



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

Australian Brick & Blocklaying Training Foundation Ltd

in respect of

an industry agreement to impose levies on the sale of clay bricks and concrete masonry products

Date: 5 August 2009

Authorisation no.: A91166

Public Register no.: C2009/769

Commissioners: Samuel
Kell
Schaper
Court
Dimasi
Willett

Summary

The ACCC proposes to grant authorisation under section 88(1A) of the *Trade Practices Act 1974* to allow the Australian Brick and Blocklaying Training Foundation Ltd, Think Brick Australia and the Concrete Masonry Association of Australia and their members to impose a levy of \$2 per 1,000 clay bricks and 10 cents per square metre on concrete masonry walling products.

The ACCC proposes to grant authorisation for a period of five years.

The ABBTF, on behalf of Think Brick Australia and the Concrete Masonry Association of Australia (CMAA), has sought authorisation under section 88(1A) of the *Trade Practices Act 1974* (the Act) to continue to impose a levy on the sale of clay bricks and concrete masonry walling products sold in NSW, Victoria, Queensland, South Australia, Western Australia, Tasmania and Australian Capital Territory.

Application A91166 is to take account of amendments introduced 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 A91133 lodged with the ACCC on 15 April 2009 under sections 88(1) of the Act. On 13 May 2009 the ACCC granted interim authorisation to A91133 to allow the ABBTF to engage in the proposed arrangements. On 15 July 2009 the ACCC issued a draft determination for application A91133 proposing to grant authorisation for five years. The practical effect of application A91166 is to seek protection from the new cartel provisions for the levy arrangements.

The applicants wish to continue to raise funds for a national program designed to alleviate shortages of skilled bricklayers. The funds will be used to create apprenticeship opportunities for school leavers and mature age entrants and to provide subsidies for employers of apprentice bricklayers.

The ACCC is satisfied that the proposed arrangements will result in a public benefit by increasing the supply of skilled bricklayers and reducing delays in construction times. The ACCC considers that the public detriment is limited, particularly given that the imposition of the levies will result in only a negligible increase in the cost of housing and the arrangements are unlikely to result in collusive conduct beyond that authorised.

The ACCC will now seek further submissions from the applicant and interested parties in relation to this draft determination prior to making a final decision. The applicant and interested parties may also request that a conference be held to make oral submissions on the draft determination.

On 29 July 2009 the ACCC granted interim authorisation to A91166 to allow the ABBTF, Think Brick and the CMAA to continue to impose the levies. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

1. The application for authorisation

- 1.1 On 24 July 2009 the Australian Brick & Blocklaying Training Foundation (ABBTF) lodged application A91166 with the ACCC for authorisation to impose a levy on the sale of clay bricks and concrete masonry walling products.
- 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 in respect of an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not.
- 1.3 Application A91166 was made under section 88(1A) of the Act to make and give effect to a contract, arrangement or understanding, a provision of which is or may be a cartel provision.
- 1.4 In particular, the ABBTF applied for authorisation on behalf of itself, Think Brick Australia and the Concrete Masonry Association of Australia and their members to impose a levy of \$2 per 1,000 clay bricks sold and 10 cents per square metre on concrete masonry walling products sold in Victoria, New South Wales, Queensland, Western Australia, South Australia, Tasmania and Australian Capital Territory.
- 1.5 The ABBTF seeks authorisation for a period of five years.
- 1.6 The objective of imposing a levy on the sale of clay bricks and concrete masonry walling products is to raise funds for a national program designed to alleviate shortages of skilled bricklayers. The manufacturers of the applicant organisations and other firms will match the funds raised by the levies with voluntary contributions.
- 1.7 The program aims to address skill shortages in the industry by increasing the number of apprentices in training and improving the retention rate of existing apprentices.
- 1.8 This application, A91166, relates to and is in the same terms as application A91133 lodged with the ACCC on 15 April 2009 under section 88(1) of the Act. On 13 May 2009 the ACCC granted interim authorisation to A91133 to allow the ABBTF to continue imposing the levies. On 15 July 2009 the ACCC issued a draft determination for application A91133 proposing to grant authorisation for five years. A copy of this draft determination is at [Attachment 1](#) of this draft determination and forms part of this determination.

Interim authorisation

- 1.9 On 24 July 2009 the ABBTF requested that the ACCC grant interim authorisation to A91166.
- 1.10 On 29 July 2009 the ACCC granted interim authorisation. In granting interim authorisation, the ACCC stated that it considered the protection provided by interim

authorisation would allow the applicants to continue imposing the levies as part of the bricklayer training scheme while the ACCC considered the substantive application.

- 1.11 Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

2. ACCC evaluation of A91166

2.1 The ACCC's evaluation of the proposed arrangements is in accordance with tests found in sections 90(5A) and 90(5B) of the Act. Section 90(5A) in particular provides 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 of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public and
- this benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made, or the proposed understanding were arrived at and the provision concerned was given effect to.

2.2 In the context of applying the net public benefit test at section 90(8)¹ of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.²

2.3 For the reasons set out in Attachment 1 of this draft determination, the ACCC is satisfied that the proposed arrangements are likely to generate public benefits, in particular:

- by increasing the current and future supply of skilled bricklayers and
- reducing delays in construction times.

