



**Australian  
Competition &  
Consumer  
Commission**

# **Determination**

## **Application for Authorisation**

lodged by

**The Australian Pensioners League  
of Western Australia**

in respect of

**Agreement between Western Australian  
funeral directors for the provision of  
funeral director services to the Australian  
Pensioners League at a fixed price**

**Date: 24 October 2001**

**Authorisation no: A70012**

**Commissioners:**  
Sheehan

Jones  
Martin  
Cousins

**File no: C2001/52**

## Summary

On 10 January 2001, the Australian Pensioners League of Western Australia (APL) lodged an application for authorisation (A70012) with the Australian Competition and Consumer Commission (the Commission). Authorisation was sought to make and give effect to a contract, arrangement or understanding, a provision of which may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the *Trade Practices Act 1974* (TPA).

The application seeks authorisation for an agreement between the APL, Western Australian Funeral Directors Association (WAFDA) and certain non-WAFDA funeral directors for the provision of funeral directors services to an APL funeral fund, on behalf of members who have contributed to that fund and for whom the funeral director services are provided, at a fixed concessional rate.

The APL funeral fund is a funeral pre-payment scheme available to aged, invalid, and widowed pensioners in Western Australia, as well as certain superannuants, for the purpose of allowing the elderly the benefit of prior planning of a burial or cremation, at a substantially reduced cost to the funeral fund member.

The fixed rate offered by the funeral fund is negotiated annually with the WAFDA on behalf of its members, and with individual non-WAFDA members who choose to participate in the scheme.

The Commission considers that while the proposed arrangements will reduce price competition between WAFDA members to that section of the market covered by the arrangements the Commission notes that the arrangements cover only a small section, and the lower priced end, of the relevant market. Most significantly, the Commission considers that the arrangements are likely to result in a lower end price to fund members than could be negotiated in the absence of the arrangements.

The Commission also considers that there are public benefits arising from the arrangements. In particular, the Commission considers there is a public benefit in the provision of funeral directors services to a section of the community that the Applicant claims is under-privileged at a price significantly lower than the market price.

The Commission concludes that the public benefits likely to result from the proposed arrangements are sufficient to outweigh any anti-competitive detriment that may arise. The Commission therefore grants authorisation to application A70012 for a period of 5 years, subject to the condition that if the Commission requests, APL will furnish the Commission with a copy of any contracts between the parties entered into under this authorisation.

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# 1. Introduction

- 1.1 Organisations who engage, or propose to engage, in certain anti-competitive business arrangements or conduct that could breach the *Trade Practices Act 1974* (TPA), may apply to the Australian Competition and Consumer Commission (the Commission) for authorisation of such arrangements or conduct. When an application for authorisation is made, the Commission is required under the TPA to make a determination in writing either granting or dismissing the application. It is also required to take into account any submission made to it in relation to the application. The Commission is first required to issue a draft determination in writing. The applicant or any interested party dissatisfied with the draft may request that the Commission hold a conference with the applicant and interested parties. At the conference parties can discuss the operation and effect of the draft determination. After any such conference the Commission reconsiders the application taking into account the comments made and further submissions received and publishes its final determination.
- 1.2 The Commission may grant authorisation where the public benefit of the subject arrangements or conduct outweighs the public detriment, including the anti-competitive detriment. If granted, an authorisation provides immunity from legal proceedings under the TPA in respect of the arrangements or conduct. This protection extends only from the time the authorisation is granted. Consequently, an organisation would not be protected from legal action under the TPA in respect of any business arrangements or conduct engaged in prior to the granting of authorisation of such arrangements or conduct.

## The application

- 1.3 On 10 January 2001, the Australian Pensioners League of Western Australia (APL) lodged application A70012 with the Commission. The application was made under subsection 88(1) of the TPA<sup>1</sup> for authorisation to make and give effect to a contract, arrangement or understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of Section 45 of the TPA. Authorisation was requested on an indefinite basis.
- 1.4 The application seeks authorisation for an agreement between the APL, Western Australian Funeral Directors Association (WAFDA) and certain non-WAFDA funeral directors for the provision of funeral directors services to an APL funeral fund, on behalf of members who have contributed to that fund and for whom the funeral director services are provided, at a fixed concessional rate.
- 1.5 The APL notes that while it is not a funeral director, nor is it in competition with any of the other relevant parties, funeral directors party to the arrangements are in competition, and the APL does not wish to be considered to be accessorially liable within the terms of Section 75B of the TPA with respect to any price

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<sup>1</sup> The application has also been considered as an application under the Competition Code.

fixing arrangement. Further, the APL and the members of its funeral fund stand to be detrimentally affected if the process of having a fixed concessional rate funeral is ended. Therefore, the APL has applied for authorisation for the arrangements to provide assurance that they will be able to continue.

### **Interim Authorisation**

- 1.6 At the time of lodging the application, the Applicant requested interim authorisation for the proposed arrangements on the grounds that interim authorisation was required in order to facilitate the negotiation of a new set of arrangements for the coming year (the existing agreement between the APL and WAFDA was due to expire on 1 March 2001). The Applicant argued that funeral directors may be inclined to delay negotiations of a new agreement until the outcome of the application was known, or at least until interim authorisation had been granted.
- 1.7 On 25 January 2001, the Commission denied the Applicant's request for interim authorisation. The Commission's letter to the Applicant dated 31 January 2001 advising of its decision to deny interim authorisation, noted that while in the process of considering the current application for authorisation it did not propose to take any action in respect of the current arrangements, or in respect of any new arrangements negotiated beyond 1 March 2001, to the extent that those arrangements were carried out in accordance with the terms specified in the Applicant's supporting submission.

