



Australian
Competition &
Consumer
Commission

Determination

Applications for authorisation

lodged by

Transport Workers Union of Australia SA/NT Branch

in respect of

collective bargaining for South Australian 'Milk Vendors'

Date: 9 September 2009

Commissioners: Samuel
Kell
Schaper
Court
Willett

Authorisation no.: A91146
A91179

Public Register no.: C2009/1228

Summary

The Australian Competition and Consumer Commission grants authorisation to the Transport Workers Union of Australia SA/NT Branch to engage in collective negotiations on behalf of milk vendors with National Foods and Parmalat. The ACCC grants authorisation for five years.

The Transport Workers Union of Australia SA/NT Branch (TWU) has sought authorisation under sections 88(1A) and 88(1) of the *Trade Practices Act 1974* (the Act) to engage in collective negotiations on behalf of milk vendors with dairy processors National Foods Milk Limited and Parmalat.

The ACCC considers that the proposed arrangements are likely to deliver public benefits by allowing milk vendors to provide more effective input into contractual terms and conditions than would be the case if they were to each deal individually with the processors. The ACCC also considers that the proposed collective bargaining arrangements may lead to some transaction cost savings.

The ACCC considers that, on balance, the potential anti-competitive detriment that may result from the collective bargaining arrangements is likely to be mitigated by the following factors:

- the current level of negotiation between individual milk vendors and the processors with which they contract is low
- participation in the proposed collective bargaining arrangements is voluntary
- the size and composition of the bargaining group will be limited by the terms of the authorisation granted by the ACCC and
- the proposed conduct does not involve any collective boycott activity.

The ACCC considers that the public benefits will outweigh the public detriment and grants authorisation for five years.

If no application for review of this determination is made to the Australian Competition Tribunal, it will come into force on 1 October 2009.

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1. The applications for authorisation

- 1.1 On 25 June 2009 the Transport Workers Union of Australia SA/NT Branch (the TWU) lodged application for authorisation A91146 with the ACCC. On 5 August 2009 the TWU lodged application for authorisation A91179.¹
- 1.2 Authorisation is a transparent process in which the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Trade Practices Act 1974* (the Act). 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. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Further information about the authorisation process is contained in Attachment A. A chronology of the significant dates in the ACCC's consideration of these applications is contained in Attachment B.
- 1.3 Application A91146 was made under section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 1.4 Application A91179 was made under section 88(1A) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).

Collective Bargaining

- 1.5 The TWU is seeking authorisation for collective bargaining arrangements between milk vendors in South Australia and the dairy processing companies to whom they supply their services. The application includes seeking authorisation for:
- an arrangement between milk-vendor members and non-members (both present and future) of the Transport Workers Union of Australia SA/NT Branch for that union to collectively bargain on their behalf with National Foods Milk Limited and the purchaser of Dairy Farmers (Parmalat) in South Australia in relation to the terms and conditions of new distribution contracts between those parties, National Foods and the purchaser of Dairy Farmers (Parmalat) in South Australia
 - an arrangement between milk-vendor members and non-members (both present and future) of the TWU to give effect to any contracts agreed to by the TWU with National Foods and the purchaser of Dairy Farmers (Parmalat) in South Australia.
- 1.6 The TWU proposes that the particular items to be negotiated would include:
- 'milk margins' paid to vendors

¹ Application A91179 is to take account of amendments introduced to the *Trade Practices Act 1974* (the Act) by the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009*, which commenced on 24 July 2009. This application relates to and is in the same terms as application A91146 lodged with the ACCC on 25 June 2009 under section 88(1) of the Act.

- delivery fees paid to vendors
- rationalisation of distribution businesses
- acceptable date codes on products
- non-supply of products
- on-site management of depots and cold-chain compliance.

1.7 The TWU proposes that the process for collective negotiation will be:

- the TWU will write to vendors (both members and non-members of the TWU) to notify them of the authorisation and to advise the vendors that they may nominate the TWU to negotiate contract terms and conditions on their behalf
- vendors may then nominate the TWU to negotiate on their behalf
- the TWU will then notify the relevant processor that it has been authorised to negotiate on behalf of the relevant vendors
- the TWU will then engage in negotiations on behalf of those vendors with the relevant processor
- the TWU will then report back to the relevant vendors
- there may be further negotiations with the relevant processor and
- vendors will then make individual decisions on whether to contract with the relevant processor.

Collective boycott

1.8 The TWU notes authorisation is not being sought to make a contract or an arrangement or arrive at an understanding containing an exclusionary provision. The application variously states:

The proposed negotiation process will be voluntary and each accredited vendor will independently need to make a decision regarding whether or not to participate in the process or to adopt any collective negotiated terms and conditions.

...

It is proposed that all vendors (both members and non-members of the TWU) will retain the right to negotiate individually with the relevant processor...

...

...[N]o authorisation is sought in respect of any collective boycott activity.

Dispute resolution

1.9 The TWU is, also, seeking authorisation to represent any milk vendor or group of milk vendors in any dispute which may arise between any milk vendor or milk vendors and National Foods or the purchaser of Dairy Farmers in South Australia.

1.10 It gives as examples of vendor-processor disputes in the industry:

- failure to supply product
- the supply of 'low coded' product (product closer to its 'use-by' date)
- the supply of damaged stock
- rationalisation
- failure to allow a vendor to 'split his round' for sale purposes
- failure to mediate when a dispute arises between vendor/customer
- allocation of customers by processors
- transfer by the processor of vendor customers to direct billing
- allocation of times and days for loading
- temperature of product supplied.