2.4 For the reasons set out in Attachment 1 of this draft determination, the ACCC considers that the proposed arrangements will generate little public detriment, particularly given that the imposition of the levies will result in only a negligible increase in the cost of housing.

2.5 Accordingly, the ACCC considers that the public benefit likely to result from the arrangements would outweigh any likely public detriment.

Length of authorisation

2.6 The Act allows the ACCC to grant authorisation for a limited period of time.³ The ACCC generally considers it appropriate to grant authorisation for a limited period of

¹ 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.

² Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.

³ Section 91(1).

time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

- 2.7 In this instance, the ABBTF seeks authorisation for five years.
- 2.8 In its 2006 determination regarding these arrangements (A90993), the ACCC authorised the arrangements for three years. The ACCC took the view that this time frame allowed sufficient time to review the impact of the scheme and evaluate whether it delivered the public benefits claimed.
- 2.9 The ACCC notes the ABBTF's submission that a three year term is an insufficient time frame to see sustainable improvements in overcoming delays given that apprentices take three or four years to complete their training.
- 2.10 Having reviewed data on apprenticeship commencements and completions and the submissions from interested parties, the ACCC considers that the arrangements have resulted in public benefits that warrant a longer period of authorisation.
- 2.11 As such, the ACCC proposes to grant authorisation to the proposed arrangements for a period of five years.

3. Draft determination

The application

- 3.1 On 24 July 2009 the Australian Brick and Blocklaying Training Foundation Limited (ABBTF) lodged application for authorisation A91166 with the Australian Competition and Consumer Commission (the ACCC).
- 3.2 Application A91166 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 a contract or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act) or
 - give effect to a provision of a contract, arrangement or understanding that is, or may be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act).
- 3.3 In particular, the ABBTF seeks authorisation to make and give effect to an agreement between itself, Think Brick Australia and the Concrete Masonry Association of Australia and their members to impose a levy of \$2 per 1,000 clay bricks sold and 10 cents per square metre on concrete masonry walling products sold in Victoria, New South Wales, Queensland, Western Australia, South Australia, Tasmania and Australian Capital Territory.

The net public benefit test

- 3.4 For the reasons outlined in [Attachment 1](#) of this draft determination, the ACCC considers that in all the circumstances the arrangements for which authorisation is sought are likely to result in a public benefit that would outweigh the likely detriment to the public arising from the arrangements.
- 3.5 The ACCC therefore proposes to grant authorisation to application A91166.

Conduct for which the ACCC proposes to grant authorisation

- 3.6 The ACCC proposes to grant authorisation to allow the ABBTF, Think Brick and the CMAA and their members to impose a levy of \$2 per 1,000 clay bricks and 10 cents per square metre on concrete masonry walling products sold in Victoria, New South Wales, Queensland, Western Australia, South Australia, Tasmania and Australian Capital Territory for a period of five years.
- 3.7 This draft determination is made on 5 August 2009.
- 3.8 The attachment to this determination forms part of the draft determination.

Interim authorisation

- 3.9 At the time of lodging this application, the applicants requested interim authorisation for the proposed arrangements. The ACCC granted interim authorisation on 29 July 2009.
- 3.10 Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Further submissions

- 3.11 The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

Draft determination

Application for revocation and substitution of authorisation A90993

lodged by

Australian Brick & Blocklaying Training Foundation Ltd

in respect of

**an industry agreement to impose levies on the sale of clay bricks and concrete masonry
products**

Date: 15 July 2009

Authorisation no.: A91133

Public Register no.: C2009/769

Commissioners: Samuel
Kell
Schaper
Court
Dimasi
Willett

Summary

The ACCC proposes to grant authorisation to the Australian Brick and Blocklaying Training Foundation, Think Brick Australia and the Concrete Masonry Association of Australia and their members to impose a levy of \$2 per 1,000 clay bricks and 10 cents per square metre on concrete masonry walling products.

The ACCC proposes to grant authorisation for a period of five years.

The Australian Brick and Blocklaying Training Foundation Ltd (ABBTF) sought authorisation to enable itself, Think Brick Australia (Think Brick) and the Concrete Masonry Association of Australia (CMAA) and its members to impose a levy of \$2 per 1,000 clay bricks and 10 cents per square metre on concrete masonry walling products sold in Victoria, New South Wales, Queensland, Western Australia, South Australia, Tasmania and Australian Capital Territory.

The applicants wish to continue to raise funds for a national program designed to alleviate shortages of skilled bricklayers. The funds will be used to create apprenticeship opportunities for school leavers and mature age entrants and to provide subsidies for employers of apprentice bricklayers.

The ACCC is satisfied that the proposed arrangements will result in a public benefit by increasing the supply of skilled bricklayers and reducing delays in construction times.

The ACCC considers that the public detriment is limited, particularly given that the imposition of the levies will result in only a negligible increase in the cost of housing and the arrangements are unlikely to result in collusive conduct beyond that authorised.

At the time of lodging its application the ABBTF requested interim authorisation. On 13 May 2009 the ACCC granted interim authorisation to the proposed arrangements until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

The ACCC will now seek further submissions from the applicant and interested parties in relation to this draft determination prior to making a final decision. The applicant and interested parties may also request that a conference be held to make oral submissions on the draft determination.

