

TRADE PRACTICES ACT 1974COMMISSION DETERMINATION

24 February 1978

Members : Bannerman (Chairman)  
Gilbert  
Haddad  
McConnell  
Pengilley (dissent)  
Willis

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

Registration No. A4006File 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

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 that 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.

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(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

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.<sup>(1)</sup> The Commission has seen no objection to a number of matters which assist small business, small business

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(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.

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- (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 authorization granted as to "costing aids":

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

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- (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 (1956) 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 :



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- (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)

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- (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.<sup>(9)</sup> Similarly, Mr. McConnell cleared a price agreement which had unique features and related to the prices to be charged on returnable bottles.<sup>(10)</sup> Either of these agreements in my view would probably have received authorization if clearance had been unavailable,<sup>(11)</sup> although I concede there is some conjecture involved here and I cannot, of course, speak for the Commission in this regard. However, I feel

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(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.<sup>(12)</sup> Flexibility will still be available within the Act to authorize exceptional cases such as Interflora<sup>(13)</sup> and WA Drinks<sup>(14)</sup> or cases where efficiency benefits can clearly be shown.<sup>(15)</sup>

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).

TRADE PRACTICES ACT 1974DRAFT COMMISSION DETERMINATION  
AND SUMMARY OF REASONSAPPLICATION FOR AUTHORIZATION UNDER S.88(1) ON  
BEHALF OF RETAIL CONFECTIONERY AND MIXED BUSINESS  
ASSOCIATION (VICTORIA).Registration No. A4006File No. A74/9

(Note : The Commission's statement of general principles issued with this determination and reasons should be read as introductory to and part of the reasons in this case.)

This is an application made by Hutchinson Holdings Proprietary Limited on behalf of the members of the Retail Confectionery and Mixed Business Association (Victoria) for authorization of a contract, arrangement or understanding referred to in the application as the circulation of "suggested price lists for the guidance and assistance of members". An interim authorization has been operating hitherto.

2. The Association currently has some 3200 members (only a few of which are corporations), all of which are proprietors of businesses described as milk bars and mixed businesses. There are said to be between 5,000 and 6,000 mixed businesses of this kind in Victoria. Although it is difficult to generalise, the Association believes that the average outlet would support the proprietor, his wife and one full-time employee. Such outlets would, in the main, open for service to the public for approximately 15 hours per day, seven days per week. The lines carried are described as food (which includes groceries, cakes, pies and sandwiches,) cool drinks, milk shakes, confectionery, ice cream, cigarettes and in some cases, newspapers.

3. The suggested price lists which are distributed from time to time are updated through the Association's monthly magazine "Milk Bar". The lists cover soft drinks, ice cream, confectionery, bread, biscuits, sandwiches, milk shakes, cigarettes

and tobacco and are estimated to account for about 60% of an average outlet's turnover. The Association maintains that it only suggests prices to its membership when in its opinion the margins allowed in the manufacturers' recommended prices are insufficient to provide proprietors with an adequate return or where there are difficulties associated with the calculation of retail prices due to the involvement of State taxes and sales tax. There are of course, no manufacturers' recommended prices for items like sandwiches that are made on the premises.

4. The Association suggested prices are calculated on the basis of cost plus a gross profit margin which is aimed at providing a mixed business that has average turnover of \$2,500 per week with a gross margin of 21-22%. The Association margins have been criticised by some manufacturers in the course of enquiry because they do not take into account quantity discounts that they say a majority of members would receive; on the other hand the Association says that many shopkeepers do in fact have to pay full prices without discount and it would be misleading to them to calculate margins on lower prices than they were paying. The Commission is not adjudicating between these points of view. The members themselves realise that ultimately they can only get what customers are prepared to pay; often the members do not adopt the Association prices.

5. The Association has referred to the following matters as being relevant to demonstrate the extent of public benefit flowing from the arrangements :

- (i) The existence of these types of outlets trading outside 'normal' business hours and especially at weekends is in itself a public benefit.
- (ii) Their continued existence depends both on the guidance and assistance in pricing provided by the Association and the counter balancing influence it exerts on manufacturers endeavouring to reduce the retail margins.
- (iii) Approximately 40% of the Association's membership changes each year as a result of businesses changing hands. These new entrants, in the main,

are completely untrained and need guidance on price and other matters in order to survive.

