TRADE PRACTICES ACT 1974

COMMISSION DETERMINATION

24 February 1978

Members : Bannerman (Chairman
Gilbert
Haddad
McConnell
Pengilley (dissentin
Willis

APPLICATION FOR AUTHORIZATION - S.88(1)
ON BEHALF OF RETAIL CONFECTIONERY AND
MIXED BUSINESS ASSOCIATION (VICTORIA)

Registration No. A4006 File No. A74/9

(Note: The Commission's statement of general principles (re price recommendations to members by trade associations of small businesses) issued with the draft determination and summary of reasons were introductory to and part of that summary of reasons now confirmed as below)

The Commission prepared a draft determination in this matter dated 12 December 1977. The draft determination and the reasons for determination were sent to the persons concerned in accordance with the provisions of s.90A of the Act.

2. There were no requests for a pre-decision conference and the provisions of s.90A have thus been complied with. The Commission now makes its final determination in accordance with the draft and gives as its reasons for determination the summary of reasons sent with the draft. Authorization is granted for the Association's arrangements to circulate to members from time to time suggested price lists for soft drinks, ice cream, confectionery bread, biscuits, sandwiches, milk shakes, cigarettes and tobacco.

3. This determination and Dr. Pengilley's dissent, together with the draft determination and summary of reasons has been placed on the public register.

RETAIL CONFECTIONERY AND MIXED

BUSINESS ASSOCIATION (VIC.) -

Registration No. A4006
File No. A74/9

Separate Views of Dr. Pengilley, Member of the Commission

1. The Commission has stated general principles relating to small business which it seeks to apply to the above case. I do not wish to comment in detail upon the Commission's statement of general principles. Suffice it to say that the thrust of the Commission's statement is addressed to efficiency and that "small business trade associations should be free to assist their members towards increasing their efficiency provided that is really what they are doing, rather than attempting to control or limit market competition in the interests of their members, efficient or not" (Par.9). This is a quite acceptable statement of principle but depends very greatly upon the subjective interpretations one gives to certain words. There are great difficulties of interpretation in the words "assist", "increasing efficiency" and so on. These difficulties can only be solved in the context of concrete factual situations. I do not agree with the Commission's application of its stated general principles to the present case.

There are two matters to be decided by the Commission. Firstly, is there public benefit? Secondly, does such public benefit outweigh anticompetitive effects? The Commission reaches the conclusion that the recommended prices arrangements "produce, in the circumstances of this case, some public benefit" and that "there is little anticompetitive effect to set against what public benefit there is". For my own part, I reach the conclusion that there is no public benefit and that the anticompetitive effect of the arrangements is, in all probability, greater than the Commission concludes.

2. In essence the recommendation of prices in this industry -

(a) Does not assist about 35 - 40% of the industry at all as they are not members of the Association and do not

...2/

receive its price list. Presumably this 35 - 40% does not regard the Association's price recommendations as of importance or they would join the Association and receive the recommendations. The conclusion that the price recommendations serve some basic need is rebutted by the empirical fact that a large segment of the industry sees no such basic need.

(b) Are not regarded by those industry members which receive the price lists as essential to their survival. The Association puts its submission in very strong terms as to the necessity for such price recommendations but it is clear to me that they are in no way essential.

The Commission indeed largely accepts this view. Having done so, it seems that the applicable conclusion to draw is the same as that drawn by the Commission in its Betta Stores Ltd. decision (A50000 dated 6.12.77.) In tha case, the Commission rejected authorization saying, amongst other things that "it is not demonstrated that the viability of the members depends on the existing joint arrangements or on the proposed joint advertising (with prices) of a small part of their range of goods." (par.16 - my emphasis).

It is my personal view (and I put it no higher than that) that if the Retail Confectionery and Mixed Business Association had ceased to issue price recommendations (as did a number of other trade associations) rather than continue issuing them pursuant to interim authorization, then an application to resume the issue of price recommendations would not have received Commission authorization. For in such a case, the viability of the retail confectioner would, in my view, have been factually established as not depending upon the price recommendations. Whilst the Commission does not presently have that more comfortable factual situation before it, everything, in my view, seems to point to the same conclusion.