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List of abbreviations

ABBTF	Australian Brick and Blocklaying Training Foundation Ltd
CMAA	Concrete Masonry Association of Australia
GTC	Group Training Company
NCVER	National Centre for Vocational Education Research
RTO	Registered Training Organisation

1. The application for authorisation

- 1.1. On 15 April 2009 the Australian Brick and Blocklaying Training Foundation Ltd lodged an application for the revocation of authorisation A90993 and its substitution with authorisation A91133 with the ACCC.
- 1.2. Authorisation is a transparent process where 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.
- 1.3. 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 this application is contained in Attachment B.
- 1.4. Application A91133 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.
- 1.5. The ABBTF applied for authorisation on behalf of itself, Think Brick Australia and the Concrete Masonry Association of Australia and their members to apply a levy of \$2 per 1,000 clay bricks sold and 10 cents per square metre on concrete masonry walling products sold in Victoria, New South Wales, Queensland, Western Australia, South Australia, Tasmania and Australian Capital Territory.
- 1.6. The ABBTF seeks authorisation for a period of five years.

The arrangements

- 1.7. The objective of imposing a levy on clay bricks and concrete masonry products is to raise funds for a national program designed to alleviate shortages of skilled bricklayers. The manufacturers of the applicant organisations and other firms will match the funds raised by the levies with voluntary contributions.
- 1.8. The program aims to address skill shortages in the industry by increasing the number of apprentices in training and improving the retention rate of existing apprentices.

Collection of the levies

1.9. In the 2007-2008 financial year, the ABBTF collected approximately \$7,106,620 from the levies.¹

1.10. The mechanism for collecting the levies is as follows:

- each participating manufacturer completes a monthly return which includes sale of clay brick and concrete masonry products for the month, plus the matching contribution from the manufacturer
- the return for each month is sent to a firm of independent accountants
- the accountant prepares tax invoices for the amount of the levy which is then forwarded to each manufacturer
- the levy amount is remitted by each manufacturer to an ABBTF Trust Account
- the accountants then remit the total levies received to the ABBTF General Account.

Compliance audit

1.11. The collection and contribution process and calculations adopted by all participating companies is subject to a compliance audit. The audit is conducted at random by an independent auditor to ensure the validity of the levy collections. The results of the compliance audit are reported to the ABBTF Board but do not disclose confidential levy amounts of individual companies.

Distribution of the levies

1.12. The funds will be used to:

- Promote the trade of bricklaying at schools, career expos and through broad based advertising which assists young people in making career choices.
- Run the 'Step Out' program which is a 40 hour hands on taster for year 10 students. This program is delivered in schools and enables students to complete a brick project (e.g barbeque, garden wall etc) or in a TAFE/Registered Training Organisation (RTO) training centre to enable students to experience the trade training environment.
- Provide support for pre entry apprenticeship training. To this end ABBTF will support TAFE/RTO training centres by contributing to course costs. For example, in NSW, ABBTF will pay TAFE a subsidy of \$480 per head for running a pre entry training course.
- Provide support for bricklayers directly employing apprentices. The ABBTF will pay a subsidy of \$6000 for bricklayers directly employing apprentices, with \$2000 payable on the completion of each of the first three years. In South Australia, the \$6000 is paid over four years.

¹ Australian Brick & Blocklaying Training Foundation Limited, 2007-2008 Annual Report, p. 18.

- Provide support for host employers of apprentices through Group Training Companies (GTCs) which helps reduce the charge out rate of apprentices. The ABBTF subsidies for group schemes vary across the states between \$6000 and \$14,400.

1.13. The ABBTF advises that the funds are currently apportioned in the following matter:

Step Out Program for school students	14%
Pre-entry training support	3%
Apprentice subsidies to employers – direct	28%
Apprentice subsidies via group training company	26%
Mature age allowance	2%
Skilled overseas migration	1%
Promotion	10%
Development	10%
Administration	6%
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Total	100%

Interim authorisation

1.14. The levy arrangements were previously covered by authorisation A90993 which expired on 17 May 2009. At the time of lodging its application, the ABBTF requested interim authorisation.

1.15. On 13 May 2009 the ACCC granted interim authorisation to the proposed arrangements.

2. Background to the application

The applicant

- 2.1. The ABBTF is an industry funded not-for-profit organisation that was established to address the national shortage of skilled bricklayers.
- 2.2. The purpose of the ABBTF is to ensure that there is an adequate and competent bricklaying and blocklaying workforce to support the demand for bricks and blocks as a construction material. The ABBTF also strives to improve the standing of bricklayers and blocklayers within the building industry.
- 2.3. The ABBTF administers a national program that is designed to promote the profile of bricklaying as a trade and improve the retention rate of apprentices in the industry.
- 2.4. The program is funded by a levy on clay bricks and concrete masonry products.

The building and construction industry

- 2.5. Bricklaying forms part of the general construction industry. The brick and blocklaying sector generates \$1.55 million in revenue, representing 0.1% of Australia's Gross Domestic Product. Bricklayers constitute approximately 9% of all construction trade workers.²
- 2.6. The industry is made up mainly of small independent contractors, with the four largest employers accounting for less than 10% of annual industry revenue.³ Most of the industry's revenue is derived from the residential building market, which includes new residential construction and alterations and additions to existing homes.