Period of authorisation

1.11 The TWU is seeking authorisation for five years.

Other parties

1.12 The TWU is seeking for the authorisation to extend to future parties to the proposed collective bargaining arrangement. Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party or proposed party to the conduct.

Draft determinations

1.13 Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

1.14 On 22 July 2009 the ACCC issued a draft determination for application A91146 proposing to grant authorisation for five years. On 12 August 2009 the ACCC issued a draft determination for application A91179 proposing to grant authorisation for five years.

1.15 A conference was not requested in relation to either draft determination.

2. Background to the application

Milk Vendors

- 2.1 South Australia's milk vendors, also called 'Accredited Vendors' and 'Milkies', transport dairy products, including fresh drinking milk, from dairy-product manufacturers/processors, such as National Foods and Dairy Farmers/Parmalat, to retailers and consumers.
- 2.2 According to the TWU, there are 125 accredited milk vendors in South Australia (being those accredited under a state-government regime recently replaced with standard local-government health and food-safety regulations) – down from 225 in 1995. The TWU notes that most milk vendors are small businesses, typically run by husband-and-wife teams. The TWU notes that its members distribute more than 60 per cent of milk in South Australia.

South Australian dairy processors

- 2.3 In recent years there have been two milk 'processors' operating facilities in South Australia – being those businesses that purchase 'raw' milk from dairy farmers and process it into fresh drinking milk and other dairy products. They were National Foods Limited (National Foods), which sells under such brand names as Pura, Yoplait and Farmers Union, and Australian Co-operative Foods Limited (Dairy Farmers), which sold under such brand names as Dairy Farmers, Moove and Ski.
- 2.4 National Foods is owned by the Kirin beverages group of Japan and describes itself as one of Australia's largest food and beverage groups, with core activities in milk, other fresh dairy foods such as yoghurt and cream, fruit juice, soy beverages and specialty cheeses.
- 2.5 In 2008 Dairy Farmers was purchased by National Foods. As part of the acquisition, National Foods provided undertakings to the ACCC that it would divest, among other Dairy Farmers assets, Dairy Farmers' South Australian processing plant and licences in South Australia for certain 'white' and flavoured milk brands.
- 2.6 Parmalat is an Italian-headquartered global dairy group. Its Australian business comprises Parmalat Australia Ltd and Parmalat Food Products Pty Ltd. The group has been marketing and distributing dairy products in South Australia in recent years and on 27 July 2009 it completed the purchase of the Dairy Farmers assets being divested by National Foods.

Distribution arrangements in South Australia

- 2.7 Milk vendors providing services to Dairy Farmers have in recent years provided these services as part of a franchise system. Parmalat has noted that it uses a franchised distribution system in its Queensland and Victorian operations and that it intends to continue using a franchise model in South Australia.

- 2.8 Milk vendors provide services to National Foods on an individual contract basis. Exclusive territories were removed from these contracts in 2005.
- 2.9 Milk vendors purchase products directly from processors and sell it to buyers who are the vendors' customers. These customers include those in the 'route trade' (for example, milk bars and service stations) and home-delivery customers. Milk vendors earn an income by setting a margin between the price at which the product is obtained from the processor and the price at which it is on-sold to customers.
- 2.10 Milk vendors also deliver products on behalf of the processors and receive a processor delivery fee generally based upon specific product volumes (known as 'direct-billing'). The TWU submits that under direct-billing arrangements, processors contract directly with major customers, such as supermarkets. The TWU has submitted that the delivery fee paid under direct-billing arrangements is below the margin earned in the traditional trade. National Foods and Parmalat have noted that moves to direct billing are often driven by the customers. Parmalat has also noted that, although delivery fees might be lower than resale margins, under direct-billing arrangements the processor bears the risks and costs of maintaining the customer account.
- 2.11 Milk vendor contracts commonly include restrictions on a vendor's ability to sell and transport competing products. These restrictions may be waived by processors in certain circumstances.

The applicant and authorisation A90927

- 2.12 The Transport Workers Union of Australia is a trade union whose members include transport workers such as truck 'owner-drivers'. The applicant in this matter, the union's SA/NT branch, has taken on the work of the former Milk Vendors Association SA Inc (the Association), which the applicant states traces its origins back to a 1931 association of Adelaide-area milk vendors.
- 2.13 On 27 April 2005 the ACCC granted conditional authorisation (A90927) for five years to the Association to negotiate separately with National Foods Milk Limited and Dairy Farmers on behalf of its then current and future members in relation to the terms and conditions of distribution contracts for the processors' products, according to certain specified arrangements and within certain specified limits.
- 2.14 The ACCC granted authorisation subject to two conditions:
- bargaining groups negotiating with each processor must not be represented in negotiation by a common person or persons
 - neither the members of the bargaining groups nor bargaining agents acting on their behalf may disclose information obtained by them in the course of negotiations, other than to members of the same bargaining group.

3. Submissions received by the ACCC

- 3.1 The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. To this end the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application. A summary of the submissions received by the ACCC from the applicants and interested parties follows.

Prior to the draft determination

- 3.2 Broadly, the applicant submits that, before the Association was granted authorisation to collectively bargain on behalf of milk vendors in 2005, ‘vendors had no significant input into processor distribution contracts’. It submits that under the proposed arrangements, the TWU

...would be able to play a far more extensive role in contract negotiations similar to the Milk Vendors' Association in 2005. This is likely to result in a greater degree of vendor influence in relation to the terms of the distributor contracts and fairer and more consistent outcomes to disputes.