...3/

(c) What is provided by the Association is not "cost" information and gives no efficiencies by savings on "costing". It is purely information that a certain price is "recommended". Nowhere in most of the price lists are costs even referred to. Thus I do not see that the list has any merit in that it assists the small businessman in calculating the profits and mark ups of his business. Even if one accepts the fact that there may be some degree of common cost factors in small businesses of this kind (and this is conjecture only upon which I have some not inconsiderable reservations) nevertheless I fail to see how price recommendations can cover what must amount to significant variations in cost factors in individual cases. For example, the rental paid or the cost of real estate must vary enormously between each particular business. I should think that businesses could well make profits or losses in applying the recommendations and reliance on the recommendations may well promote inefficiency for this reason. The fact that the information is not cost information is clearly shown by the fact that -

(i) In nearly all recommendations no cost figures or assessments at all are given;

(ii) In no case is the percentage mark up shown;

(iii) The formulae are mostly mere mechanical applications of statutory formulae from the days of war time price control or as applied by the South Australian Prices Commissioner.

I cannot see how this can be considered a justification of such formulae and in order to sanction a recommendation agreement, I think it is necessary to look at the basis on which it is calculated. In the present case, mostly calculations are made on war time price control formulae. It seems to me that the results reached by the application of such formulae cannot have public benefit consequences. The formulae are hardly presently relevant. Even when they were in force, they were

...4/

formulae for a statutory maximum price. The Association clearly wants the formulae to be the minimum price and urges its members to this end. The whole basis of the present recommendations is thus a different one to the basis of the formulae which the recommendation seeks to apply. Also the activities of the South Australian Prices Commissioner do not appear to me to have any relevance to Victoria. It is a matter for the Victorian legislature to decide if it wants price control in that State. If it does not so decide, then it is not for any industry group to import an industry system of pricing into Victoria from another price controlled State.

(iv) In no case are ranges of prices or mark ups given (except in the case of some small goods). Hence the individual has no choice to make as to alternatives which may be put to him.

3. Hence the Commission in authorizing the price recommendation is, in my view, stating that the use of a war time formulae (aimed at a different purpose to the present one) or the statutory formulae of another State; which gives no cost assistance to small business; which is not regarded as essential by small business itself to its survival or operation and, indeed, is not even received by 35% to 40% of the industry members constitutes a public benefit. For myself, I am unable to reach this conclusion.

4. The situation may well be different if other methods of costing and trade association assistance were outlawed by the Trade Practices Act. But they are not (although they may not necessarily receive authorization and since 1 July 1977 business may have to assess its position in competition terms). Thus the Commission would have no objection to calculation of prices showing cost and giving a variation as to the appropriate price. This is genuine cost assistance.(1) The Commission has seen no objection to a number of matters which assist small business, small business

...5/

(1) Ashby on behalf of Pharmacy Guild of Australia A59 Commission Authorization Determination 24 Nov. 1977 Par.25 et seq

indeed being the chief beneficiary of a number of these arrangements. These are matters primarily which assist small business to obtain competitive advantages which large businesses possess by virtue of their structure.(2) In these cases, identifiable actual or potential increases in the efficiency of small business are ascertainable. In the present case, no such increase in efficiency can be seen. Indeed the price recommendation arrangements may well, in my view, promote inefficiency.

The Commission has allowed in clearance terms (pre 1 July 1977), agreements which it regarded as relating to genuine "cost information"(3) and I have no argument with this decision. The Commission has also authorized the distribution of various other forms of information where these are genuine "costing aids". An example is the distribution of estimated repair times for a number of diverse repairs on diverse brands of motor vehicles. In this case, each service repair station itself would probably not have had adequate experience in a wide variety of vehicles upon which to base repair quotations.(4) But neither of the situations present in the two cases referred to is here present. For, in this case, there is nothing more nor less than a price recommendation made which recommendation has nothing to do with assisting an individual in his costing.

...6/

(2) See for example Joint Advertising Purchasing and Promotion Arrangements - Information Circular No.15 of 12 May 1976; Market Information Agreements - Information Circular No.14 of 18 April 1976; Standard Forms and Uniform Terms of Trading - Information Circular No.22 of 24 October 1977.

(3) Customs Agents of Australia - Clearance decision of Dr.Haddad, Commissioner under delegation - 7 Sept. 1976. C23196.

(4) See Authorization Application - Victorian Automobile Chamber of Commerce A231; A320 - Commission Determination 11 June 1976 (Reprinted in Second Annual Report - Year Ended 30 June 1976 as Appendix 4.)

It should be noted that the Commission however denied authorization of recommended rates based on the survey saying -

> "The Commission believes that in the case of associations with a large number of small business members, it should be possible for either a formula or guidelines to be developed, to assist members in understanding ... cost factors ... In fact, a suitably structured formula where the business proprietor inserted his own known costs could be an aid to the competitive process."