Skill shortages in the industry

- 2.7. The building and construction industry had suffered from a critical shortage of skilled bricklayers for a number of years. In 2003, the Productivity Commission noted that skill shortages had severe impacts on construction costs and ultimately housing affordability, especially in peak periods.⁴
- 2.8. According to the most recent ABS statistics, there is a national average of 11.3 bricklayers per 10,000 in population.⁵ As at December 2007, only Victoria and Western Australia⁶ were serviced at a rate that was above the national average; all other states were listed on the DEEWR labour market rating as being in shortage.⁷

² Australian Bureau of Statistics 2006, *Australian and New Zealand Standard Classification of Occupations*, Cat. No. 1222.0

³ IBIS World, *Bricklaying Services in Australia*, 21 November 2008, p.7.

⁴ Productivity Commission, *First Home Ownership – Productivity Commission Discussion Draft*, December 2003

⁵ Australian Bureau of Statistics 2006, CDATA Database. This figure is adjusted to account for Western Australia's preference for double bricking.

⁶ There is a high number of bricklayers in WA due to double brick construction – most houses in WA use approximately 21,000 bricks on average, whereas other states use approximately 8,000.

⁷ DEEWR Labour Economics Office State Reports, December 2007.

- 2.9. The ACCC understands that several factors have contributed to the national shortage of skilled bricklayers. They include:
- the cyclical nature of the trade means that it is viewed by young people as lacking security
 - low wages in the industry make the trade unattractive to young people
 - the trade consists largely of an aging population
 - some employers prefer to hire skilled staff rather than untrained apprentices
 - some employers tend not to hire apprentices due to the added costs to their businesses and the added administrative work.
- 2.10. The ABBTF submits that the most significant issue affecting the supply of skilled bricklayers is the aging workforce. The ABBTF notes that in 2006, roughly 47% of bricklayers were over the age of 40 and 24% were over the age of 50.⁸ It is estimated that in the next ten years, approximately one third of the workforce will leave the trade.⁹

Supply of bricklaying apprenticeships

- 2.11. Apprentices are sometimes employed through group training companies, which offer their apprentices to bricklayers for a fee. The bricklayers are not responsible for the employment and training of an apprentice throughout the entire term of the apprenticeship. Apprentices may be moved between bricklayer clients of the GTC, depending on the volume of work the bricklayer has and the variety of practical experience each bricklayer is able to provide an apprentice.
- 2.12. The fees paid to the GTC by the bricklayer in respect of an apprentice reflect the employment costs incurred by the GTC during the time that the apprentice works for the bricklayer.

Past authorisations

- 2.13. The current application for authorisation follows earlier authorisations for similar schemes. The most recent authorisation was A90993, which was granted in 2006. The amount of the levies has not changed since that time.
- 2.14. The earlier schemes involved similar conduct, but the amounts of the levies were smaller. Some schemes imposed a single levy on sales of clay bricks at the rate of \$1.00 per thousand bricks. Other schemes imposed two levies, which were set at \$1.00 per thousand bricks and 5 cents per square metre of concrete masonry products.
- 2.15. The increases in the amounts of the levies were authorised as the cost of supporting apprentices rose as the number of apprentices involved in the programs increased and workers compensation premiums rose.

⁸ ABBTF application for revocation and substitution A91133, supporting submission, 15 April 2009, p. 8.

⁹ ABBTF application for revocation and substitution A91133, supporting submission, 15 April 2009, p. 8.

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.
- 3.2. Broadly, the ABBTF submits that the proposed arrangements will deliver public benefits by improving retention rates for bricklaying apprenticeships, thereby increasing the current and future supply of skilled bricklayers and reducing delays in construction times.
- 3.3. The ACCC sought submissions from over 40 interested parties potentially affected by the application, including government departments, industry associations, group training companies and construction companies. The ACCC received submissions from:
 - Boral Masonry
 - Brickworks Townsville
 - Clay Brick and Paver Association of Queensland
 - Master Builders Association of Western Australia
 - Skill Hire Pty Ltd
- 3.4. The views of the ABBTF and interested parties are outlined below. Copies of public submissions are available from the ACCC website (www.accc.gov.au) by following the 'Public Registers' and 'Authorisations Public Registers' links.

ABBTF's supporting submission

- 3.5. The ABBTF's submissions on the public benefits and detriments of the proposed arrangements are discussed in Chapter 4.

Interested party submissions

Boral Masonry

- 3.6. Boral submits that the feedback it has received from the industry is that the levy is a great initiative that helps to contribute to training and career paths for young people.
- 3.7. Boral considers that the scheme is important to the industry going forward, as it helps a lot of different people from different backgrounds and provides them with more opportunities to obtain qualifications. The scheme also provides direction to apprentices on how they should be completing their apprenticeships, and provides them with advice if they have any problems.
- 3.8. Boral notes that the scheme also promotes the trade at career expos and administers the Step Out program for school students.

- 3.9. Boral submits that the only problem with the levy is that it should run for longer than three years, as this time frame means that it does not support an apprentice for the entire duration of their apprenticeship. Boral suggested that 4-5 years would be an appropriate time frame for authorisation.

Brickworks Townsville

- 3.10. Brickworks submits that in the years it has been applying the levy, it has seen a steady increase in apprenticeships. Brickworks considers that this project has been the most positive thing to be introduced to the brick and blocklaying industry in North Queensland in 30 years.
- 3.11. Brickworks considers that the levy is going a long way to addressing the lack of qualified brick and blocklayers.