The [TWU] would be in a position to collate vendor concerns and draw on its extensive databases of industry information in conducting negotiations and/or addressing disputes.

The range of services available to consumers would be maintained, efficiency would increase, the ability of the processors and of the major retail chains to extract monopoly profits would be restricted and competitive forces would influence retail prices.

- 3.3 The ACCC sought submissions from parties it considered could be affected by the application or help with the ACCC’s consideration of it, including milk vendors in South Australia, National Foods, Parmalat, retailers’ representatives, operators of supermarkets and service stations, dairy-industry groups and state and Australian governments. It received responses from National Foods and Parmalat.

- 3.4 National Foods’ submitted, among other points, that:

- A single collective bargaining unit covering all milk distributors in South Australia would not be appropriate or justifiable, as National Foods and Dairy Farmers have substantially different milk distribution arrangements - Dairy Farmers uses a franchise system and National Foods does not.
- Certain conditions must be imposed ‘to ensure a de facto single collective bargaining unit covering all milk distributors in South Australia does not arise and to retain some prospect of competitive tension between distributor groups’.

- 3.5 The Parmalat group stated that it opposed the TWU’s application for authorisation. It submitted, among other points, that the application failed to provide evidence that there was a sufficient public benefit to outweigh the public detriment or correctly identify relevant market characteristics or the future with and without the proposed arrangement.

- 3.6 Parmalat stated that if authorisation was to be granted, the TWU should confirm, among other matters, that it would negotiate separately with National Foods and Parmalat and the TWU and distributors should be required to refrain from disclosing terms proposed by one processor to a distributor offered a contract by another processor.
- 3.7 National Foods and Parmalat also sought clarifications about the arrangements proposed and made other submissions on what should and should not be permissible in any industry negotiations.
- 3.8 On 14 July 2009 the TWU submitted a response to Parmalat's submission and on 15 July it submitted a response to National Foods' submission. In both cases it stated that it agreed there would be separate bargaining groups with separate negotiation representatives.
- 3.9 On 22 July 2009 the ACCC issued a draft determination for authorisation application A91146. On 12 August 2009 the ACCC issued a draft determination for authorisation application A91179. The draft determinations proposed to grant authorisation, for five years.

Following the draft determination

- 3.10 A conference was not requested in relation to either draft determination.
- 3.11 The ACCC received no submissions in response to the draft determinations.
- 3.12 The views of the applicant, of National Foods and of Parmalat are outlined in the ACCC's evaluation of the proposed conduct in Chapter 4 of this determination. Copies of public submissions may be obtained from the ACCC's website (www.accc.gov.au/AuthorisationsRegister), by following the links to this matter.

4. ACCC evaluation

4.1 The ACCC's evaluation of the proposed conduct is in accordance with the tests found in the following sections of the Act:

- sections 90(5A) and 90(5B) of the Act, which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:
 - the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public and
 - that benefit, in the case of section 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.
- sections 90(6) and 90(7) of the Act, which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
 - the provision of the proposed contract, arrangement or understanding in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public and
 - that benefit, in the case of section 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision.

4.2 For more information about the tests for authorisation and relevant provisions of the Act, please see [Attachment C](#).

The market

4.3 The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.

4.4 The TWU has outlined in its application an industry structure consisting of dairy primary producers, processors, vendors and retailers and states that it is not necessary for the ACCC to define comprehensively the relevant markets. However, it submits that there are two relevant areas of competition, each in South Australia (with, it submits, contracts limiting vendor territories to particular metropolitan and regional areas):

- The supply of distribution services to the processors (National Foods and the Dairy Farmers assets now owned by Parmalat). The TWU submits that milk vendors compete with each other to acquire distribution contracts from the processors but also submits that ‘the level of actual competition is, at most, negligible’ as, it submits, all existing contracted vendors have a right to renegotiate contract renewals, vendor numbers have fallen and, as new retail outlets open, these are allocated to existing vendors.
 - The supply of milk and (other) dairy products to retailers and customers. The TWU states that milk vendors hypothetically compete with each other to supply retailers and with retailers to supply consumers. The TWU submits that, again, competition among milk vendors is limited by, in its submission: the time it takes for distribution to customers in an area and contracts that prevent vendors from seeking to supply customers of other vendors contracted to the same processor. The TWU submits milk vendors do compete with retailers for consumers, who mainly get their dairy products through supermarkets. The TWU further submits that price competition between milk vendors is ‘extremely limited’ because of slim margins and retail competition.
- 4.5 Parmalat submits that the two relevant markets in South Australia are that for the supply of milk and dairy products to retailers and that for the supply of such products to consumers.
- 4.6 For the purpose of assessing this application, and consistent with its conclusions for authorisation A90927, the ACCC has identified three relevant areas of competition, broadly being those associated with:
- the supply of distribution services to processors – that is, competition between milk vendors for the distribution of milk and other dairy products to direct billing customers
 - the wholesale supply of milk and other dairy products to retailers and route trade customers – that is, competition between milk vendors and processors to supply milk and other dairy products to retailers and route trade customers (including supermarkets, milk bars, offices, restaurants, petrol stations and schools)
 - the retail supply of milk and other dairy products to consumers – that is, competition between retailers and milk vendors who provide home delivery services.