Though I was not a party to this decision I record that I think all aspects of it are plainly correct, including the authorisa-

5. I see no point in canvassing the competition issues of the decision in detail. However, I think that the Commission may well underrate some of the competitive repercussions. The agreement is clearly aimed at increasing retail margins. The whole thrust of the applicants' public benefit submission is directed at demonstrating the fact that the Association has been most active in this area. If the result of increasing prices has not occurred, this has not been for want of activity on the part of the Association. It would be an odd conclusion, in my view, that there was no anti-competitive result merely because a Trade Association has failed to achieve its stated objective. This question, however, must ultimately be a question for the courts.

For my own view I find it difficult to reduce the anti-competitive effect to the extent that the Commission has done so. Especially do I find it difficult to do so when reported case law in the United States, the United Kingdom and New Zealand consistently talks about the "social" and "moral" sanctions which apply to recommended price agreements and the great deal of adherence merely because such agreements are set by trade associations for member benefit.(5) In the

...7/

(5) See, for example, American Column & Lumber 257 US 377 "business honour" and "social penalties" referred to as "potent and dependable restraints"; Re Mileage Conference (1966) 2 All ER 849 where the extent of "moral obligation" as a sanction referred to; Re New Zealand Council of Registered Hairdressers 1961 NZLR 161 where prices of hairdressers largely identical because "price cutting frowned upon"; Re New Zealand Master Grocers 1961 NZLR 177 at p.185 as follows :

> "Mr. Gray (i.e. the trade witness) agreed that it followed from the fact that the decisions as to margins were made by representatives of the Members of the Association that the members would act on what had been decided by their representatives. Mr. Gray admitted that he expected the general body of the membership to apply the margins as he did himself, but he said no force was attached to the recommendations as to margins and the members did not have to follow them. He accepted, however, that the great majority did. He considered they followed the recommendations in the price guide because the price guide only suggested that they do what had been decided on their behalf."

It appears to be common ground that :

> "It cannot be denied that the aim of every price fixing agreement is either the prevention or limitation of one form of competition."

New Zealand Hairdressers 1961 NZLR 161 at 173
See also U.S. v. Trenton Potteries 273 US 292 (1927) (The words "price fix" where used above include "price recommendation".

present case empirical evidence of actual adherence to the recommendations has not been available. For the reasons stated, I would expect that there would, however, be a high degree of actual adherence to price recommendations. In view of this I cannot join in the Commission conclusion, based primarily on the applicant's representations, that "there is little anti-competitive effect". In terms of overall effect in this particular market, I would feel it likely that the anticompetitive effect may well be much higher than the Commission has been prepared to find.

But even if I am wrong here, I regard there as being no public benefit in the agreement. This lack of anticompetitive effect is, in my view, a pure competition matter.

6. I finally see not inconsiderable difficulty of consistency of interpretation between the present case and conclusions which the Commission has drawn from cases previously decided by it.

The Act was, of course varied as regards its "public benefit" authorization test as and from 1 July last. However, as regards the points essential to the present decision, I do not see any great difference in the authorization test pre July or post July. For "public benefit" has still to be shown and I see no public benefit here.

I believe that most of the points put in this case have been evaluated by the Commission in public benefit terms in prior cases. It is not possible to go over the whole of three years of Commission decision making and I agree that each application has to be seen in light of a particular industry background. Also, of course, the authorization test itself has changed as at 1 July 1977. Nevertheless, there is nothing in the present case, in my view, which would justify a departure from conclusions reached by the Commission on the facts of somewhat similar cases or cases which can be applied here by analogy. Some such conclusions previously reached in particular cases are that there is no public benefit in :

...8/

215

(i) A recommended price agreement to ensure payment of "a proper and reasonable sum";(6)

(ii) A recommended price agreement which was claimed to save members from "time consuming and sometimes complex task of pricing goods";(7)

(iii) A price agreement merely by virtue of the fact that it is a "recommendation only";(7)

(iv) A recommended price agreement providing alleged "accurately costed" prices.(8)

...9/

(6) Australian Chamber of Shipping A3193 - 21 June 1976. Again, circumstances clearly vary between that case and the one presently before the Commission. The relevant common point in the ACS Case is that it was not suggested that lower rates were unreasonable or unprofitable or the result of "unfair dealing" by others. In the present case, notwithstanding the submissions of the applicant, I would not be prepared to hold other rates or other methods of setting prices as necessarily involving "unprofitable" trading or "unreasonably" low charges.