Clay Brick and Paver Association of Queensland (CBPAQ)

- 3.12. CBPAQ considers that the existing brick levy is fundamental to the future of the building industry. CBPAQ is of the view that the levy has assisted bricklayers in Queensland to achieve the skills necessary to deliver affordable housing, the use of thermal efficient products, efficient construction timelines and attractive streetscapes.
- 3.13. CBPAQ submits that the brick levy delivers the following public benefits:
- It enables the continual introduction of new apprentices to the bricklaying industry, which is important given that the workforce is aging.
 - As evidence that the levy has affected the industry, apprenticeship numbers within Queensland have increased from 86 in 2003 to 515 in December 2008. It is critical that this trend continues.
 - The levy is not limited to builders and developers; it applies to purchases made by 'Mums and Dads.' The CBPAQ has no record of any objection to the levy from this market.
 - The ABBTF has supported seven new trade training providers. This has reduced the travel required by apprentices to attend off the job training and ultimately reduced the cost to training providers.
 - It has assisted over 400 employers, both directly and through Group Training Companies. This support to employers has been achieved by providing incentives to take on apprentices and further support for apprentices to attend training and receive training resources.
 - The support of school based construction programs has helped over 5000 students consider bricklaying as a career. Many of these programs were operated in regional centres who would not have had such an opportunity unless the ABBTF provided such programs.

Master Builders Association of Western Australia

- 3.14. Master Builders WA provided a written submission to the ACCC regarding the 2004 authorisation for the levy arrangements. The ABBTF subsequently changed the manner in which the levy would be disbursed in WA and the application was amended. Master Builders WA submits that this outcome benefited all parties with an interest in training bricklaying apprentices in WA.
- 3.15. Master Builders WA considers that the current application for authorisation seeks to retain the current funding model and on this basis, it does not oppose the arrangements being reauthorized.

Skill Hire

- 3.16. Skill Hire is a Group Training Company that hires apprentices out to contract bricklayers and in doing so, receives the ABBTF subsidy of approximately \$1.25 - \$1.30 per bricklayer per hour. The subsidy equates to around \$10 per day and \$50 per week.
- 3.17. Skill Hire submits that without the levy, it would not be as cost effective to hire apprentice bricklayers. If the subsidy were to be taken away, Skill Hire notes there would be an increase in an apprentice's hourly rates and contract bricklayers could hand the apprentice back to the group training company.

4. ACCC evaluation

- 4.1. The ACCC's evaluation of the arrangements is in accordance with the test found in 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 the circumstances that:
- The provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public and
 - This benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision concerned was given effect to.
- 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 ABBTF submits that clay bricks and concrete masonry products are supplied in the following markets:
- commercial construction market
 - housing construction market.
- 4.5. The ABBTF notes other affected markets are:
- the supply of bricklayer services
 - the supply of apprentice employment services through group training companies
 - the supply of bricklayer training services.
- 4.6. In its most recent determination regarding the bricklaying levy (A90993) the ACCC identified three relevant areas of competition:
- the supply of clay bricks and pavers in commercial and housing construction
 - the supply of concrete masonry products in commercial and housing construction
 - the supply of bricklaying services in commercial and housing construction.

Markets for the supply of clay bricks and masonry products

- 4.7. The ACCC considered that there was some degree of substitutability between clay bricks and masonry products in their respective markets. In addition, these products could be delineated into separate markets for the supply of each of the products in the housing and commercial construction sectors.

- 4.8. The geographical boundaries of these markets were considered to be state based at their broadest because:
- interstate transportation costs are not economical
 - it is more convenient to use local manufacturers and suppliers with regard to time and cost considerations.

Markets for the supply of bricklaying services

- 4.9. The ACCC was also of the view that the market for the supply of bricklaying services could also be delineated into separate markets for the supply of these services for housing and commercial construction.
- 4.10. The ACCC considered that the geographical boundaries of the markets for the supply of bricklaying services were, at their broadest, state based because:
- interstate transportation costs are not economical
 - it is more convenient to use a local bricklayer with regard to time and cost considerations
 - consumers are more likely to support local bricklayers.
- 4.11. The ACCC considers that the placement of apprentice bricklayers is part of the broader market for the supply of bricklaying services.
- 4.12. For the purpose of assessing this application, the ACCC considers these areas of competition are affected by the proposed conduct.

The counterfactual

- 4.13. The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.¹⁰
- 4.14. Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.
- 4.15. All earlier schemes that were funded by a levy to support the training and placement of apprentices, either on a state or national basis, operated under authorisations granted by the ACCC.

¹⁰ 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.

4.16. The ACCC considers that the relevant counterfactual is one where there is no scheme that is funded by the levies and administered by the ABBTF for the purposes of promoting bricklaying apprenticeships and providing incentives to employers of apprentices.