### **Draft Determination**

- 1.8 On 5 September 2001, the Commission issued a draft determination proposing to authorise the proposed arrangements. The authorisation proposed by the Commission was subject to a condition that if the Commission requests, APL will furnish the Commission with a copy of any contracts between the parties entered into under this authorisation.
- 1.9 Copies of the Commission's draft determination were sent to interested parties with an invitation to request the Commission to hold a pre-determination conference in respect of the draft. No further submissions were received and no requests for a pre-determination conference were made.

## **2. Background to the industry**

### **The funeral service industry**

- 2.1 The funeral service industry has, until comparatively recently, been characterised by family owned businesses that operated funeral home(s) and/or shop fronts, usually in nearby localities.
- 2.2 However, in recent years the industry has become more concentrated with an increasing number of larger multi-firm businesses entering the industry, generally through the purchase and amalgamation of existing businesses. Larger multi-firm operations tend to have a considerable advantage over single premise businesses in that they are able to centralise operations, labour, use of the hearse and other cars and share a mortuary between several outlets. Multi-firm businesses are also advantaged by brand recognition, which can be particularly important given the circumstances in which funeral services are engaged.
- 2.3 Funeral directors generally organise all aspects of the funeral and burial or cremation of the deceased, including the collection of the deceased, storage of the body pending burial or cremation, preparation of the body, viewing facilities and chapel services.
- 2.4 In providing the service, funeral directors generally deal with third parties, for instance when obtaining the coffin or casket from the manufacturer, negotiating with the cemetery or crematorium, making arrangements with florists or newspapers, arranging for the services of clergy and in some instances dealing with monument masons.

### **The Western Australian market**

- 2.5 The WAFDA has 12 Perth metropolitan members who operate 27 separate businesses throughout Perth and its suburbs. A number of WAFDA members based in the Perth metropolitan area also have branches in other parts of Western Australia. In addition, 16 country members of the WAFDA operate 24 separate businesses throughout country Western Australia.
- 2.6 Australian Bureau of Statistics records indicate that there were 10, 664 deaths in Western Australia in 1998. The WAFDA have advised that their members provided 9, 610 funerals in 1998, representing a market share of 90.1%.
- 2.7 There are also numerous non-WAFDA funeral directors in Western Australia, located in the Perth metropolitan area and throughout country Western Australia. Many of these funeral directors conduct their businesses using more than one business name. Some of these funeral directors are small operations which use the funeral service facilities of other directors or facilities available at hospitals.

### **3. Background to the application**

#### **The Applicant**

- 3.1 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 through which pensioners' issues can be canvassed, and, where necessary, action taken to improve the personal, social and economic conditions for elderly Western Australians.
- 3.2 The APL presently has in excess of 18,000 members and operates 67 branches throughout suburban and rural Western Australia.
- 3.3 Functions performed by the APL include:
- administration of a reduced price funeral fund;
  - providing residential care for the elderly through provision and operation of a hostel;
  - provision of an insurance scheme specifically designed for pensioners;
  - provision of a podiatry clinic for the elderly;
  - provision of discounts to pensioners through an 'over 50s' membership reward scheme;
  - provision of housing, both self funded and rental, for the elderly; and
  - access to legal services for pensioners.

#### **Existing arrangements**

- 3.4 The APL, as part of its operations, conducts a 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.
- 3.5 The fund currently has in excess of 6,300 members and holds funds in trust of in excess of \$9 million.
- 3.6 Full details of the operation of the APL funeral fund are provided in section 5 of this determination.

#### **Previous authorisations**

- 3.7 The Trade Practices Commission<sup>2</sup> has issued two previous determinations, dated 19 December 1986 (A70007) and 23 March 1990 (A70009) regarding

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<sup>2</sup> Prior to 1995 the Commission's predecessor was the Trade Practices Commission.

applications for authorisation with respect to conduct which included an agreement for the provision of funeral services to the APL funeral fund at a fixed price. Both applications were lodged by the WAFDA.

- 3.8 The funeral agreements the subject of these applications were between the WAFDA, the APL and the Civilian Maimed and Limbless Association of Western Australia operating as the Metropolitan Pensioners Funeral Fund (MPFF).
- 3.9 Under the agreements WAFDA directors provided basic funerals to members of the APL and MPFF funds at a set, concessional price. This price was set by the WAFDA annually with the funds choosing to renew the agreements if they considered the WAFDA's price a worthwhile concession.
- 3.10 In its 19 December 1986 determination, the Commission accepted that the arrangements the subject of the application provided a public benefit in that they bought about a concessional funeral rate for a significant class of certain pensioners in Western Australia.
- 3.11 However, the Commission noted that it would consider this public benefit would be outweighed by anti-competitive detriment arising from the arrangements where funeral directors outside the arrangements were precluded from offering their funeral services to members of the APL and MPFF.
- 3.12 In its 19 December 1986 determination, the Commission granted authorisation to the WAFDA for the arrangements to provide concessional rate funeral services to the funds, until 31 March 1989, when it proposed to review the matter. The Commission's determination of 23 March 1990 was based on this review.
- 3.13 In its 23 March 1990 determination, the Commission did not consider that the arrangements raised any competition issues between funeral directors in Western Australia. However, the Commission did not consider that there was a material public benefit in the arrangements. Specifically, the Commission did not consider that the concessional rate being offered under the scheme represented a significant concession off the standard cost of a funeral. Consequently, the Commission denied authorisation of the arrangements.
- 3.14 The Applicant has noted that the current application differs from previous applications in that the agreements in place offer substantial discounts on full price funerals. The current agreement offers a discount in the vicinity of 60% off the full price of a basic funeral, compared to previous applications for authorisation where the agreed rate contained a discount in the vicinity of 25% off the full price of a basic funeral.



