



Australian
Competition &
Consumer
Commission

Determination

Applications for Authorisation

lodged by

**The Federation of Australian Wool Organisations on
behalf of itself, the National Council of Wool Selling
Brokers of Australia Ltd and the Private Treaty Wool
Merchants of Australia Inc**

*in relation to the imposition of a levy on bales of wool sold at
auction or by private treaty*

Date: 11 January 2006

Commissioners:

Samuel
Sylvan
McNeill
Martin
Smith
Willett

Authorisation nos. A90984
A90985

Public register no. C2005/1616

Executive Summary

On 20 September 2005, the Federation of Australian Wool Organisations (FAWO) lodged applications for authorisation A90984 and A90985, for itself and on behalf of the National Council of Wool Selling Brokers of Australia Ltd (NCWSBA) and the Private Treaty Wool Merchants of Australia Inc (PTWMA), with the Australian Competition and Consumer Commission (the ACCC). The applicants also applied for interim authorisation for the proposed arrangements.

The authorisation process

A key objective of the *Trade Practices Act 1974* (the Act) is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.

The Act, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'.

Broadly, the ACCC may 'authorise' businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

The ACCC conducts a comprehensive public consultation process before making a draft decision and ultimately a final decision to grant or deny authorisation.

The proposed arrangements

The FAWO, NCWSBA and PTWMA are seeking authorisation to:

- make and give effect to an arrangement (in the form of an Implementation Deed) between the applicants and any party who accedes to the deed, which will establish arrangements for the imposition of a levy on bales of wool sold at auction or by private treaty; and
- give effect to a provision allowing the applicants to refuse to supply goods or services to persons who have not agreed to pay the proposed levy.

The purpose of the proposed levy is to raise funds for a test marketing campaign for the promotion of Australian wool in the United States. It is proposed that the levy of A\$1.50 per bale of wool will be added to the post-sale service charge paid by wool purchasers, to selling agents, at the point of sale.

The entity responsible for undertaking the proposed campaign is Woolmark, a wholly owned subsidiary of Australian Wool Services Ltd.

Assessment of public benefits and detriments

Overall, the ACCC is satisfied that the proposed campaign is likely to result in the following public benefits:

- increased demand for Australian wool;
- increased efficiency in the promotion of Australia wool; and
- increased employment.

The ACCC is of the view that there are likely to be little, if any, public detriments arising from the proposed arrangements.

On balance, the ACCC is satisfied that the public benefits likely to arise from the proposed arrangements will outweigh any public detriments.

Determination

The ACCC grants authorisation to applications A90984 and A90985 for a period of two years from the date this determination comes into force.

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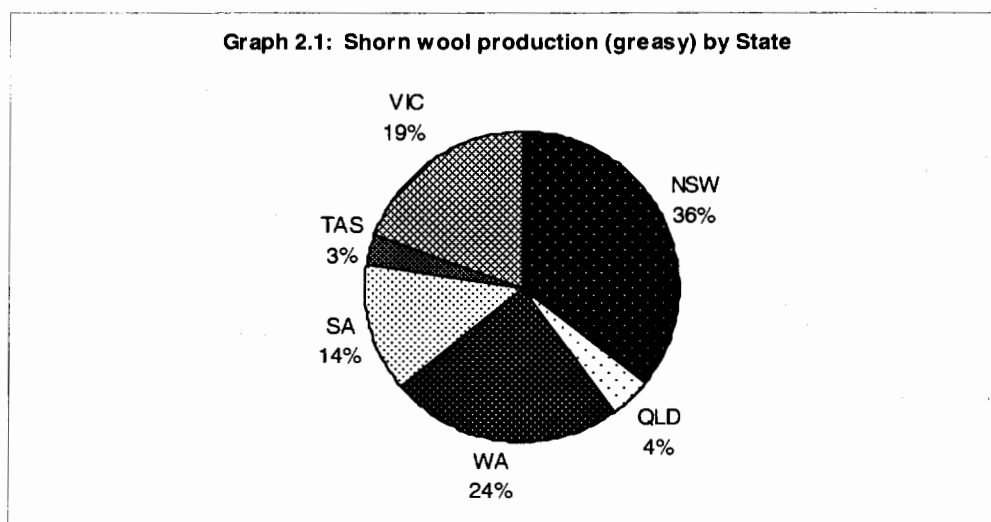
1 Introduction

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2 The Act, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'. Broadly, the ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.3 The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny authorisation. Upon receiving an application for authorisation, the ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.4 The ACCC then issues a draft determination in writing, proposing to either grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the ACCC will take into account any submissions received from interested parties.
- 1.5 Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides interested parties with the opportunity to put oral submissions to the ACCC in response to a draft determination. The ACCC will also invite interested parties to lodge written submissions on the draft.
- 1.6 The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final written determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied.
- 1.7 This document is the final determination in relation to authorisation applications A90984 and A90985 lodged by the Federation of Australian Wool Organisations (FAWO) for itself, and on behalf of the National Council of Wool Selling Brokers of Australia Ltd (NCWSBA) and the Private Treaty Wool Merchants of Australia Inc (PTWMA) ('the applicants').
- 1.8 The ACCC also has the power to grant interim authorisation, at the time the application is lodged or at a later stage. Interim authorisation protects the arrangements for which authorisation is sought from legal action under the Act while the ACCC considers and evaluates the merits of the application.