Public benefit

4.17. 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.¹¹

4.18. The ABBTF submits that its program for addressing the shortage of skilled bricklayers is providing the following public benefits:

- employment and career opportunities for young people
- knowledge and hands on experience in bricklaying for school students to confirm career choices and improve retention rates in bricklaying apprenticeship training
- opportunities for people to complete pre trade training to gain credit against an apprenticeship in bricklaying and improve their employment prospects as apprentice bricklayers
- increase in the future supply of skilled bricklayers by increasing apprentice numbers commencing their training and the numbers in training
- increase in the current supply of skilled bricklayers through an increase in apprentice completions
- increase in the retention of apprentices in their apprenticeship which reduces waste in the delivery of training as well as the cost to industry for their on site employment and training
- increase in the number of mature age adult apprentices in training to secure work opportunities in the industry
- increased skills in the bricklaying trade and lower the cost of installation with up skilling to improve efficiency and quality of tradespeople in the industry
- assisting skilled migration into Australia to add to the bricklaying workforce and create potential employers of new apprentices.

4.19. In considering public benefits - particularly cost savings from increases in productive efficiency from 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

¹¹ 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.

public benefit. Of particular interest will be the number and identity of the proposed beneficiaries.

4.20. The public benefits that the ACCC has considered for the purposes of this assessment are outlined below.

Outcomes of the previous authorisation

4.21. As this conduct has been occurring under previous authorisations, it is instructive to compare the outcomes with the benefits submitted by the applicants in earlier authorisations.

Increase in the current and future supply of skilled bricklayers

4.22. In the most recent authorisation of these arrangements in 2006, the ACCC recognised there was a risk that some of the public benefits may not be realised. While the ACCC accepted that the arrangements were likely to increase apprenticeship numbers, the ACCC also noted that if actual numbers of apprentices trained through the scheme fell short of projections, the associated public benefits would be reduced accordingly.

4.23. In order to understand the effect the arrangements have had on apprenticeship employment and training, the ACCC considers it important to examine the impact of the scheme on both apprenticeship commencements and attrition rates.

Apprenticeship commencements

4.24. The ABBTF submits that its support of apprentice employment has seen an increase in retention rates and reduced attrition.

4.25. The information available to the ACCC suggests there has been a steady increase in apprenticeship commencements since the first version of the scheme was authorised in 1998. Data from the National Centre for Vocational Education Research (NCVER) indicates that from 1998 to 2008, commencements for the March quarter have increased by 257 or 113%, and for the full year by 668 or 95.6%.¹²

4.26. These figures are reproduced in Table 1.

¹² National Bricklaying Apprenticeship Status Report, 15 March 2009, p. 62.

Table 1

Apprenticeship commencements for Bricklaying by March quarters - NCVER data									
	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Australia
1998	96	70	24	10	24	(a)	(a)	(a)	228
1999	134	99	43	8	21	(a)	(a)	5	311
2000	147	122	51	18	30	(a)	(a)	6	374
2001	83	49	25	3	22	(a)	(a)	(a)	187
2002	125	101	28	17	18	(a)	(a)	10	301
2003	119	114	43	21	29	(a)	(a)	12	342
2004	124	149	74	34	51	6	(a)	9	447-451 ^a
2005	115	132	63	31	100	5	(a)	17	463-467 ^a
2006	87	139	55	31	108	7	(a)	9	436-440 ^a
2007	100	107	73	39	119	6	(a)	17	461-465 ^a
2008	107	173	69	44	67	7	(a)	18	485-489 ^a

Source: National Bricklaying Apprenticeship Status Report, 15 March 2009, p. 62.

(a) Due to confidentiality reasons (a) represents figures 1-4 inclusive.

4.27. The ACCC also notes the submission of CBPAQ that apprenticeship numbers within Queensland have increased from 86 in 2003 to 515 in December 2008.

Attrition rates

4.28. A proportion of the apprenticeships started are not completed. Quantifying this attrition rate is difficult, as the numbers can be masked until the point in time where the apprenticeship would have been completed.

4.29. The ABBTF submits that a comparison of the attrition rates of the 2007 apprentices over their first year with historical attrition from previous years shows improved retention with ABBTF support in every state.

Table 2

ATTRITION WITHIN 12 MONTHS FOR APPRENTICE BRICKLAYERS					
	NCVER Stats				ABBTF Supported
Start Year	2003	2004	2005	2006	2007
VIC	33.5	36.8	38.2	35.3	30.7
NSW	29.4	43.3	34.6	39.4	25.6
ACT	42.3	47.6	38.3	25.0	15.0
QLD	34.3	34.7	31.8	32.9	29.3