## **4. The Application**

- 4.1 The APL administers a funeral pre-payment scheme available to aged, invalid, and widowed pensioners in Western Australia, as well as certain superannuants, all of whom must be over the age of 55, for the purpose of allowing the elderly the benefit of prior planning of a burial or cremation, at a substantially reduced cost to the funeral fund member.
- 4.2 The fund provides members with a reduced price funeral. For funerals provided by WAFDA members the fee is currently \$1,790.00 plus a one-off \$55 administration fee (plus optional extras). For funerals provided by non-WAFDA members the fee is currently \$1,677.50 plus a \$55 administration fee. The APL submits that provision of similar funerals to non-fund members would cost in the vicinity of \$2,8000 to \$3,000. The saving passed on to fund members is therefore in the range of \$1,010 to \$1,210.00 per funeral.
- 4.3 The stipulated fee can be paid by members of the funeral fund either as a lump sum or, more often, for the benefit of those members unable to make such payments, by instalments. For those members choosing to pay by instalment, there are no restrictions set regarding payment amounts or terms, other than a minimum deposit of \$75. Members are free to contribute any amount they wish at any time they wish.
- 4.4 The level of prices and the extent of services are agreed between the APL, as the trustee of the fund, and either the WAFDA or the individual non-WAFDA funeral directors concerned. The price is 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.
- 4.5 The funeral contracts provide that for each funeral conducted for a member of the fund, the funeral director will be paid by the APL a fee in accordance with that specified in the schedule to the agreements. Any costs for services not covered by the funeral fund are negotiable between the funeral director and the member's next of kin. Such costs do not attract any concession rate.
- 4.6 Upon the death of a fund member, if the next-of-kin retains a funeral director who has entered into a fixed 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 to be the fixed price for the fund members applicable at the time that the relevant funeral occurs. If the member of the fund who has passed away is fully paid up then the APL forwards to the funeral director concerned the amount of the agreed fee. If the member 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 member the difference between the monies held in the funeral fund and the cost of the funeral previously agreed.
- 4.7 There is no requirement that the estate or next-of-kin of a deceased member of the 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 to a fixed fee with the APL perform the funeral. In such cases, the APL will forward to the funeral director concerned the amount of money held by the member in the fund, the balance of any charge rendered by the funeral director being paid by the estate or next-of-kin directly to that funeral director.

- 4.8 As at 1 December 2000 the funeral fund had 6,384 members and held funds in trust of approximately \$9,090,000.
- 4.9 The Applicant notes that while it is not a funeral director, nor is it in competition with any of the other relevant parties, as funeral directors party to the arrangements are in competition, the APL does not wish to be considered to be accessorially liable within the terms of section 75B of the Act with respect to any price fixing arrangement. Further, the APL and the members of its funeral fund stand to be detrimentally affected if the process of having a fixed concession rate funeral is ended. Therefore, while the APL is of the view that the current arrangements do not constitute a breach of the TPA, they have applied for authorisation to provide assurance that the arrangements will be able to continue.

## **5. Applicant's supporting submission**

- 5.1 The APL contended that the proposed agreements, the subject of the application, do not breach the TPA. However, the Applicant stated that it has made this application for authorisation to avoid any suggestion that it is involved in a breach of the TPA by way of a price fixing arrangement without immunity under the authorisation provisions of the TPA.

### **Public benefits**

- 5.2 The Applicant submitted that the funeral fund scheme provides the following public benefits:
- The fund allows a significant number of under-privileged members of the Western Australian community (currently 6,384 members) to make pre-payment for a dignified and decorous funeral, which might otherwise be beyond their financial means. The Applicant contends that, unlike other pre-paid funeral schemes, members are able to contribute to the fund at an amount and rate which they choose or is convenient for them.
  - Elderly people, due to associated physical and mental deterioration and illness, are often at a significant disadvantage when negotiating commercial contracts. The fund allows members to ensure that adequate funeral arrangements are in place before they die so as to avoid being a burden on their family.
  - The fund provides its members a significant saving on the standard cost of a funeral. The size and strength of the APL enables it to negotiate deals that are as advantageous as possible and which would be beyond the scope of individual members of the fund to negotiate.
  - Collective negotiation by the fund on behalf of its members alleviates the stress and anxiety that would otherwise be suffered if those individuals had to negotiate themselves.
  - The burden of having to negotiate separate contracts with each WAFDA member is relieved thereby keeping administrative cost to the APL and its members to a minimum.
  - WAFDA members are relieved of some administrative burden as the APL ensures that its members are eligible for the concessional rate in that they are bona fide financially disadvantaged persons and are paid up members of the fund. This in turn brings about cost savings to both the WAFDA and members of the fund.
  - The next-of-kin of fund members are provided with a significant financial benefit in that their deceased relatives are able to be provided with a dignified and decorous funeral without any cost burden falling upon next-of-kin.