- (iv) The calculation of the suggested retail prices by the Association results in a substantial saving in manpower hours as it frees hundreds of shopkeepers from the task of making similar calculations for a multitude of different lines.
- (v) The suggested price list includes a sufficient margin to enable members to continue serving the public outside 'normal' trading hours. On the other hand, according to the Association, recommended prices calculated by manufacturers generally are influenced more by concern to improve and maintain the manufacturers' market shares than they are to ensure that the retailer obtains a reasonable margin of profit.

6. The essence of the above arguments is that the recommended prices assist the viability and efficiency of the small businesses involved so that they can provide service in "pockets" of the market and after normal trading hours. The recommendations are claimed to be the more necessary because of the constant turnover of ownership and the lack of experience in new owners, and because of the valuable time the recommendations save for the owners.

7. In discussing the above, it should first be noted that the milk bars and mixed businesses are not solely reliant on the Association recommended prices; they also have manufacturers' recommended prices over a large part of their range - sometimes they have both for the same items. They would also no doubt feel some pressure from the competition of cheaper prices in larger stores and would need to know the main price relativities in their area and judge their effect on sales. It is therefore quite feasible that Association members might be able to manage without the Association recommendations rather better than the Association suggests. Add to this the consideration that there are apparently many milk bars and mixed businesses outside the Association.

8. In an effort to make some spot check of the above, Commission staff conducted enquiries and interviewed, among others,

a number of suppliers to such businesses, selected mixed business operators within and outside the Association and the Secretary of the Association. The Association itself has not carried out any surveys to establish the extent to which members use the price lists. Commission staff interviewed 34 shopkeepers. Although no statistical picture of the trade can emerge from that, it is notable that there was little support from the interviews for the proposition that the Association lists were essential - the reason was that the shopkeepers had other pricing information available, mainly manufacturers' or wholesalers' recommended retail prices. Nevertheless, although in most cases not the primary source, the Association lists were generally regarded as having some value and they were often used as a check. The Association's publication of particular price changes in its monthly magazine "Milk Bar" was also considered useful because the information was kept up to date; however the increases could be applied to manufacturers' recommended prices as well as to Association prices. A schedule recording the main points of the interviews with the shopkeepers has been placed on the public register. No names or addresses are included.

9 . It seems likely that the Association members do not engage much in price competition. However, the Association price lists would be far from the main reason for that, and in themselves their anti-competitive effect is likely to be low. The very nature of the businesses indicates that they are unlikely to seek custom on the basis of price, and indeed in many cases they would be unable to do so. Their main appeal comes from location, convenience, personal service, and from after-hours trading. They are likely to serve "pockets" of the market. Nevertheless, most or all of what they sell is available at bigger stores or supermarkets, at least during ordinary hours, so that the price relativities will have to reflect a balance between the importance to customers of that factor on the one hand and the convenience and service factors on the other. It is not to be overlooked that manufacturers' recommended prices are widely used by the milk bars and mixed businesses, and that that is quite permissible.

10. The judgement the Commission has to take is whether public benefit resulting from the availability of the Association

price lists outweighs any anti-competitive effect. As already stated, the Commission thinks the anti-competitive effect is small. That means it can be outweighed by public benefit that is not itself considerable. The Association's public benefit claim is that the members have to depend on the Association price lists for their viability and efficiency. This is an exaggeration, having particular regard to the availability of manufacturers' recommended prices. Nevertheless, the members probably use the Association lists sufficiently for their availability to be regarded as a pro-efficiency factor for the small businesses concerned. They provide a basic source of price information geared towards the members' own type of operation and the members use them along with other price information to decide the prices for the many products they sell. The members are very small retail businesses, whose cost patterns are likely to be similar, and who occupy an often precarious place in the market providing a convenient service to the public in terms of local and after hours shopping.

11. The Commission's conclusion is that the Association lists do give some assistance to the efficiency of these very small businesses and thus produce, in the circumstances of this case, some public benefit. The lists provide a general guide to prices and pricing policy for people, many of whom come to the businesses without prior experience and leave the businesses after a short space of time. They work all day and every day, and time saving must contribute to their viability and efficiency. They depend on price lists but not really on the Association lists and could manage without those, but their availability is helpful. There is little anti-competitive effect to set against what public benefit there is. On balance, the Commission finds the requirements of Section 90(7) of the Trade Practices Act are satisfied, and authorization is accordingly granted. The actual authorization is for the 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.