TAS	22.2	20.0	20.0	40.0	16.7
SA	30.4	16.2	25.3	31.0	20.4
WA	31.9	39.9	32.7	34.5	34.3
	32.2	37.7	34.8	35.1	29.0

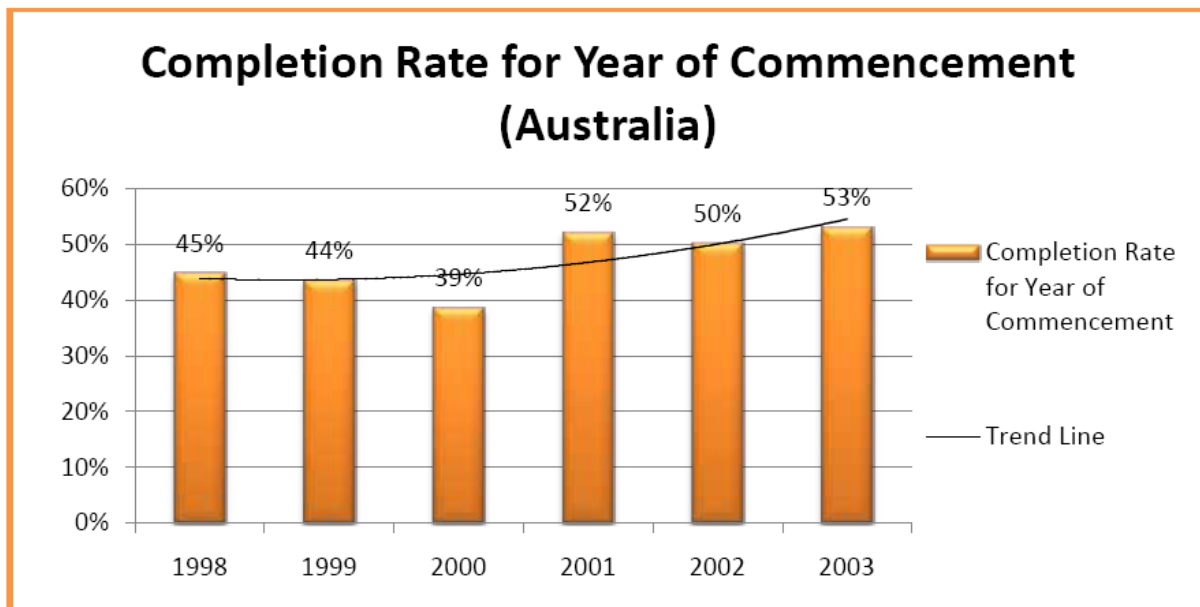
Source: ABBTF application for authorisation, supporting submission, 15 April 2009, p. 6.

4.30. The ABBTF submits that national completions of apprentice bricklayers are¹³:

2005	329
2006	473
2007	598
9 months to September 2008	515

4.31. In order to gauge the success of the program, the ACCC has compared completion figures for a year against the commencement data for the year in which the apprentice would have commenced.¹⁴ For example, an apprentice in Victoria who commenced in 1998 would have completed their apprenticeship training in 2001, whereas apprentices who commenced in 2005 are still in training, so there is no completion data available for them. A comparison of national completion rates and year of commencement figures is outlined in Graph 1.

Graph 1



Source: National Bricklaying Apprenticeship Status Report, 15 March 2009, p. 69.

¹³ ABBTF application for revocation and substitution A91133, supporting submission, 15 April 2009, p. 5.

¹⁴ National Bricklaying Apprenticeship Status Report, 15 March 2009, p. 66.

4.32. The ACCC considers that this data is sufficient to demonstrate that the program has enjoyed some success in redressing skill shortages by increasing apprenticeship numbers and reducing attrition rates. To the extent that this trend continues, the ACCC considers that increased retention rates will deliver public benefits by reducing waste in the delivery of training. In addition, the ABBTF subsidies for employers of apprentices will reduce the cost to industry of an apprentice's on-site employment and training.

Reduction in construction times

4.33. The ABBTF submits that delays in construction times have been reduced since the program was implemented. The ABBTF considers that this is partly attributable to a lower level of building activity and also the increased availability of bricklayers as apprentice completions improve.

4.34. There has been a decline in demand for housing since the 2006 authorisation. Housing starts have reduced by 1.3% per annum over the last five years.¹⁵ It is estimated that demand for bricklaying services further decreased during 2008-09, reflecting a decline in the demand for housing construction and the tightening of lending arrangements as a result of the global financial crisis.¹⁶ The ACCC understands the industry has also been negatively impacted by the trend towards construction of multi unit dwellings and medium density houses which tend to use fewer bricks per dwelling.¹⁷

4.35. As a result, it is difficult to demonstrate that any reductions in construction times that have been experienced are a result of the authorised arrangements. However, the ACCC notes that the Housing Industry Association is forecasting that there will be a strong recovery for the housing sector in 2010.¹⁸ Should this occur, there will be a need for an adequate bricklaying workforce to meet construction deadlines. In this regard, the ACCC notes the submission of the ABBTF that the bricklaying workforce is aging and the current rate of apprenticeship commencements is insufficient to cover those exiting the workforce.

4.36. In this context, the ACCC considers that the scheme is likely to deliver public benefits by helping to ensure that the ongoing supply of skilled bricklayers is sufficient to meet future housing demand. As a result, the program will be reducing delays in construction that are caused by labour shortages and the costs associated with these construction delays.

ACCC conclusion on public benefits

4.37. The ACCC considers that the ongoing operation of the program facilitated by the levies on clay bricks and concrete masonry products is likely to result in public benefits by addressing skill shortages in the bricklaying industry and reducing the resulting delays in construction times.

¹⁵ National Bricklaying Apprenticeship Status Report, 15 March 2009, p. 21.

¹⁶ IBISworld Industry Report, *Bricklaying Services in Australia*, 21 November 2008, p. 23.

¹⁷ National Bricklaying Apprenticeship Status Report, 15 March 2009, p. 22.

¹⁸ *Ibid*, p. 22.

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.¹⁹

4.39. Agreements between competitors which influence the pricing decisions of market participants have the potential to result in allocative inefficiencies. That is, they can move prices away from levels that would be set in a competitive market. This can result in higher prices for consumers and send market signals which direct resources away from their most efficient use.

Increase in the cost of building

4.40. The imposition of the levies will effectively fix an increase in the price of clay bricks and concrete masonry products. This will result in an increase in the cost of building, which means consumers will ultimately be paying higher prices for their houses.