The ‘future-with-and-without test’ or counterfactual

- 4.7 The ACCC applies the ‘future with-and-without test’ established by the Australian Competition Tribunal (the Tribunal) to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.²

² *Australian Performing Rights Association* (1999) ATPR 41-701 at 42,936. See also for example: *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 at 48,556; *Re Media Council of Australia (No.2)* (1987) ATPR 40-774 at 48,419.

4.8 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’.

4.9 The TWU has submitted that

In the absence of this proposed collective bargaining arrangement, it is most likely that South Australian milk vendors would have no option but to accept the standard form processor contracts and to comply with processor requirements in relation to the operation of their businesses.

It is most likely that without the proposed arrangement the decline of the independent distribution network would continue to the point of extinction. This would result in a decline in the range of available services and a reduction in consumer choices which have been maintained under the collective bargaining arrangement.

4.10 Parmalat has however submitted that the TWU has failed to correctly identify the future without the proposed arrangement, which it states would be a future where franchising continues to have an impact on the industry. Parmalat submits that

A key concept of franchising is that the franchisor/processor and the franchisees/distributors need to work together to ensure the mutual success of their businesses. Direct communication and negotiation between the franchisor and its franchisees, without the involvement of third parties achieves this. Where the involvement of a third party is required, the [Franchising] Code has mediation provisions.

4.11 The ACCC considers, consistent with authorisation A90927, that the most likely situation without the proposed arrangements would be that the processors offer contracts – whether along the lines of a franchise model or not - directly to individual milk vendors, with no input from the TWU or limited general input by it from time to time.

Public benefit

4.12 Public benefit is not defined in 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.³

4.13 In considering public benefits - particularly cost savings from increases in productive efficiency resulting from the conduct proposed for authorisation - the ACCC applies a public benefit standard when determining the weight to be given to productive efficiency savings. That is, the ACCC will consider how much weight society considers should be attached to a public benefit. Of particular interest will be the number and identity of the proposed beneficiaries.

³ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

4.14 The TWU has submitted that the following public benefits would arise if the conduct were authorised:

- fairness in the negotiating process
- compliance with statutory requirements
- efficiency of operations
- continued viability of the independent distribution sector
- reduction in transaction costs
- better information and
- improvements in health and safety.

4.15 For the purposes of its assessment, the ACCC proposes to consider whether the proposed collective bargaining arrangements will deliver benefits to the public through improved input into contracts and reductions in transaction costs. Where relevant, the broader public benefit claims made by the TWU will be considered.

Input into contracts

4.16 The TWU has submitted that collective negotiations strengthen the milk vendors' bargaining positions, allowing them greater input into contract terms. It submits that there was a decline in the numbers and profitability of milk rounds after many aspects of the wider dairy industry were deregulated in the mid 1990s and this reflected a relative strength in bargaining power of processors offering 'take-it-or-leave-it' contracts.

4.17 The TWU submits that from the time of the ACCC's 2005 authorisation granted to the Association:

Vendors were able to collectively negotiate on a more equal footing with processors via the collective bargaining arrangement A90927. However, National Foods made concessions in some areas of the contract only to insert harsher and more restrictive clauses in other sections of the agreement. The collective negotiations allowed vendors to negotiate on a more equal basis and the range of distribution services has been maintained and the quality preserved.

4.18 The TWU states:

The proposed arrangement would help to continue to address the disparity, as did collective bargaining authorisation A90927, in relative bargaining positions and provide vendors with some competitive equivalence in contract negotiations...

4.19 National Foods submits there are very small public benefits associated with the application but that the arrangements may deliver improvements in milk vendor input into the terms and conditions of new contracts.

4.20 National Foods has however noted that it rejects any assertion that it has overwhelming bargaining power in its dealings with milk vendors and it does not accept the TWU's assertion that its milk vendor contracts are weighted strongly in its favour. National

Foods submits that its distribution contracts have been developed with significant distributor input and have proven to be both effective and efficient.

- 4.21 Parmalat notes that milk vendors providing distribution services to the former Dairy Farmers business do so under a franchise system which it intends to retain. In this context Parmalat submits that fairness in the negotiating process is already achieved through the provisions of the Franchising Code of Conduct and also through the unconscionable conduct provisions of the Act.
- 4.22 The TWU in its further submission of 14 July 2009 stated that ‘given the present bargaining positions of vendors are extremely disadvantageous and the history of the industry, [Parmalat’s] assertion appears erroneous’. In its further submission of 15 July 2009 it stated that it agreed that National Foods generally had a very constructive relationship with distributors but it held overwhelming power, as characterised within the terms of its contracts.
- 4.23 Parmalat submits that the TWU does not specify exactly what benefits would flow from an improvement in the bargaining position of milk vendors and, as stated above, that the only benefit sought through the application is an improvement in the milk vendors’ bargaining position. Parmalat submits this is a benefit to the milk vendors and not to the public.
- 4.24 Parmalat states that:
- There are various methods available to processors to distribute their products to customers/retailers and ultimately to consumers, of which the independent distributor network is just one. From the processor point of view, for the distribution of packaged milk, to date, the independent distributor network has provided the most effective method of distribution.
- 4.25 The ACCC notes that milk vendors continue to represent a significant distribution channel for processors in South Australia - in this respect the TWU has noted that its members transport over half the state’s milk for local distribution.
- 4.26 The ACCC does, however, note that processors who are dissatisfied with their dealings with milk vendors are likely to have a number of distribution alternatives. The ACCC considers that for small vendors in particular it may be difficult, for example, to redeploy their businesses and efforts to other activities if they could not reach an acceptable relationship with National Foods or Dairy Farmers/Parmalat.
- 4.27 Generally, one way in which small businesses can seek to redress an imbalance in bargaining power is to bargain collectively. This may allow small businesses to achieve competitive parity with larger businesses, enabling them to achieve more appropriate commercial outcomes through, for example, greater input into contract terms and conditions.
- 4.28 This improved input can provide a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their businesses, for example, addressing common contractual problems in a more streamlined and effective manner. The ACCC accepts that providing small businesses with the ability to provide greater input into the terms and conditions of their contracts with larger businesses may also reduce the likelihood of unfair contractual terms being imposed.