- The community as a whole benefits in that a pensioners' representative group is able to negotiate an arrangement, on behalf of a valued but under-privileged section of the community, whereby those persons are able to have funerals which might otherwise be beyond their financial means. This benefit to a needy group in the community is one that is in accordance with an aim pursued by the community as a whole, namely the provision of protection and support to elderly pensioners. The benefit operates to the advantage of the community as a whole.
- 5.3 The Commission wrote to the Applicant on 26 March 2001, seeking clarification of material provided in the Applicant's submission in support of its application. Specifically, the Commission noted that a number of the public benefit claims that the Applicant had made (as listed above) related to the operation of the funeral fund generally. However, the Commission noted, it is not the funeral fund itself for which authorisation is sought, but rather the potentially anti-competitive arrangements between WAFDA members by which they collectively agree on a common fixed price.
  - 5.4 The Commission therefore sought further clarification of the public benefits the Applicant considered flowed directly from the arrangement by which WAFDA members collectively agree on a common fixed price.
  - 5.5 The Applicant responded that without an agreement to provide the service at a common fixed price the funeral fund would be unable to continue.
  - 5.6 The Applicant argued that 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.
  - 5.7 The Applicant further argued that cheaper overall funeral costs are passed on to fund members as WAFDA funeral directors are relieved of some of the administrative tasks otherwise involved in providing discounted funerals. These administrative tasks include the APL ensuring that its members are eligible for the concessional rate in that they are bona fide financially disadvantaged persons and are paid up members of the funeral fund. The Applicant noted that the non-profit nature of the APL and its charitable standing results in a lower administrative cost than if WAFDA funeral directors were responsible for these administrative tasks themselves. The Applicant argued that this assists in bringing about cost savings for members of the fund.
  - 5.8 The Applicant argued that the administrative burden that would be placed on it if it were required to negotiate separate contracts with each individual funeral director would be beyond its capacity.
  - 5.9 The Applicant argued that if this were required, given its limited resources, it is unlikely that the funeral fund would continue. The Applicant stated that it does not have the administrative capacity to negotiate separate contracts with each of the WAFDA's 28 members who operate 51 individual businesses. Given these

administrative difficulties, the Applicant believed it would not be able to replace collective agreements with the WAFDA with separate contracts with each individual member of the WAFDA. The Applicant argued that the current system is workable because it is able to negotiate directly with the WAFDA, which is authorised to speak on behalf of all its members.

- 5.10 The Applicant further argued that in the event that individual negotiation with WAFDA members was required, any failure to negotiate an agreement with large funeral directors would severely detract from the attractiveness of the scheme.
- 5.11 The Applicant noted that unless there is a fixed price negotiated with the WAFDA, the fund would be unable to offer a fixed price to its members. The Applicant stated that unless a fixed price service is able to be offered to members of the fund it is highly unlikely that persons would be prepared to join it.
- 5.12 The Applicant argued that any cessation of the system of having fixed price concessional funeral fees charged by competing funeral directors would result in loss of the public benefits identified above in respect of the fund. The Applicant stated that without the agreeing of a set fee, any agreement by competing funeral directors to provide a minimum stipulated funeral service would become largely meaningless. The Applicant argued that the attractiveness of the funeral fund to members and the ability of the APL to manage the fund would be so detrimentally affected that it is highly unlikely that the fund would be able to continue.

#### **Effect on competition**

- 5.13 The Applicant argued that any potential anti-competitive detriment from the arrangements is severely limited by the nature and operation of the fund.
- 5.14 The Applicant argued that the outcome of the arrangements is a lower end price to fund members than would be achievable in a competitive market. The Applicant provided estimates from WAFDA that provision of similar funerals to non-fund members would cost in the vicinity of \$2,800 to \$3,000. The Applicant notes that the saving passed on to fund members is therefore in the range of \$1,010 to \$1,210 per funeral, or a saving of 63%. The Applicant argued that the cost of the funeral service it has negotiated is as low as possible in the circumstances.
- 5.15 The Applicant further noted that participating funeral directors, both WAFDA members and non-members, are free to negotiate or charge lower fees for any aspect of the funeral to any member of the APL funeral fund should they wish to do so.
- 5.16 However, the Applicant argued if individual members of WAFDA were free to opt out of the agreement by charging higher fees than agreed or delivering a lower level of service the entire agreement between the APL and WAFDA would become largely meaningless.

- 5.17 The Applicant also noted that non-WAFDA directors are free to compete for the supply of funeral services to fund members either through negotiation with the APL to provide services to the fund, or through direct negotiation with fund members.
- 5.18 The Applicant noted that fund members and their next-of-kin are not encouraged to use any particular funeral director, whether or not that director is a member of the WAFDA, save for the fact that the concessional rates charged by those funeral directors who have agreements with the fund are identified.
- 5.19 The Applicant observed that funeral fund members and their next-of-kin at all times retain freedom of choice, both with respect to the funeral director engaged to provide the service and whether or not to remain in the funeral fund. Members (or their next-of-kin) are entitled to leave the fund and receive full reimbursement of all contributions made, excluding allowed bonuses and administration fees, at any time.
- 5.20 In addition, members and their next-of-kin are entitled to choose a funeral director who is not a participant in the fund to perform the funeral of the fund member. In the event that a funeral director who has not entered into an agreement with the APL for fixed concessional rate funerals is chosen, funds paid into the funeral fund by the deceased are forwarded to the selected director.

## **6. Submissions by interested parties**

- 6.1 The Commission sought submissions from a wide range of interested parties in relation to the application for authorisation and the public benefit and public detriment claims made by the APL. Whilst the Commission did not receive a large number of submissions, no party objected to the application. Copies of submissions received by the Commission are on the public register. Set out below are the main points raised in submissions received from interested parties.

### **Bowra & O'Dea<sup>3</sup>**

- 6.2 Bowra & O'Dea viewed the agreement between the APL and the funeral directors association as one of a community service to the poorer section of the community, providing for a basic but dignified funeral service. They argue that terminating the agreement would result in a significant number of individuals not being able to afford even a basic funeral. Therefore Bowra & O'Dea supported the application.