2 Overview of the wool industry

Wool production and exports

- 2.1 Australia is the world's largest wool producing country, accounting for about 25% of world production.¹ In 2003/04 there were approximately 106 million sheep shorn in Australia and shorn wool production amounted to 480 million kilograms of greasy wool.²
- 2.2 New South Wales is the largest producer of Australian wool, followed by Western Australia and Victoria. These three states combined represent around 80% of the nation's wool production.



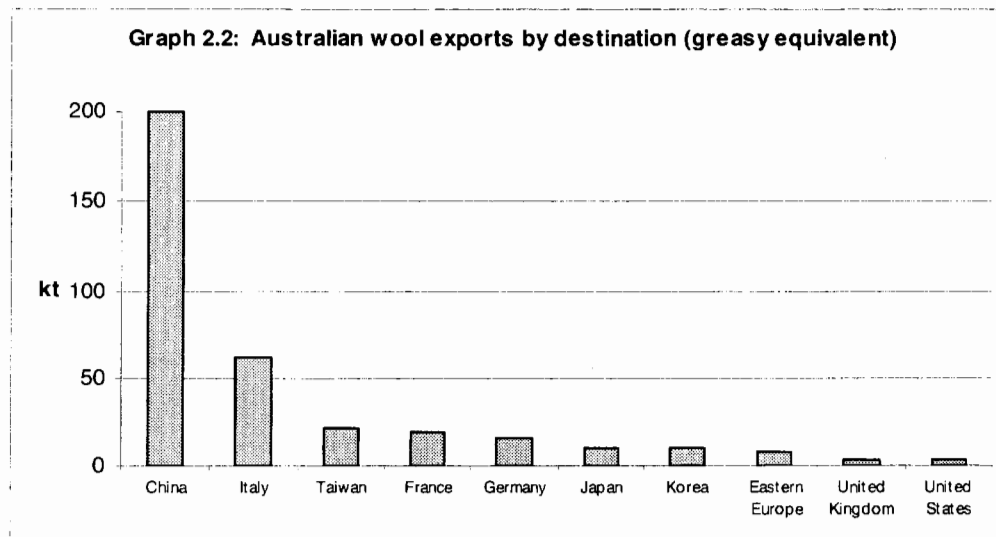
Source: ABARE, Australian Commodity Statistics 2004, p 228.

- 2.3 Wool trade can be broadly categorised into apparel and non-apparel on the basis of end use. In general finer micron wool is used in the apparel sector and broader fibre diameter wool is used in non-apparel. Apparel use of fine micron wool is typically used in the manufacture of clothing and garments. Non-apparel use of coarser micron wool includes the manufacture of carpets and other commercial uses.
- 2.4 Wool is exported as greasy, semi-processed, or as wool on skins. Greasy wool is wool which has not been processed and contains grease, dirt, vegetable matter and other material. Semi-processed wool includes wool that has been scoured, carbonised or otherwise processed at an early stage.
- 2.5 In 2004/05, almost 98% of the wool produced in Australia was exported.³ The major export markets are China, Italy, Taiwan and India, with approximately half of Australia's wool exported to China.

¹ Australian Bureau of Statistics, *Year book Australia*, 2005, cat. no. 1301.0.

² ABARE, *Australian Commodity Statistics*, 2004, p 228.

³ Department of Agriculture, Fisheries and Forestry submission, 17 October 2005.



Source: ABARE, Australian Commodity Statistics 2004, p 232.
 Note: Wool exports to other countries total 123 kt.

- 2.6 Over time there has been a degree of rationalisation in the wool industry with some producers exiting the industry, diversifying into mixed enterprises, or expanding to achieve increased economies of scale.
- 2.7 In 2005/06 wool prices are forecast to decrease on average as demand for wool continues to decline following a well established long term trend. Over the last decade, world demand for wool has been falling and this trend is expected to continue.⁴
- 2.8 Weaker demand reflects changing consumer preferences away from woollen apparel and competition from lower priced alternative fibres such as synthetics and cotton.⁵
- 2.9 Changing fashion tastes and preferences with a broad shift away from more formal clothing, which favours wool textiles, to casual, easy care fashion that is dominated by cotton and synthetic fibres has contributed to the decline in demand for Australian wool.⁶
- 2.10 In searching for higher returns, wool producers have been increasingly focused on achieving finer microns through advances in breeding technology. Over 50% of Australia's wool clip is 20 micron or finer.⁷ The majority of wool grown is within the 19 to 25 micron band.

Sale of wool

- 2.11 The sale of wool typically involves an auction, private treaty merchant, direct sale or forward contract. The auction system is by far the most popular method of selling. It is estimated that 80% to 85% of wool is sold by brokers

⁴ ABARE, *Australian Commodities*, 2005, vol. 13, no. 3, p 482.

⁵ Ibid.

⁶ Department of Agriculture, Fisheries and Forestry submission, 17 October 2005.

⁷ ABARE, *Australian Commodities*, 2005, vol. 13, no. 3, p 483.

at auction, 10% to 15% by private treaty merchants and 5% by other methods.⁸ There are five major auction centres located in Sydney, Newcastle, Melbourne, Launceston and Fremantle.