- 4.29 In this case, the ACCC considers that public benefits arise by allowing milk vendors to collectively bargain, assisting them to achieve more appropriate commercial outcomes. The ACCC notes that, to the extent relevant, this improved input into contracts may also assist the negotiating parties to achieve improved compliance with statutory requirements, improvements in health and safety and improvements in the efficiency of processor and distributor operations through the provision of improved information to the parties.
- 4.30 The ACCC notes that it would still be open to processors to negotiate with milk vendors on an individual basis if that is their preference. The proposed arrangements also do not eliminate the ability of processors to tailor collectively negotiated arrangements to individual circumstances where appropriate or to deal directly with individual milk vendors.

Transaction costs

- 4.31 The TWU submits that before 2005, that is, before authorisation A90927, processors were required to replicate the negotiation process with numerous milk vendors. The TWU stated that under this process, milk vendors were required to declare that they had had the opportunity to take legal and financial advice. The TWU considers that a reasonable estimate of the resulting transactions costs for milk vendors was an average of \$2500 each, with processor costs likely to exceed \$500,000. The TWU submits that, in contrast, costs per milk vendor under the 2005 collective bargaining arrangements were an estimated \$350 each.
- 4.32 In its submission National Foods has agreed that there are likely to be small benefits associated with the proposed conduct linked to small transaction cost savings.
- 4.33 Parmalat has noted that under the Franchising Code of Conduct franchisors are required to ensure that franchisees obtain legal and financial advice. Parmalat is concerned that in this environment the introduction of collective bargaining and the need to deal with the TWU as well as individual franchisees may actually add to transaction costs, rather than reduce them as submitted by the TWU.
- 4.34 The TWU has advised that there was limited collective bargaining under authorisation A90927 by members providing services to Dairy Farmers. The TWU considers that this low level of negotiation in part reflects the length of the franchise agreements and in part is a result of the comparatively smaller group of member milk vendors – who have predominantly chosen to conduct negotiations on an individual basis. The TWU has noted that not all milk vendors providing services to Dairy Farmers are franchisees, with a number of milk vendors providing supermarket delivery services under contract. In this environment and noting the length of franchise agreements, the TWU considers that collective bargaining may occur in the future.
- 4.35 In its further submission of 14 July 2009, the TWU noted that the provision of information by the TWU to the franchised milk vendors providing services to Dairy Farmers/Parmalat would be a matter between the TWU and franchisees. The TWU considers that there would be no need to deal with the franchisor in the course of this process. The TWU considers that this provision of information is likely to reduce transaction costs and deliver benefits to the public.

- 4.36 The ACCC considers that, generally, there are transaction costs associated with contracting. These transaction costs can be lower where a single negotiating process is utilised, such as in a collective bargaining arrangement, relative to a situation where multiple negotiation processes are necessary. The ACCC considers that to the extent that these transaction cost savings do arise, they are likely to constitute a public benefit.
- 4.37 The ACCC considers that some transaction cost savings are likely to result from the proposed collective bargaining arrangements compared with a situation under which each milk vendor is required to negotiate contracts individually.

Public detriment

- 4.38 Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁴

- 4.39 The TWU does not make submissions on the nature or scale of any anti-competitive detriment related to the proposed arrangements but submits that

[b]ecause vendors had an authorisation in place [A90927], it has already been established that the public benefits generated by its implementation has far outweighed any related anti-competitive detriment.

- 4.40 National Foods submits the following:

The potential detriment that may arise from the proposed conduct (which includes price fixing) is not adequately addressed in the application. A single collective bargaining unit covering all milk distributors in SA could result in a significant shift in the industry by forcing the different distribution models of National Foods and Dairy Farmers into alignment and potentially creating higher and more uniform distribution prices. For this reason, negotiation must take place with one processor and participation must be voluntary to ensure parties can retain flexibility. Furthermore, elements that are likely to be highly commercially disruptive (and may potentially result in boycotts), such as collective agitation of disputes or collective attempts to renegotiate established contracts should not be permitted.

If the conduct to be authorised is appropriately delineated in the manner set out in [National Foods' submission], the public detriment from the conduct is likely to be minimised. This is of course consistent with the ACCC final determination following a comprehensive public consultation in relation to the 2005 Milk Vendors' Association (SA) application (authorisation A90927).

- 4.41 The ACCC considers that, generally speaking, competition between individual businesses generates price signals that direct resources to their most efficient use. This is often referred to as allocative efficiency. Collective agreements to negotiate terms and conditions can interfere with these price signals and accordingly lead to allocative inefficiencies. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.

⁴ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

4.42 The ACCC has previously identified that the anti-competitive effect of collective bargaining arrangements constituted by lost allocative efficiencies is likely to be more limited where the following four features are present:

- the current level of negotiations between individual members of the group and the proposed counterparty(ies) on the matters to be negotiated is low
- participation in the collective bargaining arrangement is voluntary
- there are restrictions on the coverage and composition of the bargaining group
- there is no boycott activity.