(7) e.g. Hardware Retailers of Western Australia A7102 - 31 Mar. 1976 - "the anti-competitiveness of the practice remains despite the description of 'recommended prices'". Note this arrangement had, in my view, a number of "small business" arguments akin, in many ways, to the present agreement. Of course there were variations in that case from the present one. Nevertheless the most relevant common point was the Commission finding in that case that "Although there is some deviation from the recommended prices the lists are used to varying degrees by members as the basis for price calculation" and "Members do use the recommended prices as at least a basis for price calculation and this has significance in competition terms". In Hardware Retailers the fact that the costing task was "complex" and "time consuming" was rather belied by the fact that in nearly all other lines carried, the retailer had, in fact, to cost his own product. The items the subject of the price recommendation comprised less than 10% of the retailer's turnover.

(8) Timber Merchants Association of Victoria A73 - 12 June 1975. In the TABMA Case, the Commission found that the information was not "accurately costed" in any event. I find in the present case that this point is also relevant. Indeed, for reasons stated, I feel that there is generally no "costing" at all in the present case and thus it cannot, by definition, be "accurately costed".

To my view, the above conclusions, drawn admittedly from the particular facts before the Commission in particular other industries, do have extreme relevance to the present case. I feel they are here applicable and would see no reason why they should, therefore, not be here applied for consistency of decision making.

7. On the other hand, a rejection of authorization in this case necessarily raises the question of whether recommended price agreements can ever receive authorization. The answer in my view is "yes" but only if circumstances are not those usually present in most trade association recommended agreements. Under delegation, I cleared such a type of agreement in Interflora.(9) Similarly, Mr. McConnell cleared a price agreement which had unique features and related to the prices to be charged on returnable bottles.(10) Either of these agreements in my view would probably have received authorization if clearance had been unavailable,(11) although I concede there is some conjecture involved here and I cannot, of course, speak for the Commission in this regard. However, I feel

...10/

(9) Interflora Australian Unit Pty. Ltd. C22370-371. Clearance decision (Pengilley under delegation) 20 Oct. 1976. In this case there was no degree of market dominance but the prime motivating reason in the decision was that it was impossible to see, on any practical basis, how the activities of Interflora could operate without the recommended agreement. The alternative to no recommended prices was not a more competitive service but no service at all.

(10) Soft Drink Manufacturers Association of W.A. Agreement. Clearance decision (McConnell under delegation) 4 June 1976 C7277. Competition was in respect of the contents of the bottles not in respect of the price to be charged for returnable containers.

(11) Interflora (Note (9)) on the basis that the service would not be available absent the agreement and it was a public benefit to be able to send flowers to distant destinations; Soft Drinks (Note (10)) on the basis of litter and resource savings which were submitted and, to my mind, sounded in "public benefit" terms.

my view in this (i.e the Victorian Confectionery) case would necessarily lead to a rejection of authorization for most "usual" trade association price recommendation agreements. If this is where the logic of the authorization test leads one, then this is the view which must be accepted and upheld. Business at least will have consistency of interpretation as a basis for its actions. Such a position would, I believe, save quite exceptionally, not cause industry to suffer in efficiency terms in view of other procedures available to it to improve efficiency without infringing the Act.(12) Flexibility will still be available within the Act to authorize exceptional cases such as Interflora(13) and WA Drinks(14) or cases where efficiency benefits can clearly be shown.(15)

8. As I read the Commission's decision, it is a conclusion that the agreement may not be "all that bad" in terms of economic and social result. But, notwithstanding this, I do not think the agreement has any ascertainable public benefit. I see some not inconsiderable public detriment - not the least of which is the perpetuation of War Time price control pricing conduct in a period 33 years after the cessation of hostilities.

I also do not accept the Commission's conclusions as to low anticompetitive effect, though detailed factual evidence is not available on this general point.

I see no public benefit in the agreement and I do see some anticompetitive effect. It is, of course, not for me, but for a court of law to hold in due course whether conduct of this nature, without authorization, breaches the Trade Practices Act.

I accept that my views do not form those of the majority of the Commission. The views which I will apply in future cases are those of the majority of the Commission where I feel the criteria in the present case reasonably apply.

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(12) See note (2) above.

(13) See note (9) above.

(14) See note (10) above.

(15) For example, Victorian Automobile Chamber of Commerce (see note (4) above).