- 2.12 Private treaty merchants who purchase wool directly from the grower may sell at auction, direct to local processors in the domestic market, or directly to exporters. There are approximately 25 private treaty merchants in Australia and most also act as brokers in addition to their private treaty operations.⁹
- 2.13 Virtually all Australian wool is tested and samples made available prior to sale. The Australian Wool Testing Authority Ltd provides testing services to wool producers to determine wool characteristics such as staple strength, staple length, vegetable matter, colour and yield.

Wool levies

- 2.14 There has been a long history of government involvement in the wool industry. Between 1936 and 1999, a compulsory levy was imposed on wool growers for the conduct of promotion and research and development.
- 2.15 On 1 December 1998, the then Federal Minister for Agriculture, Fisheries and Forestry proposed to establish a Future Directions Taskforce to undertake a benchmarking study of wool against its competitor fibres and review the structures for wool marketing and promotion, and research and development.¹⁰
- 2.16 The taskforce terms of reference required the identification and reporting of means to improve the funding and administration of wool promotion and research and development.¹¹ The report delivered in 1999 recommended that levy-funded generic advertising at wool grower expense should cease forthwith in mature developed wool markets.¹²
- 2.17 A Wool Working Party was established to progress the recommendations of the report. The party was also required to identify a range of wool levy funding options from zero to 4%, to recommend a set of service models for wool marketing and research and development, and to conduct a poll (WoolPoll) among wool growers to ascertain their views on the future levy and the use of funds collected. The Working Party identified five service models linked to wool levies, ranging from zero to 4 per cent.¹³
- 2.18 In 2000, the WoolPoll ballot was conducted and the results indicated that 85% of voters expressed a first preference for a compulsory wool tax. The ballot also showed that 60% of votes and voters, based on an optional

⁸ Applicants' submission, 14 November 2005, p 3.

⁹ Applicants' submission, 14 November 2005, p 3.

¹⁰ DAFF, Media Release, *Response to AWRAP 'No Confidence' Motion*, 1 December 1998.

¹¹ DAFF, Media Release, *Wool Task Force Membership and Terms of Reference Announced*, 9 February 1999.

¹² www.imcpr.com.au/woolpoll2000/; see WoolPoll 2000 Voter Information, p 7.

¹³ *Ibid*, introduction.

preferential voting system, supported the service model with a 2% levy for research and development, and no funds for targeted retail and consumer marketing activities.¹⁴

- 2.19 On 1 July 2000, the wool levy rate of 4% was reduced to 3%. From 1 July 2001, the wool levy rate was reduced to 2%.
- 2.20 Under the Wool Services Privatisation Act 2000, Australian Wool Innovation (AWI) must conduct a poll every three years to determine the wool levy rate to apply for the following three years.
- 2.21 In 2003, AWI, under the Wool Services Privatisation (Wool Levy Poll) Regulations 2003, conducted WoolPoll 2003. The majority of votes and voters supported the retention of the 2% levy.
- 2.22 At present, there is a 2% research and development levy payable by the wool producer on the sale price of shorn wool to provide funding for research and development programs administered by AWI.

Wool promotion

- 2.23 The International Wool Textile Organisation (IWTO) expressed concern for the deteriorating situation of the wool industry in 2003 and commissioned a global survey. The results of the survey highlighted:¹⁵
- a loss of share in the apparel market, in particular an almost complete loss of market share in respect of women's fashion wear; and
 - that this loss in market share was due to a lack of promotion and communication with the market (including the withdrawal of grower levy funds for wool promotion in Australia).
- 2.24 In response, the IWTO established an Apparel Taskforce. In April 2005, the Apparel Taskforce presented recommendations to the IWTO Congress held in Hobart, which highlighted the urgent need for wool promotion and for a test marketing campaign to be established.¹⁶ As a result, agreement was reached between AWI, Australian Wool Services and the IWTO to establish a test marketing campaign in the United States.¹⁷

¹⁴ WoolPoll 2000 Wool Working Party, *Results of the WoolPoll 2000 Ballot*, March 2000, p 1.

¹⁵ Applicants' submission, 19 September 2005, p 10.

¹⁶ IWTO, Presidential Message, *Test Marketing Project*, viewed 8 November 2005 at <http://www.iwto.org/Projects/TM/TestMarketingProject.htm>

¹⁷ IWTO Press Release, *All Systems go for Test Marketing*, 11 October 2005.

3 The Applications

- 3.1 On 20 September 2005, FAWO applied for itself, and on behalf of the NCWSBA and the PTWMA, for authorisations A90984 and A90985.
- 3.2 Application for authorisation A90984 was made under sub-section 88(1) of the Act for the granting of an authorisation:
- to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of the Act;
 - to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of the section 45 of Act.
- 3.3 Application for authorisation A90985 was made under sub-section 88(1) of the Act for the granting of an authorisation:
- to make a contract or arrangement, or arrive at an understanding, where a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act;
 - to give effect to a provision of a contract, arrangement or understanding where the provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the Act.

The applicants

- 3.4 FAWO acts as the Australian National Committee of the IWTO. FAWO is an industry body in Australia and is used for addressing major local issues. Member organisations of FAWO include the Wool Producers, Australian Council of Wool Exporters Inc, Australian Wool Processors Council Inc, Australian Wool Testing Authority, Australian Wool Exchange Ltd, National Council of Wool Selling Brokers of Australia Ltd and Private Treaty Wool Merchants of Australia Inc.
- 3.5 Associate members of FAWO include the Australian Superfine Wool Growers' Association Inc, Australian Wool Handlers Pty Ltd, Australian Wool Innovation Ltd, CSIRO Textile & Fibre Technology, Department of Agriculture WA, Department of Primary Industries Victoria, the Interactive Wool Group and the Woolmark Company.
- 3.6 The NCWSBA is an industry organisation specifically established to represent the interests of selling agents. Typically this includes individuals or entities who are involved in providing warehousing, wool selling and other services to wool growers.

