. In identifying the relevant public benefit it is necessary to compare the position which would apply in the future if the proposed conduct was stopped with the position in the future if the conduct was allowed. All of the circumstances relating to public benefit must be considered, including how the proposed arrangement is likely to operate in practice so as to give rise to public benefit. Consideration of the matter is not confined to some narrow or rigid examination of the documents lodged for authorisation.

See Re Media Council of Australia (No 2) (1987) 88 FLR 1.

52. In determining an application for authorisation, the test to be applied by the ACCC is the "future with-and-without test". In considering and weighing public benefit and detriment, the ACCC should make a comparison of the position that would or would be likely to exist in the future if the authorisation was granted, with the position if the authorisation was not granted.

ACCC
- 5 JAN 2001
PERTH

See Re Australian Performing Right Association (1999) ATPR 41 - 701.

53. It is submitted by the APL that the proposed arrangements with the WAFDA and non-WAFDA funeral directors who are prepared to supply their services to the funeral fund at a fixed price will result in benefit to the public and that benefit outweighs any anti-competitive detriment flowing from the arrangements. When one considers and weighs the public benefit and detriment if authorisation is granted in comparison with the position if the authorisation is not granted, it is submitted that a considerable public benefit will be lost if authorisation is refused.
54. As set out in the analysis of the APL funeral fund scheme contained in section 2 of these submissions, the funeral fund provides fixed fee funeral benefits for persons over the age of 55 years who are in receipt of some form of aged, invalid or widow pension, or are superannuants who have been retired for at least a twelve month period. The funeral fund scheme provides the following advantages and consequential public benefit:
- 54.1 it enables a significant number of under-privileged members of the Western Australian community (currently 6,384 members) to make pre-payment for a dignified and a decorous funeral, which funeral might otherwise be beyond their financial means. Unlike other pre-paid funeral schemes members are able to contribute to the fund at an amount and rate that they chose;
- 54.2 the elderly persons who are members of the funeral fund are comforted by the fact that a significant potential burden for their next-of-kin has been met at a price that is fixed and will not be subject to fluctuations after their death;
- 54.3 a significant cost saving is provided to members of the funeral fund in that the APL believes based upon information provided to it by the

ACCC

- 5 JAN 2001

PERTH

WAFDA that a saving of approximately \$2,500.00 to \$2,700.00 per funeral is passed on to members by virtue of the concessional rate charged by the WAFDA to funeral fund members for their funerals. It is reiterated that the proposed fee for funerals provided by WAFDA members to members of the APL funeral fund is \$1,710.50 (inclusive of GST) plus a one-off \$55.00 administration fee and certain stipulated optional extras and the proposed fee for funerals provided by non-WAFDA members is \$1,677.50 (inclusive of GST) plus a one-off \$55.00 administration fee and certain stipulated optional extras;

- 54.4 the size and strength of the APL enables it to negotiate deals with respect to the cost and scope of funerals supplied by members of the WAFDA and other funeral directors that are as advantageous as possible. It is highly unlikely that the elderly individual members of the funeral fund would be able to negotiate as advantageous agreements if left to their own devices. The conducting of negotiations by the APL rather than by the individual members alleviates the stress and anxiety that would otherwise be suffered if those individuals had to negotiate by themselves;
- 54.5 administratively, the fixing of a set fee for funerals or, alternatively, a maximum fee for funerals keeps general administration costs low in that the fund knows in advance what premiums to collect from members and there is a resulting consistency when dealing with funeral directors in setting the price of funerals. The APL can be assured that it is achieving a low fixed price for its funeral fund members without needing to carry the administrative cost and burden of negotiating separate contracts with each of the large number of funeral directors who are members of the WAFDA or who are otherwise involved in the funeral fund scheme;
- 54.6 WAFDA funeral directors are relieved of some administrative responsibility since the APL ensures that its members are eligible for

ACCC
- 5 JAN 2001
PERTH

the concessional rate in that they are bona fide financially disadvantaged persons and are paid up members of the funeral fund. It is submitted that the non-profit nature of the APL association and its charitable standing results in a net lowering of administrative costs than if WAFDA funeral directors were responsible for these administrative tasks. This assists in bringing about cost savings for members of the fund;

54.7 the next-of-kin of the members of the funeral fund are provided with significant financial benefit in that their deceased relatives who were members of the funeral fund are able to be provided with a dignified and decorous funeral without any cost burden falling upon the next-of-kin;

54.8 the community as a whole benefits in that a pensioners' representative group has been able to negotiate on behalf of a valued but under-privileged section of the community a system whereby those persons are able to have funerals which might otherwise be beyond their financial means. It is submitted that this benefit to a needy group in the community is one that is in accord with an aim pursued by the community as a whole, namely the provision of protection and support to elderly pensioners. The benefit therefore operates to the advantage of the community as a whole.

55. Paragraph 46.3 of these submission is repeated in that it is reiterated that the Commission in its 1990 decision to reject an application for authorisation by the WAFDA appears to have been substantially motivated, particularly when that decision is contrasted with the decision to grant authorisation in 1986, by the finding that the "concessional rate" did not appear to be a significant concession. It is stressed that the APL believes, based on information provided to it by the WAFDA, that the concessional rate now charged by funeral directors to members of the funeral fund is approximately \$2,500.00 to \$2,700.00 cheaper than the usual cost of equivalent funerals. Further, the

ACCC

- 5 JAN 2001

PERTH

agreement not only provides a genuine cost saving to the elderly, the funeral fund enables the payment of the amount of the cost of funerals by instalments, with a minimum deposit of \$75.00 with no minimum term or minimum payment amounts. The APL believes that this significant benefit in the manner in which the cost of the funeral is paid by funeral fund members is an advantage that the APL funeral fund has over other funeral funds offered by individual funeral director companies.

56. It should also be noted that, as referred to in section 2 of these submissions, the APL is invoiced directly by funeral directors for the cost of a member's funeral and this benefits the member's next-of-kin in that the APL pays the fee directly to the funeral director. The APL submits that a reading of the decision dismissing the application for authorisation made by the WAFDA in 1990 indicates that there was a failure to draw to the attention of the Commission the substantial benefits created by the arrangements the subject of this authorisation application listed in paragraph 54 above, other than the benefit of a concessional rate being charged of members for funerals and that fund management is easier since the fund knows in advance what premiums to collect from members.

6. PUBLIC BENEFIT V. ANTI-COMPETITIVE EFFECT

57. The APL submits that the public benefit that flows from the provision of fixed concessional rates for funeral services in accordance with the agreements the subject of this application for authorisation provide a public benefit that outweighs any anti-competitive effect caused by the agreements.
58. The APL submits that the findings by the Commission in 1986 and 1990 regarding any anti-competitive effect when considering the applications for authorisation by the WAFDA still apply. The agreements do not preclude

ACCC
- 5 JAN 2001
PERTH