Current level of negotiations

4.43 Where the current level of individual bargaining between members of a proposed bargaining group and the target is low, the difference between the level of competition with or without the collective arrangements may also be low.

4.44 The TWU has submitted prior to the 2005 authorisation A90927 milk vendors had no significant input into distribution contracts. The TWU considers that in the absence of collective bargaining it is likely that milk vendors would have no option but to accept standard form contracts offered by processors.

4.45 The ACCC notes that, based upon the submissions of the TWU, National Foods and Parmalat, there does appear to be some opportunity for individual milk vendors to vary the terms and conditions of their contracts, albeit predominantly where the processor deems it appropriate. However, in general, the ACCC considers that the level of bargaining between individual milk vendors and the processors with which they contract is low.

4.46 On this basis the ACCC considers that the difference in the level of competition among vendors with or without the collective bargaining arrangements is likely to be small.

Voluntary participation in the collective bargaining arrangements

4.47 The TWU proposes that collective negotiations on behalf of member and non-member milk vendors be conducted on an opt-in basis and notes that milk vendors will retain the right to negotiate individually with the relevant processor should they choose to do so.

Coverage or composition of the group

4.48 The TWU notes that under the terms of the 2005 authorisation A90927, two bargaining groups were convened providing for separate negotiation processes with National Foods and Dairy Farmers respectively, including restrictions on information sharing between these two groups.

4.49 Under the current application it is proposed that vendors be advised in the process of collective negotiation by an experienced TWU official, and that the TWU will provide secretarial services. As noted previously, the TWU does not anticipate that there will be extensive bargaining by the TWU with Parmalat (para 4.34). The TWU has,

however, noted that it will have in place a mechanism to ensure that information obtained in one bargaining group is not provided to another bargaining group.

- 4.50 National Foods in its submission has noted that it opposes the formal or informal formation of a single bargaining group across South Australian milk vendors. National Foods has submitted that, in the event that authorisation is granted by the ACCC, the authorised conduct must clearly provide for separate bargaining groups with separate representation and restrictions upon information disclosure. Parmalat has also sought similar separations and information barriers.
- 4.51 In its further submissions of 14 and 15 July 2009, the TWU stated that it agreed, among other things, that it would be negotiating separately with National Foods and Parmalat and that there would be prohibitions on the transfer of information between bargaining groups.
- 4.52 In general, the ACCC considers that limiting bargaining groups (for example by geography, size or counterparty) allows negotiations to better take into account the specific demand or supply characteristics of particular businesses. This significantly reduces the anti-competitive effects associated with 'one size fits all' negotiations and allows competition between groups to provide the competitive discipline that leads to efficient resource use.
- 4.53 The ACCC considers that it is appropriate for any authorisation granted by it to establish restrictions upon common representation and the exchange of information regarding contract negotiations between the likely National Foods and Parmalat bargaining groups. The ACCC considers that with such restrictions in place, the coverage and composition of the bargaining groups will not give rise to significant anti-competitive detriment.

Boycott activity

- 4.54 In the Tribunal's decision in the *VFF Chicken Meat Growers' Boycott Authorisation* it was stated in part:

The seriousness of the potential consequences of authorising the use of collective boycotts is beyond doubt: they can result in substantial commercial damage not only to the direct target(s) of them but also to the other upstream and downstream businesses and their employees. Consumers might suffer disruption to market supplies and possibly at least temporary price increases.⁵

- 4.55 The ACCC notes that the TWU has not applied for authorisation to engage in collective boycott activity. Accordingly, any such conduct, should it occur, would not be protected from legal action under the Act.

Dispute resolution

- 4.56 The TWU has noted that disputes within the industry can be categorised as
- vendor/processor disputes – such disputes may include such matters as failure to supply product, supply of low-coded product, supply of damaged stock and transfer of customers by processors (to other vendors or to direct-billing arrangements).

⁵ *Re VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT 2, at paragraph 381.

- vendor/customer disputes - such disputes may include such matters as non-supply of product, supply of damaged product, and temperature of product supplied.
 - vendor/vendor disputes – the TWU submits that such disputes are infrequent.
- 4.57 The TWU has sought authorisation to represent any milk vendor or groups of milk vendors in any dispute which may arise between the milk vendor(s) and the processors.
- 4.58 National Foods in its submission has expressed concern that the collective agitation of disputes, which may of itself potentially result in collective boycotts, is likely to be highly commercially disruptive and should not be authorised.
- 4.59 Parmalat has noted that, through its Parmalat Leadership Council, a forum is established to discuss and resolve matters of concern to both franchisees and Parmalat. Parmalat further notes that where the involvement of a third party is required in order to assist in resolving concerns, the Franchising Code of Conduct provides for a mediation process.
- 4.60 The ACCC has previously accepted that industry bodies can represent and assist members in matters such as ensuring its members have access to appropriate legal and/or financial services, or even making representations to major suppliers in relation to issues, without the need for authorisation.⁶
- 4.61 However, where such assistance is insufficient, the ACCC considers the most effective dispute resolution process is one which is developed in consultation with all parties in the bargaining process and is ultimately implemented with the support of all parties.
- 4.62 In granting authorisation A90927 in 2005 the ACCC noted that it was open to the parties to develop their own dispute resolution process for disputes about contracts, taking account of what each party hopes to achieve by such a process, which could form part of any negotiated agreements. Noting that the Association had not demonstrated that any public benefit would arise from the collective representation in disputes, the ACCC refused to grant authorisation to this aspect of the 2005 application.
- 4.63 The ACCC did, however, go on to note that the Association may collectively represent members in disputes arising out of agreements collectively negotiated under the arrangements, provided provision for such representation forms part of the agreement entered into.
- 4.64 The ACCC is not proposing to grant authorisation to specifically provide for the TWU's representation of a milk vendor or groups of milk vendors in any dispute which may arise between the milk vendor(s) and the processors. The ACCC is concerned that such disputes may not relate to the contracted arrangements between the parties and could result in broad anti-competitive detriment.
- 4.65 The ACCC is, however, proposing to authorise the TWU to collectively represent milk vendors participating in the collective bargaining arrangements in disputes arising out of agreements collectively negotiated under the authorised arrangements, provided provision for such representation forms part of the agreement entered into.