- 3.7 The PTWMA is an industry organisation specifically established to represent the interests of private treaty merchants. Typically this includes individuals or entities who are involved in purchasing wool directly from wool growers outside the auction system.

Proposed arrangements

- 3.8 The applicants propose to establish arrangements for a levy to be imposed on bales of wool sold at auction or by private treaty for the purpose of raising funds (US\$2.8 million) for a test marketing campaign for the promotion of Australian wool in the United States.
- 3.9 The overall cost of the campaign is estimated at US \$7 million and the applicants advise that pledges towards the cost have been received from Australian Wool Innovation Ltd, Australian Wool Services Ltd and Australian Wool Exchange Ltd.
- 3.10 The applicants have informed the ACCC that the proposed campaign will promote mens clothing (suits, trousers, jackets and coats) and womens clothing (trousers, jackets and coats) in several regions of the North East of the United States. The entity responsible for undertaking the proposed campaign is Woolmark, a wholly owned subsidiary of Australian Wool Services Ltd.
- 3.11 To implement the levy FAWO plans to enter into and give effect to an Implementation Deed between itself, the NCWSBA, PTWMA and any selling agent who accedes to the deed. The deed provides for the collection and remittance of funds collected by selling agents, including the management and application of funds raised by the levy.
- 3.12 The levy is set at the rate of A\$1.50 per bale of wool and will be added to the post-sale service charge, charged by selling agents and private treaty merchants, to buyers of wool at the point of sale.
- 3.13 The applicants have sought authorisation for the proposed arrangements until such time as the target amount of funds for the campaign (US\$2.8 million) is raised. The applicants estimate that it will take approximately twelve months to raise the target amount.
- 3.14 The applicants also propose to give effect to a provision which is, or may be, an exclusionary provision, by refusing to supply goods or services to persons who have not agreed to pay the levy.
- 3.15 The applicants state that the exclusionary provision will be imposed by selling agents and private treaty merchants who execute a deed of accession, and who will be under a contractual obligation to collect the proposed levy on all wool sales made by them. The provision will not be an express term in the Implementation Deed.

Collection and administration of the levy

- 3.16 As discussed above, it is proposed that the levy will be added to the post-sale service charge, charged by selling agents and private treaty merchants, to buyers of wool at the point of sale. The post-sale service charge will remain a matter for individual negotiation between the selling agent or private treaty merchant and the relevant buyer.
- 3.17 Selling agents and private treaty merchants will remit funds on a periodic basis to FAWO's bank account, who will then release the funds to IWTO or at the direction of IWTO, to Woolmark. Woolmark is the body responsible for undertaking the proposed campaign. Under standard industry terms, wool is not released to the buyer until it is paid for.
- 3.18 The applicants estimate that it will take approximately 12 months to collect the target amount of US\$2.8 million. This estimate is based on 2,750,000 bales sampled by the Australian Wool Testing Authority in 2004/05 and factoring in a 1% fall in production in 2005/06 and a 10% leakage in the number of bales covered by the Implementation Deed. Applying a levy of A\$1.50 per bale and an Australian/US exchange rate of 0.75 cents, this equates to US\$2.76 million.¹⁸
- 3.19 With regard to administration of the levy, although the applicants have indicated that the exact proportion of funds to be used for administration is difficult to estimate, the applicants expect the amount to be small, with only direct costs for services provided by third parties to be incurred. The applicants have indicated that A\$75,000 is considered a reasonable estimate.

Audit arrangements

- 3.20 The applicants' intention with regard to audit arrangements is summarised below.¹⁹
- 3.21 The Implementation Deed reserves the right for FAWO to inspect records and audit the collection of funds, including through an independent auditor. The Australian Wool Industries Secretariat (AWIS) has in place procedures for collecting details on the number of bales sold at auction and the applicants expect that a slight modification to this process will facilitate the reconciliation of funds against the number of bales sold.
- 3.22 Similarly, private treaty merchants already supply details of bales transacted to AWIS and the applicants expect that this information can be used to audit receipts from private treaty merchants.
- 3.23 FAWO intends to ask its auditors to audit the information from brokers and private treaty merchants to ensure that funds have been properly remitted in accordance with the Implementation Deed.

¹⁸ Applicants' submission, 14 October 2005, p 1.

¹⁹ Applicants' submission, 14 October 2005, p 4.

- 3.24 With regard to the distribution of funds, FAWO's auditor will be asked to audit payments released by FAWO for the purpose of the international test marketing campaign.

Interim authorisation

- 3.25 As part of its application, the applicants requested interim authorisation for the conduct to coincide with the upcoming Northern hemisphere Autumn/winter; the period of greatest demand for woollen products.
- 3.26 On 26 October 2005, the ACCC granted interim authorisation, on condition that the applicants refrain from collecting the levy.
- 3.27 On 30 November 2005, ACCC granted interim authorisation for collection and use of the levy.

4 Submissions from interested parties

4.1 The ACCC received submissions from the interested parties detailed below. These submissions are available on ACCC's public register and its website. In general, the majority of submissions were supportive of the proposed arrangement.