### **William Barrett & Sons**

- 6.3 William Barrett & Sons argued that they conduct a minimal number of funerals under the APL Funeral Benefit Fund arrangement, often to persons with limited funding for funeral expenses. They noted that the fund allows people to access funeral services at a reduced rate.
- 6.4 William Barrett & Sons noted that bereaved families retain the choice of funeral director and that the funeral fund only covers part of the cost of the funeral, with funeral costs varying depending on funeral location.
- 6.5 William Barrett & Sons raised no objections to the operation of the fund.

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<sup>3</sup> Bowra & O'Dea trade under the business names Bowra & O'Dea Funeral Directors, Leanne O'Dea Funeral Directors and Pensioner Funeral Services.

## **7. Statutory Test**

- 7.1 Application A70012 was made under sub-section 88(1) of the TPA in respect of arrangements which may substantially lessen competition. The TPA provides that the Commission shall only grant authorisation if the applicant satisfies the relevant test in sub-section 90(6) of the TPA.
- 7.2 Relevantly, sub-section 90(6) provides that the Commission shall grant authorisation only if it is satisfied in all the circumstances that:
- the provisions of the arrangements have resulted, or are likely to result, in a benefit to the public; and
  - that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the arrangements.
- 7.3 In deciding whether it should grant authorisation, the Commission must examine the anti-competitive aspects of the arrangements, the public benefits arising from the arrangements, and then weigh the two to determine which is the greater. Should the public benefits or expected public benefits outweigh the anti-competitive aspects, the Commission may grant authorisation or grant authorisation subject to conditions.
- 7.4 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.
- 7.5 Sub-section 88 (10) provides that an authorisation may be expressed to apply to or in relation to another person who subsequently becomes a party to the contract, arrangement or understanding, at a time after it is made or arrived at, or after an authorisation is granted.



## **8. Commission evaluation**

- 8.1 The Commission's evaluation of the application is in accordance with the statutory test outlined in section 7 of this draft determination. As required by the test, it is necessary for the Commission to assess the likely benefits and detriment, including the effects on competition, resulting from the proposed arrangements.
- 8.2 On 5 September 2001, the Commission issued a draft determination, subject to any pre-determination conference requested pursuant to s.90A of the TPA, to grant authorisation to application A70012 under s.88 of the TPA and the Competition Code. The Commission did not receive any requests for a pre-determination conference and no further submissions were received following the draft determination.

### **The relevant market and its features**

- 8.3 The Commission notes the following features of funeral directors services:
- 8.4 It appears that customers make choices about funeral directors having regard to recommendations by family and close friends, and on some occasions members of the clergy, as well as to the proximity of the funeral director to the customer.
- 8.5 This was confirmed by the analysis in the 1992 Prices Surveillance Authority Investigation into Funeral Prices (the PSA report). The Victorian Independent Funeral Association advised the PSA that up to 80% of people will return to the company with whom they or their family have traditionally dealt. This is particularly the case in country areas where customers tend to use the local funeral director in their town.
- 8.6 The PSA report also stated that where customers do not have a particular funeral director in mind customers tend to choose a 'local' funeral director in their time of need. The PSA stated that consumers are not generally prepared to travel more than a few suburbs to engage the services of a funeral director.
- 8.7 The PSA report found that there does not appear to be a great deal of price competition between funeral directors. The main reasons for the absence of price competition are:
- the circumstances in which funeral services are generally acquired; and
  - the reliance by the bereaved on personal contacts rather than on price comparison in selecting a funeral director.
- 8.8 There appears to be a higher degree of non-price competition in the funeral industry. However, this non-price competition is difficult to quantify as it often relates to such factors as the personal characteristics of the funeral director.
- 8.9 Whilst in some circumstances, there might be some room to argue for regional markets for the provision of funeral services, in the context of the agreement between WAFDA (and certain non-WAFDA) members who are represented on

a state-wide basis, and the APL (who represents members on a state-wide basis), the appropriate market in which to assess the arrangements the subject of the application appears to be the Western Australian market for the provision of funeral directors services.

## **Effect on competition**

- 8.10 Authorisation is sought for an agreement between the APL, WAFDA and certain non-WAFDA funeral directors for the provision of funeral directors services to an APL funeral fund, on behalf of members who have contributed to that fund and for whom the funeral directors services are provided, at a fixed concessional rate.
- 8.11 The specific conduct in relation to the application which is of concern to the Commission is the arrangement between WAFDA funeral directors to provide funeral directors services to the APL funeral fund at an agreed fixed price.
- 8.12 The Commission understands that most funeral funds operate by offering such a fixed price service. Generally speaking, such arrangements do not raise concerns regarding their effect on competition. However, there is a clear distinction between offering a fixed price service and a price fixing arrangement.
- 8.13 In general terms, agreements between competitors to provide a service at a common fixed price are likely to lessen competition relative to a situation where each of the service providers individually determines its own price. However the extent of the detriment and the impact on competition will depend on the specific circumstances involved.
- 8.14 The Applicant has submitted that the outcome of the arrangements is a lower end price to fund members than would be achievable in a competitive market.
- 8.15 Additionally, the Applicant argued that the arrangements do not restrict competition amongst funeral directors participating in the scheme or between participating and non-participating funeral directors.
- 8.16 Similarly, the Applicant contended that the arrangements do not restrict the choice of fund members either in engaging a participating funeral director or in choosing to engage the services of a funeral director who is not party to the arrangements.

### *Commission evaluation*

- 8.17 The Commission is required to assess the effect on competition of the arrangements within the context of the market in which the conduct occurs. As far as this application is concerned, the Commission notes that the arrangements cover only around 5%, and the lower priced end, of the relevant market<sup>4</sup>. Any

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<sup>4</sup> ABS 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. The APL funded 555 members' funerals in the corresponding period.

potential anti-competitive effect of the arrangements must be seen in this context.