⁶ See for example: ACCC Determination A90885, 28 April 2004, page 33.

Balance of public benefit and detriment

4.66 In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.

4.67 In the context of applying the net public benefit test in section 90(8)⁷ of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.⁸

4.68 For the reasons outlined in this chapter, the ACCC considers that the proposed arrangements are likely to deliver public benefits by allowing milk vendors to provide more effective input into contractual terms and conditions and may also lead to some transaction cost savings.

4.69 The ACCC considers, also, that any potential anti-competitive detriment which may result from the collective bargaining arrangements is likely to be mitigated by the following factors:

- the current level of negotiation between individual milk vendors and the processors with which they contract is low
- participation in the proposed collective bargaining arrangements is voluntary
- the size and composition of the bargaining group will be limited by the terms of the authorisation granted by the ACCC and
- the proposed conduct does not involve any collective boycott activity.

4.70 Accordingly, the ACCC considers the public benefit that is likely to result from the conduct will outweigh the public detriment. The ACCC is therefore satisfied that the tests in sections 90(5A), 90(5B), 90(6) and 90(7) are met.

Length of authorisation

4.71 The Act allows the ACCC to grant authorisation for a limited period of time.⁹ The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

4.72 In this instance, the applicant seeks authorisation for five years.

4.73 Before the 22 July 2009 draft determination, National Foods submitted that any authorisation, if made, should be limited to a period of five years. It submitted this

⁷ The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

⁸ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

⁹ Section 91(1).

would be a substantial period of time for such conduct and would allow all parties to reconsider the matter in light of future industry developments.

- 4.74 In its draft determinations, the ACCC proposed granting authorisation for five years. There were no submissions received after the draft determinations.
- 4.75 The ACCC considers it appropriate to grant authorisation to the proposed conduct for five years, as was the case with authorisation A90927.

5. Determination

The application

- 5.1 On 25 June 2009 the Transport Workers Union of Australia SA/NT Branch (the TWU) lodged application for authorisation A91146 with the Australian Competition and Consumer Commission (the ACCC). On 5 August 2009 the TWU lodged application A91179 with the ACCC.
- 5.2 Application A91146 was made using Form B, Schedule 1 of the Trade Practices Regulations 1974. The application was made under subsection 88(1) of the Act to
- make and give effect to a contract, arrangement or understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 5.3 Application A91157 was made using Form B, Schedule 1 of the Trade Practices Regulations 1974. The application was made under subsection 88(1A) of the Act to
- make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- 5.4 In particular, the applicant seeks authorisation on behalf of TWU-member and non-member milk vendors (present and future) to engage in collective bargaining on their behalf in relation to the terms and conditions of distribution contracts with the processors for whom milk vendors distribute, namely National Foods Milk Limited and the purchaser of Dairy Farmers (Parmalat). Authorisation is also sought to give effect to any contracts agreed to by the TWU with the processors.
- 5.5 The TWU also seeks authorisation to represent any milk vendor or group of milk vendors in any dispute that may arise between any milk vendor or milk vendors and National Foods or the purchaser of Dairy Farmers (Parmalat).
- 5.6 The TWU has expressed the application so as to apply to future TWU-member and non-member milk vendors.

The net public benefit test

- 5.7 For the reasons outlined in Chapter 4 of this determination, the ACCC considers that in all the circumstances the conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.
- 5.8 The ACCC therefore grants authorisation to applications A91146 and A91179, for five years.

Conduct for which the ACCC grants authorisation

Bargaining process

- 5.9 The ACCC proposes to grant authorisation for the TWU to collectively negotiate separately with each of National Foods and Parmalat on behalf of current and future TWU-member and non-member milk vendors in South Australia in relation to the terms and conditions of contracts between milk vendors and processors.
- 5.10 The collective bargaining groups formed under this authorisation must be processor specific. Each collective bargaining group must be represented in the negotiations by different TWU representatives.
- 5.11 Members of the collective bargaining groups and the TWU representative must not disclose information obtained during the course of collective negotiations to any member or TWU representative of any other collective bargaining group.
- 5.12 The arrangements for collective negotiations will include the following:
- The TWU will write to milk vendors (both members and non-members of the TWU) to notify them of the terms of this authorisation and invite milk vendors to nominate the TWU to negotiate contract terms and conditions on their behalf.
 - Milk vendors wishing to participate in a collective bargaining group (Participating Milk Vendors) must authorise the TWU, in writing, to conduct negotiations on their behalf.
 - The TWU must notify the relevant processor in writing that it has been authorised to negotiate on behalf of the identified Participating Milk Vendors. The TWU must notify the processor of the identity of the TWU representative undertaking the negotiations.
 - The TWU may then seek to engage in negotiations on behalf of the Participating Milk Vendors with the relevant processor.
 - The TWU must report back to the Participating Milk Vendors.
 - The TWU may undertake further collective negotiations with the relevant processor.
 - The TWU must report back to the Participating Milk Vendors on the outcome of any further collective negotiations.
 - Participating Milk Vendors will individually decide whether they will enter into the collectively negotiated contract offered by the relevant processor.