- The National Council of Wool Selling Brokers of Australia Inc;
- The Australian Wool and Pastoral Agency Ltd, trading as Schute Bell Badgery Lumby;
- The Australian Wool Exchange Limited;
- The Australian Council of Wool Exporters Inc;
- The Australian Superfine Wool Growers' Association Inc;
- Adelaide Wool Company Pty Ltd;
- Australian Innovation Limited;
- Department of Foreign Affairs and Trade;
- Department of Agriculture, Fisheries and Forestry;
- Wool Producers;
- NSW Farmers Association;
- Department of Primary Industries and Fisheries (Queensland);
- Private Treaty Wool Merchants of Australia Inc;
- Australian Wool Processors Council Inc;
- Department of Primary Industries (New South Wales); and
- Department of Primary Industries (Victoria).

Submissions received on the draft determination

- Fibres (Australia) Pty Ltd.

4.2 The submission from Fibres (Australia) Pty Ltd is dealt with at paragraphs 6.25 - 6.31.

5 The Statutory Tests

- 5.1 The ACCC may only grant authorisation where the relevant public benefit test in section 90 of the Act is satisfied.

Application A90984

- 5.2 The FAWO, NCWSBA and the PTWMA lodged application for authorisation A90984 under sub-section 88(1) of the Act:
- to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of the Act;
 - to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of the section 45 of Act.
- 5.3 Sub-section 90(8) of the Act provides that the ACCC shall not make a determination granting an authorisation under sub-section 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision, unless it is satisfied in all the circumstances that the proposed provision or proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract, arrangement or understanding ought to be authorised.

Application A90985

- 5.4 The FAWO, NCWSBA and the PTWMA lodged application for authorisation A90985 under sub-section 88(1) of the Act:
- to make a contract or arrangement, or arrive at an understanding, where a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act;
 - to give effect to a provision of a contract, arrangement or understanding where the provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 5.5 The relevant public benefit test for this application is found in sub-section 90(6) of the Act. This sub-section provides that the ACCC shall not make a determination granting an authorisation under sub-section 88(1) in respect of a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied that:
- the provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public; and

- that this benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the provision concerned were given effect to.

Application of the tests

- 5.6 There is some variation in the language between the tests in sections 90(6) and 90(8) of the Act.
- 5.7 The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same.²⁰ In particular the Tribunal considered that the test under section 90(6) was limited to a consideration of those detriments arising from a lessening of competition, but that the test under section 90(8) was not so limited.
- 5.8 However, the Tribunal has previously stated that with respect to the test under section 90(6):
- [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.²¹
- 5.9 Consequently, when applying either test, the ACCC can take most, if not all, public detriment likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.
- 5.10 In many authorisation applications, all detriments likely to result from the conduct appear to arise from a lessening of competition. The ACCC considers this to be the case in this matter.

Definition of public benefit and public detriment

- 5.11 Public benefit is not defined by the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes 'anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements the achievement of the economic goals of efficiency and progress'.²²
- 5.12 Similarly, public detriment is not defined in the Act but the Tribunal has given the concept a wide ambit. It has stated that the detriment to the public includes 'any impairment to the community generally, any harm or damage

²⁰ *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004.

²¹ *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty. Ltd. and Amatil Ltd. for review* (1981) ATPR 40-200 at 42,763, 42766.

²² *Re 7-Eleven Stores; Australian Association of Convenience Stores* (1994) ATPR ¶ 41-357 at 42677. The Tribunal recently followed this approach in *Qantas Airways Limited* [2004] ACompT 9, 16 May 2005.

to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency'.²³

Future with-and-without test

- 5.13 In weighing up the public benefit and anti-competitive detriment generated by proposed arrangements for which authorisation has been sought the ACCC also applies the 'future with-and-without test' established by the Tribunal.
- 5.14 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the counterfactual.

Term of authorisation

- 5.15 Sub-section 91(1) of the Act allows the ACCC to grant authorisation for a specific period of time.

²³ *Re 7-Eleven Stores; Australian Association of Convenience Stores* (1994) ATPR ¶ 41-357 at 42683.

6 ACCC Assessment

- 6.1 The ACCC's evaluation is in accordance with the statutory tests outlined in section 5 of this determination. As required by the tests, it is necessary for the ACCC to assess and weigh the likely public benefits and detriments flowing from the proposed arrangements.

Relevant markets

- 6.2 The first step in assessing the public benefits and anti-competitive detriment of the conduct for which authorisation is sought is to consider the relevant market(s) in which that conduct occurs.
- 6.3 Defining the markets affected by arrangements proposed for authorisation assists in assessing the likely public benefits and public detriments from any lessening of competition from the arrangements. However, depending on the circumstances, the ACCC may not need to comprehensively define the relevant markets, as it may be apparent that a net public benefit will or will not arise regardless of this definition.
- 6.4 The applicants consider that the relevant market to which the proposed conduct applies is the market for the production and sale of greasy wool in Australia, encompassing both domestic and export consumption.²⁴
- 6.5 The ACCC notes that there are indications that wool has been losing market share over a long period of time to other fibre substitutes. In this regard the ACCC notes that wool is a fibre which competes against other natural fibres such as cotton, and synthetic fibres such as polyester. As such, it appears that there may be a degree of substitution between competing fibre products.
- 6.6 With regard to the actual selling of growers' wool, there are a range of options available including auction sales, private treaty, and to a lesser extent direct sales and forward contracts. The percentage of wool sales by private treaty is much lower than auction and appears to have been for some time. However, it appears that there may be a level of substitution between the various selling methods, including auction, private treaty and alternative selling methods.
- 6.7 Overall, the ACCC does not consider it necessary to define the market in this instance, as the outcome of the analysis would be not affected, however a relevant area of interest is likely to be the wholesale production and sale of wool or fibre products, both domestic and international.