- 8.18 Whilst agreements between competitors to provide a service at a common fixed price are generally likely to lessen competition relative to a situation where each of the service providers individually determines its own price the Commission notes that the Applicant has argued that the outcome of these arrangements is a lower end price to fund members than would be achievable in a competitive market.
- 8.19 It is the Commission's understanding that the low fixed price negotiated between the Applicant and the WAFDA is not a result of competitive market forces. Rather, the price is offered by the WAFDA as a community service to a sector of the community that the Applicant claims is financially disadvantaged.
- 8.20 Based on the information provided by the Applicant, and the Commission's own market inquiries, the Commission accepts that the end price agreed by the WAFDA on behalf of its members is significantly less than that which the Applicant, or individual members of the fund, would be able to negotiate if they were to negotiate directly with the individual funeral directors party to the arrangements.
- 8.21 Additionally, the Commission notes that under these arrangements any individual funeral director is free to negotiate prices lower than that provided in the funeral fund agreement with fund members.
- 8.22 However, the fee which results from negotiation between the Applicant and the WAFDA remains the core element of concern to the Commission. While the Applicant has provided the Commission with details of how the price negotiated is generally arrived at, the arrangements for which authorisation is sought contain no provisions for ensuring that the price negotiated will remain significantly lower than that which may be arrived at through individual negotiation in a competitive market.
- 8.23 The Commission would be concerned if, having authorised these arrangements, the immunity from legal proceedings under the TPA for the WAFDA to agree to a common fixed price for services provided to the APL funeral fund which authorisation would provide, was exploited to arrive at a price less favourable to fund members than would be the case if each individual funeral director determined its own price.
- 8.24 If this were to occur the Commission would consider this a material change of circumstances which may form the basis for a revocation of the authorisation under s.91B of the TPA. For this reason the Commission proposes a condition of authorisation requiring that APL, when so required by the Commission, furnish to the Commission any contract executed by APL and WAFDA, or by APL and non-WAFDA parties under the arrangements for which authorisation

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This represents approximately 5.2% of the total funeral market in Western Australia and 6.2% of the funeral market with respect of persons over the age of 55.

is sought. The Commission notes that a failure to comply with this condition could form the basis for the Commission to conduct a review as to whether authorisation should be revoked under s.91B.

- 8.25 The Commission does not intend to review each contract as it is executed. However, it considers that by requiring that all contracts between the APL and WAFDA or APL and those non-WAFDA parties to the arrangements be made available to it on request the Commission will be better able to make any future assessment of the effects of those contracts on competition in the market, should it be given reason to do so.
- 8.26 The Commission considers any potential anti-competitive detriment arising from the agreement of a common fixed price among WAFDA members is further limited by the nature of the market for funeral services. As discussed above (see paragraphs 8.7 – 8.8) there does not appear to be a great deal of price competition among funeral directors. Rather, to the extent that there is competition between funeral directors this competition is predominantly based on the level and quality of service provided. The Commission notes that under these arrangements WAFDA members are not restricted from competing on service levels provided to fund members.
- 8.27 The Commission also notes that funeral fund members retain the choice of opting out of the fund at any stage, including reimbursement of funds contributed. Further, fund members are free to employ the services of any funeral director party to the arrangements, including negotiating variations on the standard agreement with the director of their choice.

### **Conclusion**

- 8.28 The Commission considers that any agreement between WAFDA members to provide funeral directors services to a segment of the market at a common fixed price has the potential to result in some lessening of competition. However, for the reasons outlined above, the Commission considers that, subject to a condition being met, the arrangements will not, in practice, result in any significant anti-competitive detriment.
- 8.29 While the arrangements inhibit price competition between WAFDA members to a small section of the market to some degree, the Commission considers that the arrangements are likely to result in a lower end price to fund members than would be negotiated in a competitive market.

### **Public benefits**

- 8.30 The Applicant claimed that a number of public benefits result from the arrangements for which authorisation is sought. These public benefits can be divided into two categories: first those claims submitted in relation to the operation of the APL funeral fund generally, and secondly those relating directly to the conduct for which authorisation is sought (agreements between the WAFDA and certain non-WAFDA members for the provision of fixed concessional rate funerals to the APL funeral fund).

8.31 The Applicant has submitted that:

- The fund allows members to ensure that adequate funeral arrangements are in place before they die so as to avoid being a burden on their family.
- The next-of-kin of fund members are provided with a significant financial benefit in that their deceased relatives are able to be provided with a dignified and decorous funeral without any cost burden falling upon next-of-kin.
- Collective negotiation by the fund on behalf of its members alleviates the stress and anxiety that would otherwise be suffered if those individuals had to negotiate themselves.
- The fund allows a significant number of under privileged members of the Western Australian community (currently 6,384 members) to make pre-payment for a dignified and decorous funeral. The Applicant contends that, unlike other pre-paid funeral schemes, members are able to contribute to the fund at an amount and rate which they choose or is convenient for them.
- The fund provides its members a significant saving on the standard cost of a funeral. The size and strength of the APL enables it to negotiate deals that are as advantageous as possible and which would be beyond the scope of individual members of the fund to negotiate.
- The burden of having to negotiate separate contracts with each WAFDA member is relieved thereby keeping administrative costs to the APL and its members to a minimum.
- WAFDA members are relieved of some administrative burden as the APL ensures that its members are eligible for the concessional rate in that they are bona fide financially disadvantaged persons and are paid up members of the fund. This in turn brings about cost savings to both the WAFDA and members of the fund.
- The community as a whole benefits in that a pensioners' representative group is able to negotiate an arrangement, on behalf of a valued but under-privileged section of the community, whereby those persons are able to have funerals which might otherwise be beyond their financial means. This benefit to a needy group in the community is one that is in accordance with an aim pursued by the community as a whole, namely the provision of protection and support to elderly pensioners. The benefit operates to the advantage of the community as a whole.