Limits on scope of authorisation

- 5.13 The TWU must not enter into contracts with processors on behalf of Participating Milk Vendors. Each Participating Milk Vendor must determine whether or not to accept the terms and conditions of the collectively negotiated contract offered by the relevant processor.

- 5.14 No party may be compelled to engage in collective negotiations. Milk vendors and processors who do not wish to participate in the collective bargaining process may continue with individual negotiations.
- 5.15 The TWU may collectively represent any or all of the Participating Milk Vendors in disputes arising out of contracts collectively negotiated under the authorised arrangements, provided provision for such representation forms part of the contract entered into.
- 5.16 The authorised collective bargaining arrangements are for the negotiation of new contracts.

Conduct not authorised

- 5.17 Authorisation does not extend to the TWU collectively renegotiating existing contracts or existing franchise agreements where these arrangements have not expired or otherwise been brought to an end.
- 5.18 Authorisation does not extend to the TWU negotiating collectively on behalf of milk vendors who are not offered new contracts by National Foods or Parmalat.
- 5.19 Authorisation does not extend to any collective boycott activity. Accordingly, should any such activity occur, it would not be protected from legal action under the Act.

Date authorisation comes into effect

- 5.20 This determination is made on 9 September 2009. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 1 October 2009.
- 5.21 Section 90(4) requires that the Commission state in writing its reasons for a determination. The attachments form part of the written reasons for this determination.

Attachment A — the authorisation process

The Australian Competition and Consumer Commission (the ACCC) is the independent 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.

The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.

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.

The ACCC conducts a public consultation process when it receives 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.

After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.

Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.

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 determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

Attachment B — chronology of ACCC assessment for applications A91146 and A91179

The following table provides a chronology of significant dates in the consideration of the TWU's application.

DATE	ACTION
25 June 2009	The TWU lodged authorisation application A91146 with the ACCC.
7 July 2009	Closing date for interested-party submissions on application A91146.
22 July 2009	The ACCC issued a draft determination for application A91146.
5 August 2009	The TWU lodged authorisation application A91179 with the ACCC.
12 August 2009	Closing date for interested-party submissions on the draft determination for application A91146.
12 August 2009	The ACCC issued a draft determination for application A91179.
27 August 2009	Closing date for interested-party submissions on the draft determination for application A91179.
9 September 2009	Final determination issued – applications A91146 and A91179.

Attachment C — the tests for authorisation and other relevant provisions of the Act

Trade Practices Act 1974

Section 90—Determination of applications for authorisations

- (1) The Commission shall, in respect of an application for an authorization:
 - (a) make a determination in writing granting such authorization as it considers appropriate; or
 - (b) make a determination in writing dismissing the application.
- (2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (4) The Commission shall state in writing its reasons for a determination made by it.
- (5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:
 - (a) that the provision would result, or be likely to result, in a benefit to the public; and
 - (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
 - (i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and
 - (ii) the provision were given effect to.
- (5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:
 - (a) that the provision has resulted, or is likely to result, in a benefit to the public; and
 - (b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.
- (6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to

the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

- (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
- (b) the proposed covenant were given, and were complied with; or
- (c) the proposed conduct were engaged in;

as the case may be.

(7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.

(8) The Commission shall not:

- (a) make a determination granting:
 - (i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
 - (ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
 - (iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
 - (iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- (b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

(9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

(9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):

- (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
 - (i) a significant increase in the real value of exports;

- (ii) a significant substitution of domestic products for imported goods; and
- (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

Variation in the language of the tests

There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).

The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.¹⁰

However, the Tribunal has previously stated that regarding 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.¹¹

Consequently, when applying either test, the ACCC can take most, if not all, public detriments 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.

Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7). Further, as the wording in sections 90(5A) and 90(5B) is similar, this approach will also be applied in the test for conduct that may be a cartel provision.

Conditions

The Act allows the ACCC to grant authorisation subject to conditions.¹²

Future and other parties

Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

- persons who become party to the contract, arrangement or understanding at some time in the future¹³

¹⁰ *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

¹¹ *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.

¹² Section 91(3).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.¹⁴

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation¹⁵. It does not apply to applications for revocation, revocation and substitution, or minor variation. The six-month period can be extended by up to a further six months in certain circumstances.

Minor variation

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation.¹⁶ The Act limits applications for minor variation to applications for:

... a single variation that does not involve a material change in the effect of the authorisation.¹⁷

When assessing applications for minor variation, the ACCC must be satisfied that:

- the proposed variation satisfies the definition of a 'minor variation' and
- if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the conduct.

Revocation; revocation and substitution

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.¹⁸ The ACCC may also review an authorisation with a view to revoking it in certain circumstances.¹⁹

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.²⁰ The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.²¹

¹³ Section 88(10).

¹⁴ Section 88(6).

¹⁵ Section 90(10A)

¹⁶ Subsection 91A(1)

¹⁷ Subsection 87ZD(1)

¹⁸ Subsection 91B(1)

¹⁹ Subsection 91B(3)

²⁰ Subsection 91C(1)

²¹ Subsection 91C(3)