²⁴ Applicants submission, 14 November 2005, p 4.

Future with-and-without test (the counterfactual)

- 6.8 The ACCC applies the 'future with-and-without test' established by the Australian Competition Tribunal to identify and measure the public benefit and detriment generated by the arrangements in the future if the authorisation is granted, compared with those generated if the authorisation is not granted.²⁵ This involves identifying a counterfactual; that is, making a prediction as to what will happen if the authorisation is not granted.
- 6.9 Currently there are no existing levies to fund promotion of the wool industry. Promotion generally takes place on an ad-hoc basis and is largely dependant on entities who are willing and have sufficient resources to run such campaigns.
- 6.10 In addition, given that the proposed arrangements would be likely to raise concerns under the Act, without authorisation it is unlikely that the levy would be imposed on any parties.
- 6.11 As discussed earlier, in 2000 wool growers voted for a 2% levy to fund research and development, and no funds for targeted retail and consumer marketing activities. A further poll was conducted in 2003 with voters confirming retention of the 2% levy.
- 6.12 Under the Wool Services Privatisation Act 2000, a wool levy poll must be conducted no later than three years from the anniversary of the previous recommendation.²⁶ The last poll was conducted in 2003 and therefore it is likely that the next poll will be conducted in 2006.
- 6.13 In conducting the poll, the declared research body must propose 3 to 5 different rates of wool levy, including a zero rate.²⁷ The information memorandum must also include how the research body proposes to expend the funds.²⁸
- 6.14 In light of the above, it is possible that the rate and purpose of the statutory wool levy could be varied in the future. However, the poll would need to be conducted and recommendations put forward to the Minister for Agriculture, Fisheries and Forestry before this could happen. Further, the proposed campaign is time limited and therefore is unlikely to be affected by the results of the poll, with most if not all of the promotion campaign likely to be completed before any changes resulting from the poll are instituted.'
- 6.15 Overall, the ACCC considers that the most likely counterfactual is a situation where promotion of the wool industry continues as it does today, with the possibility of the reintroduction of a statutory levy for the purpose of marketing and promotion at some time in the future.

²⁵ See, for example, *Re Australasian Performing Rights Association* (1999) ATPR 41-701.

²⁶ *Wool Services Privatisation Act 2000*, section 32(3).

²⁷ *Wool Services Privatisation (Wool Levy Poll) Regulations 2003*, section 9(1).

²⁸ *Wool Services Privatisation (Wool Levy Poll) Regulations 2003*, section 13(a)

Anti-competitive detriment

6.16 As discussed in section 5, the ACCC must assess the extent to which the proposed arrangements are likely to give rise to detriment to the public constituted by any lessening of competition that flows from the proposed arrangements.

Proposed levy

- 6.17 The applicants submit that there is likely to be little, if any, public detriment arising from the proposed levy and that any adverse impact on the demand for Australian wool is likely to be immaterial.
- 6.18 Further, the applicants submit that as over 95% of Australian wool is exported, the cost of the levy will be largely passed on to foreign customers and very few Australian consumers will be directly affected by collection of the levy.
- 6.19 The Department of Primary Industries and Fisheries (Queensland) submits that there appears to be little or no anti-competitive elements to the proposal.
- 6.20 The ACCC considers that price competition between wool growers is an important aspect of an efficient wool industry. The ACCC is of the view that given the levy will be applied broadly across the majority of wool sold, it is unlikely that there will be any detriment arising from lack of price competition between growers. Price competition is not precluded by the levy.
- 6.21 Further, the ACCC is of the view that as the Australian wool industry faces competition from other international competitors, it is in the applicants' interest to ensure that Australian wool prices remain competitive.
- 6.22 The ACCC also considers that any impact the levy may have on the international competitiveness of wool pricing, which in turn impacts on demand, is likely to be mitigated by the relative small size of the levy. The ACCC notes that the levy is fixed at the rate of A\$1.50 per bale of wool, estimated by the applicants to equate to less than 0.2% of the average sale price of a bale of wool.
- 6.23 A further mitigating factor is that the proposed arrangements are time limited so that any unexpected detriment that may arise will be relatively short lived. The applicants will also be conducting an evaluation in order to inform and modify any future campaign.
- 6.24 The ACCC considers it likely that the \$1.50 levy would affect the price of wool received by the wool producer where the levy is passed through the supply chain. As noted above at paragraph 6.22, the relative size of the levy is minimal.
- 6.25 In relation to the draft determination, Fibres (Australia) Pty Ltd submitted that for the section of trade that is buying privately and at auction, and then

in turn reselling in the local market, an anti-competitive situation will exist, with the \$1.50 levy on the same wool being paid more than once.