8.32 The Applicant argued that without an agreement with the WAFDA for the provision of funeral services at a common fixed price the funeral fund would be so detrimentally affected it would be unable to continue.

### *Commission evaluation*

- 8.33 The Commission notes that it is not the APL funeral fund itself for which authorisation is sought, but rather the potentially anti-competitive agreements between WAFDA members by which they agree on a common fixed price.
- 8.34 In assessing the public benefits of these arrangements the Commission's consideration is confined to those public benefits resulting from the conduct for which authorisation is sought. However, the Commission does note the Applicant's argument that without an agreement with the WAFDA for the provision of funeral services at a common fixed price the funeral fund would be so detrimentally affected it would be unable to continue. Thereby the Applicant has argued, if the conduct for which authorisation is sought were not allowed to continue, all public benefits associated with the operation of the scheme, including those not flowing directly from the price fixing agreement, would be lost. This is discussed in more detail below.
- 8.35 The Commission notes the Applicant's arguments with respect to the fund providing for adequate funeral arrangements to be put in place for fund members before their death. The Commission accepts that the APL funeral fund allows members to ensure that adequate funeral arrangements are in place before they die so as to avoid additional burden being carried by their family. The Commission also accepts that the next-of-kin of fund members are provided with a benefit in that their deceased relatives are able to be provided with a dignified and decorous funeral without any cost burden falling upon next-of-kin.
- 8.36 However, the Commission notes that any number of other commercially available pre paid funeral plans provide these same services. The Commission does not accept that the cessation of the APL funeral fund would, in itself, prevent its members from being able to avail themselves of these services. Consequently, the Commission does not accept these arguments as public benefits flowing from the arrangements for which authorisation is sought. The Commission considers that these benefits are equally available to APL funeral fund members from other pre-paid funeral schemes. The Commission notes that the service provided by the APL funeral fund is at a lower price than other commercially available funds. This is discussed in more detail below.
- 8.37 The Applicant has argued that collective negotiation by the fund on behalf of its members alleviates the stress and anxiety that would otherwise be suffered if those individuals had to negotiate themselves. The Applicant contends that, unlike other pre-paid funeral schemes, members are able to contribute to the fund at an amount and rate which they choose or is convenient for them.
- 8.38 As noted above, most large funeral directors businesses offer their own pre-paid funeral arrangements. Generally speaking these plans, like the APL funeral fund, offer fixed price funerals, the distinction being that the price offered is not a common fixed price agreed upon by competing businesses. The only discernible difference between these plans and the APL funeral plan, from the fund members' point of view, is the price and payment method on offer. Whether customers choose the APL funeral fund or an alternative fund they are still required to shop around for the funeral director and service which best suits

their needs. Therefore the Commission does not accept the Applicant's argument that its funeral plan alleviates its members of the anxiety of having to negotiate their own funeral arrangements to any greater degree than any of a number of other commercially available fixed priced pre paid funeral plans.

- 8.39 However, the Commission does accept that there is a distinction between the manner in which APL funeral fund members are required to pay for their funeral compared to other commercially available pre-paid funeral plans.
- 8.40 Under the APL funeral plan, the stipulated fee can be paid by members either as a lump sum or, more often, for the benefit of those members unable to make such payments, by instalments. With respect to instalment payments, other than a minimum deposit of \$75, there are no restrictions set regarding payment amounts or terms. Members are free to contribute any amount they wish at any time they wish. Upon death of a fund member, if they are not fully paid up, the fund will still pay the full cost of the funeral and bill the deceased's estate for the outstanding balance. The Commission considers that this provides a considerable benefit to fund members over other commercially available pre-paid funeral plans.
- 8.41 The Applicant has argued that the fund provides its members a significant saving on the standard cost of a funeral.
- 8.42 The price provided to APL fund members under these arrangements represents a significant discount on that available through other pre-paid funeral plans. As noted above, the APL fund provides funeral services at a significantly lower end price than fund members would be able to negotiate in a competitive market. Market inquiries undertaken by the Commission indicate that alternative pre-paid plans offer basic funeral packages beginning at around \$3,000 depending on the place of burial, services required, type of coffin and other extras.
- 8.43 This cost saving represents a significant benefit to a section of the community that the Applicant claims is financially disadvantaged and who, without the cost savings negotiated and payment flexibility of this plan, might not otherwise be able to afford the service.
- 8.44 As noted above, in assessing the public benefits of these arrangements the Commission's consideration is confined to those public benefits resulting from the conduct for which authorisation is sought. However, the Commission does note the Applicant's argument that without an agreement with the WAFDA for the provision of funeral services at a common fixed price the funeral fund would be so detrimentally affected it would be unable to continue.
- 8.45 The Applicant has argued that the fixing of a set fee with the WAFDA keeps the APL's and the WAFDA's costs low, allowing cheaper overall funeral costs to be passed on to fund members.
- 8.46 The Applicant argued that the administrative burden that would be placed on it if it were required to negotiate separate contracts with each individual funeral director would be beyond its capacity.