- 6.26 FAWO submitted that while it is intended that the levy be paid once on each bale of wool, it is acknowledged that a small amount of wool will be sold more than once, which can occur if a buyer purchases wool at auction or from a private treaty merchant and re-offers it for sale.
- 6.27 FAWO further submitted that the exact quantity of wool which is purchased by a buyer and re-offered is relatively very small. FAWO estimates that it is less than 2% of wool offered for sale by auction.
- 6.28 FAWO has however advised that it will:
- write to all brokers, private treaty merchants and buyers to minimise any incidences of the levy being paid more than once and advise these parties that it is intended that the levy should only be paid once on each bale of wool sold; and
 - where a buyer can affirmatively demonstrate to FAWO's satisfaction that the levy has been paid more than once on a particular bale of wool, FAWO will refund the additional levy payment to the buyer.
- 6.29 Given FAWO's undertaking to address double payment of the levy, the ACCC is satisfied that there are likely to be little, if any, public detriments arising from the proposed arrangements.

Refusal to supply

- 6.30 The applicants propose to give effect to a provision which is, or may be, an exclusionary provision, by refusing to supply goods or services to persons who have not agreed to pay the levy.
- 6.31 The applicants submit that brokers and private treaty merchants who execute a deed of accession will be under a contractual obligation to collect the levy on all wool sales made by them.
- 6.32 The applicants further submit that while it is not an express term of the Implementation Deed, brokers and private treaty merchants who have executed a deed of accession may refuse to supply wool unless a buyer pays the levy in order to comply with their obligations.
- 6.33 The ACCC notes that the intention of the exclusionary provision is to facilitate the collection of the levy for the raising of funds towards the proposed campaign. The actual effect will be to refuse supply to those customers who refuse to pay the levy.
- 6.34 The ACCC considers that there are unlikely to be any anti-competitive detriments arising from the refusal to supply. Customers are free to make a commercial decision as to whether they wish to purchase wool with the applicable levy. Given the small size of the levy, it is unlikely to be a significant consideration.

Public benefit

- 6.35 As discussed in section 5, the ACCC must assess the public benefit that is expected to flow from the authorised conduct.

Increased demand for Australian wool

- 6.36 The applicants submit that the proposed test marketing campaign will directly and indirectly increase consumer demand for Australia wool over both the short and long term.
- 6.37 The applicants further submit that with approximately 95% of wool produced in Australia exported, a principal benefit flowing from the greater promotion of wool is likely to be export enhancement.
- 6.38 In general, interested parties support the notion that the proposed campaign would assist to increase the international demand for Australian wool. Further, that lower levels of promotion since the cessation of the statutory levy for promotion has been a contributing factor leading to the decline in demand for Australian wool.
- 6.39 In general, interested parties also support the view that an increase in international demand for wool would result in a consequent increase in net exports.

- 6.40 The Department of Agriculture, Fisheries and Forestry submits that broad industry contributions to such activities are generally regarded as beneficial and likely to encourage further through-chain marketing and other activities for the benefit of the wool industry. Further, any resulting increase in demand for wool will have flow-on benefits throughout the supply chain and more generally to regional communities and the national economy.
- 6.41 The ACCC is informed by the applicants that the proposed campaign will be undertaken in several regions of the North East of the United States. As the proposed campaign will promote Australian wool in an overseas country, it naturally flows that if the campaign is successful and increases demand, there will also be a corresponding increase in exports of wool to meet that demand.
- 6.42 Given the strong correlation between demand and exports in this instance, the ACCC does not consider it necessary to distinguish these as separate public benefits, but rather as a single public benefit.
- 6.43 The ACCC acknowledges that demand for Australian wool is not solely dependent on marketing and promotion, but rather on a range of considerations including, but not limited to, exchange rates, changing fashion tastes, competing fibre substitutes, price competition and quality.
- 6.44 In this regard, the ACCC is mindful that the marketing campaign is simply one aspect of the wool industry and therefore fluctuations in demand, both upward and downward, would be expected on an ongoing basis.
- 6.45 However, the ACCC considers that demand is more likely to improve as a result of the proposed campaign than would have been the case otherwise. Therefore, the ACCC is satisfied that there is likely to be a public benefit arising from the proposed arrangements in the form of a possible increase in demand for Australian wool.

Increased efficiency in the promotion of Australian wool

- 6.46 The applicants submit that the test marketing campaign will facilitate efficient investment in the promotion of the wool industry by measuring changes in demand so that future promotion can be appropriately targeted.
- 6.47 The applicants further submit that is intended there will be qualitative and quantitative evaluation, including various comparisons of sales and trends in 'test market' stores and in 'non-test market' stores before and after the campaign, as well as metrics on consumer and retailer perceptions.
- 6.48 In general, interest parties support the public benefit claim that the evaluation component will assist future promotion campaigns of Australian wool. The Australian Council of Wool Exporters Inc (ACWE) submits that the provision for detailed analysis of the impact of the proposed campaign and proper use of the analyses will lead to efficient future wool promotion.
- 6.49 The Australian Superfine Wool Growers' Association (ASWGA) submits that accurate assessment will lead to better strategies and enable future

programs to be built around areas that can maximise returns on promotional and marketing dollars.

- 6.50 The Australian Wool Exchange Ltd (AWEX) submits that the proposed campaign has identified markets and with analysis will enable the identification of future markets and improved use of funds.
- 6.51 The ACCC considers that appropriate evaluation and analysis of the proposed campaign will assist any future marketing campaigns of Australian wool to benefit in the form of improved knowledge, improved allocation of resources and general improvements to future campaigns as required.
- 6.52 Consequently, the ACCC is satisfied that there is likely to be a public benefit following from the evaluation in the form of increased efficiency in the future promotion of Australian wool.