- 8.47 The Commission notes that the APL is a non-profit, charitable organisation established to promote the interests of pensioners in Western Australia. The Commission also accepts that the APL funeral fund is managed solely in the interest of fund members, rather than for any commercial purpose. The Commission notes that many APL staff (including those involved in the management of the fund) are volunteers.
- 8.48 The APL has alluded to the administrative difficulties it would face if it were required to negotiate individual contracts with each member of the WAFDA as well as individual non-WAFDA members. The Commission accepts that the arrangement whereby WAFDA members agree to provide services to the APL funeral fund at a common fixed price results in administrative cost savings to both the APL and WAFDA members. The Commission considers that, given the nature of the fund, these cost savings contribute to the financial viability of the fund.
- 8.49 The Commission accepts that the APL does not have the resources to manage a conventional, commercial pre-paid funeral plan whereby arrangements would be negotiated with individual funeral directors. Beyond the additional cost and resources involved in entering into such negotiations, the APL would be faced with significant additional administrative costs in managing a fund whereby members were required to contribute different amounts and have different arrangements organised depending on their funeral director of choice. The additional cost burden this would place on the APL, costs which would ultimately have to be borne by fund members, would significantly compromise any public benefits flowing from the arrangements.
- 8.50 The Commission also considers it unlikely, were it required to negotiate separate prices with individual WAFDA funeral directors, that the APL would be able to negotiate as favourable a price for its members as is the case through negotiation with the WAFDA on behalf of its members. As noted above, the price negotiated with the WAFDA is one negotiated by the WAFDA on behalf of its members as a community service to a sector of the community that the Applicant claims is financially disadvantaged, rather than for any commercial gain. In fact, it is the Commission's understanding that, given the price negotiated, some WAFDA members, while providing services on the terms negotiated, would prefer the arrangements were not in place.
- 8.51 The Commission therefore accepts that the agreement between WAFDA members to provide services to APL funeral fund members at a common, fixed, concessional rate is essential to the viability of the fund.
- 8.52 The Commission therefore accepts that public benefits flow from these arrangements. In particular, the Commission notes that the arrangements provide for a section of the community that the Applicant claims is financially disadvantaged to be provided with a service which may otherwise be beyond their means. The arrangements provide for funeral directors services to APL members at a significantly discounted price and on favourable payment terms. The arrangements also provide cost savings to the administrator of the fund and



the providers of the service which, given the nature of the fund, are likely to benefit fund members.

- 8.53 The Commission considers that the community as a whole also benefits in that the APL is able to negotiate an arrangement, on behalf of a valued section of the community, whereby those persons are able to have funerals which might otherwise be beyond their financial means. The Commission accepts the Applicant's argument that this benefit to a needy group in the community is one that is in accordance with an aim pursued by the community as a whole, namely the provision of protection and support to elderly pensioners.

### **Conclusion**

- 8.54 For the reasons outlined, the Commission considers that there are public benefits arising from the proposed arrangements. In particular, the Commission considers that the arrangements provide a public benefit through allowing a section of the community that the Applicant claims is financially disadvantaged to be provided with a service which may otherwise be beyond their means.

### **Balance of public benefit and public detriment**

- 8.55 The Commission considers that the proposed arrangements will reduce price competition between WAFDA members to that section of the market covered by the arrangements. However, the Commission considers the anti-competitive detriment of the arrangements is limited. In particular, the Commission notes that there does not appear to be a significant level of price competition in the market. Rather, funeral directors appear to compete primarily on non-price factors. The Commission notes that under the arrangements funeral directors will still compete on the level of quality and service. The Commission also notes that the arrangements cover only a small section, and the lower priced end, of the market.
- 8.56 Most significantly, the Commission considers that the arrangements are likely to result in a lower end price to fund members than would be negotiated in a competitive market.
- 8.57 The Commission accepts that there are public benefits arising from the arrangements. In particular, the Commission considers there is a public benefit in the provision of funeral directors services to a section of the community that the Applicant claims is under-privileged at a price significantly lower than the market price.
- 8.58 The Commission also considers that the conduct provides some public benefit in the reduction of administrative costs to both the fund and the provider of the service. The Commission considers that given the nature of the fund and the fund provider, without these cost savings the viability of the fund would be compromised.
- 8.59 Consequently, following consideration of the arguments advanced by the Applicant and interested parties, the Commission concludes that the public

benefits likely to result from the arrangements will outweigh the anti-competitive detriment, subject to the condition discussed at paragraph 8.24.

- 8.60 The Commission therefore grants authorisation for a period of 5 years.
- 8.61 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.
- 8.62 In addition, the Commission may review the authorisation, prior to the expiry of the authorisation, if there has been a material change of circumstances since the authorisation was granted.

## 9. Final Determination

- 9.1 For the reasons outlined in section 8 of this determination, the Commission concludes that, subject to the condition set out below, in all the circumstances the arrangements for which authorisation is sought:
- are likely to result in a benefit to the public; and
  - that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the arrangements.
- 9.2 The Commission grants authorisation under s.88 of the TPA and the Competition Code, to application A70012 for a period of 5 years from the date of this determination.
- 9.3 It is a condition of this authorisation that:
- C1 The Australian Pensioner's League, when so required by the Commission, furnish to the Commission any contract executed by the APL and the Western Australian Funeral Directors Association, and any contract executed by the APL and those non WAFDA members who are parties to the authorised arrangements, in relation to the Australian Pensioners League Funeral Fund.**
- 9.4 This authorisation applies to, or in relation to present and future members of WAFDA and those who are not members of WAFDA, present and future, who become a party to the proposed arrangements after they have been made.
- 9.5 This determination is made on 24 October 2001. If no application for review is made to the Australian Competition Tribunal, it will come into effect on 15 November 2001. If an application for review is made to the Tribunal, the determination will come into effect:-
- Where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review;
  - Where the application is withdrawn – on the day on which the application is withdrawn.