International competitiveness of the Australian wool industry

- 6.53 The applicants submit that renewed promotion of wool should result in a stronger and more productive Australian wool industry which will be better able to compete internationally against alternative fibres (such as cotton and synthetics).
- 6.54 While generally interested parties support the principle that it is important to have a competitive wool industry internationally, it is not clear to the ACCC on the information before it how the proposed campaign would result in greater economic efficiency, noting the applicants' submission that the proposed arrangements should result in a more productive industry.
- 6.55 Even if the word 'productive' was interpreted as increased production, there was no evidence presented to the ACCC to support the notion that increased production would result from efficiency gains.
- 6.56 To the extent that the proposed campaign results in increased production, this would be reflected in increased demand, which as a public benefit, was discussed earlier.

Increased employment

- 6.57 The applicants submit that increased international demand for wool can also be expected to have positive flow on effects for employment in the rural economy.
- 6.58 In general, interested parties support the public benefit claim that the proposed campaign would assist to increase employment in the wool industry.
- 6.59 The AWEX submits that there are approximately 25,000 wool classer clients who are directly employed in the wool industry and increased wool production will increase their employment opportunities.

- 6.60 The ASWGA submits that the proposed campaign will increase employment in the shearing, transport, brokerage and handling sectors, together with testing, research, education and training opportunities.
- 6.61 The New South Wales Farmers Association submits that the proposed campaign would boost confidence in wool trade and help to reverse the exodus in employment on farm, as well as shearing and shedhand contractors, and in the broader wool supply chain and rural economy.
- 6.62 The ACCC considers it likely that the proposed campaign could result in higher employment from job creation and indirect commercial activity in rural and regional Australia.
- 6.63 Consequently, the ACCC is satisfied that there is likely to be a public benefit arising from the proposed campaign in the form of higher employment, both directly in the wool industry and more indirectly in other industry sectors reliant on rural commercial activity.

Balance of public benefits and detriments

- 6.64 Overall, the ACCC is satisfied that the proposed campaign is likely to result in the following public benefits:
- increased demand for Australian wool;
 - increased efficiency in the promotion of Australia wool; and
 - increased employment.
- 6.65 The ACCC is of the view that there are likely to be little, if any, public detriments arising from the proposed arrangements.
- 6.66 On balance, the ACCC is satisfied that the public benefits likely to arise from the proposed arrangements will outweigh any public detriments.

7 Determination

- 7.1 On 20 September 2005, the Federation of Australian Wool Organisations applied on behalf of itself and the National Council of Wool Selling Brokers of Australia Ltd and the Private Treaty Wool Merchants of Australia Inc for authorisations A90984 and A90985.
- 7.2 Application for authorisation A90984 was made under sub-section 88(1) of the Act for the granting of an authorisation:
- to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of the Act;
 - to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of the section 45 of Act.
- 7.3 Application for authorisation A90985 was made under sub-section 88(1) of the Act for the granting of an authorisation:
- to make a contract or arrangement, or arrive at an understanding, where a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act;
 - to give effect to a provision of a contract, arrangement or understanding where the provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 7.4 Specifically, the applications relate to a proposal to establish a A\$1.50 levy to be imposed on bales of wool sold at auction or by private treaty for the purpose of raising funds for a test marketing campaign for the promotion of Australian wool in the United States.
- 7.5 The applications also relate to a proposal to give effect to a provision which is, or may be, an exclusionary provision, by refusing to supply goods or services to persons who have not agreed to pay the levy.

Statutory test

- 7.6 For the reasons outlined in part 6 of this Determination, the ACCC is satisfied, pursuant to sub-section 90(6) of the Act, that the conduct:
- would be likely to result in a benefit to the public, and
 - that this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the proposed contract, arrangement or understanding.

- 7.7 The ACCC is also satisfied, pursuant to sub-section 90(8) of the Act, that the proposed conduct for which authorisation is sought under sub-section 88(1) would result, or be likely to result, in such a benefit to the public that the proposed contract, arrangement or understanding ought to be authorised.

Conduct authorised

- 7.8 In relation to application for authorisation A90984, pursuant to sub-section 88(1) of the Act, the ACCC grants authorisation to allow the applicants and any other party who accedes to the Implementation Deed, to refuse to supply wool unless a buyer pays the levy.
- 7.9 The ACCC also grants authorisation to application for authorisation A90985, pursuant to sub-section 88(1) of the Act, to allow the applicants to enter into an Implementation Deed between the applicants and any other party who accedes to the Implementation Deed, to impose a fixed A\$1.50 levy on bales of wool sold at auction or by private treaty for the purpose of raising funds for a test marketing campaign for the promotion of Australian wool in the United States.
- 7.10 The ACCC grants authorisation to applications A90984 and A90985 for a period of two years from the date this determination comes into force.

Effective date of the determination

- 7.11 This determination is made on 11 January 2006. If no application for review of this determination is made to the Tribunal, it will come into force on 2 February 2006.
- 7.12 If an application for review is made to the Tribunal, this determination will come into force:
- a) where the application is not withdrawn - on the day on which the Tribunal makes a determination on the review; or
 - b) where the application for review is withdrawn - on the day on which the application is withdrawn.
- 7.13 Interim authorisation will continue until this determination comes into force.