4.41. Based on the information provided by the ABBTF, the levies will add \$16 to the cost of an average sized house,²⁰ given that around 8,000 bricks are used in the construction of an average house.

4.42. Therefore, the ACCC considers that whilst the levy will increase the cost of building, the amount of the increase is negligible relative to the total cost of building a house.

4.43. It is also relevant to the ACCC's assessment that delays in construction resulting from a shortage of skilled bricklayers can add to the cost of building houses. Initiatives which reduce delays in housing construction can also reduce construction costs. To this extent, the ACCC expects that the \$16 increase in the cost of building in brick is likely to be offset by the reduction in construction delays and the reduction in costs associated with those delays.

Potential for collusive anti-competitive conduct beyond that authorised

4.44. Generally, the ACCC would be concerned if, under the guise of the authorised arrangement, other issues were collectively determined between the authorised parties. For example, the ACCC would be concerned if the ABBTF, Think Brick, the CMAA and its members were to raise issues of pricing (beyond the levy) or market sharing in the course of administering the program.

4.45. However, in this regard the ACCC notes that the levy arrangements have been in place for a number of years and there is no evidence to suggest that they have been or are likely to be utilised in any way contrary to the authorised conduct.

¹⁹ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

²⁰ Except Western Australia, where double brick construction means that the levy represents an additional \$40 for the average house.

ACCC conclusion on public detriments

- 4.46. Overall the ACCC is of the view that although the levy results in an increase in the cost of building for consumers, any such increase will be negligible.
- 4.47. In addition, the ACCC considers that the arrangements are unlikely to result in collusive activities beyond those authorised.

Balance of public benefit and detriment

- 4.48. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangements are likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
- 4.49. In the context of applying the net public benefit test at section 90(8)²¹ of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.²²
- 4.50. For the reasons outlined in this chapter, the ACCC is satisfied that the proposed arrangements are likely to generate public benefits, in particular:
- increasing the current and future supply of skilled bricklayers and
 - reduced delays in construction times.
- 4.51. The ACCC considers that the proposed levies are likely to result in limited public detriments.
- 4.52. On balance, the ACCC considers the public benefit is likely to outweigh the public detriment.

Length of authorisation

- 4.53. The Act allows the ACCC to grant authorisation for a limited period of time.²³ 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.
- 4.54. In this instance, the ABBTF seeks authorisation for five years.
- 4.55. In its previous determination regarding these arrangements (A90993), the ACCC authorised the arrangements for three years. The ACCC took the view that this time frame allowed sufficient time to review the impact of the scheme and evaluate whether it delivered the public benefits claimed.

²¹ 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.

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

²³ Section 91(1).

- 4.56. The ACCC notes the ABBTF's submission that a three year term is an insufficient to see sustainable improvements in overcoming delays given that apprentices take three or four years to complete their training.
- 4.57. Having reviewed data on apprenticeship commencements and completions and the submissions from interested parties, the ACCC considers that the arrangements have resulted in public benefits that warrant a longer period of authorisation.
- 4.58. As such, the ACCC proposes to grant authorisation to the proposed arrangements for a period of five years.

5. Draft determination

The application

- 5.1. On 15 April 2009, the Australian Brick and Blocklaying Training Foundation lodged application for authorisation A91133 with the Australian Competition and Consumer Commission (the ACCC).
- 5.2. Application A91133 was made using Form FC of the Trade Practices Regulations 1974. The application was made under subsection 91C of the Act for an agreement between the ABBTF, Think Brick Australia and the Concrete Masonry Association of Australia and their members to apply a levy of \$2 per 1,000 clay bricks sold and 10 cents per square metre on concrete masonry walling products sold in Victoria, New South Wales, Queensland, Western Australia, South Australia, Tasmania and Australian Capital Territory.

The net public benefit test

- 5.3. For the reasons outlined in Chapter 6 of this draft determination, the ACCC considers that in all the circumstances the arrangements for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.
 - The ACCC therefore **proposes to grant** authorisation to application A91133.

Conduct for which the ACCC proposes to grant authorisation

- 5.4. The ACCC proposes to grant authorisation to allow the ABBTF, Think Brick and the CMAA and their members to impose a levy of \$2 per 1,000 clay bricks and 10 cents per square metre on concrete masonry walling products sold in Victoria, New South Wales, Queensland, Western Australia, South Australia, Tasmania and Australian Capital Territory for a period of five years.
- 5.5. Further, the proposed authorisation is in respect of the proposed arrangements as they stands at the time authorisation is granted. Any changes to the arrangements during the term of the proposed authorisation would not be covered by the proposed authorisation.
- 5.6. This draft determination is made on 15 July 2009.
- 5.7. The attachments to this determination are part of the draft determination.

Interim authorisation

- 5.8. At the time of lodging the application, the ABBTF requested interim authorisation for the proposed arrangements. The ACCC granted interim authorisation on 13 May 2009.
- 5.9. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Further submissions

- 5.10. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

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 application A91133

The following table provides a chronology of significant dates in the consideration of the application made by the ABBTF.

DATE	ACTION
15 April 2009	Application for authorisation lodged with the ACCC, including an application for interim authorisation.
4 May 2009	Closing date for submissions from interested parties in relation to the request for interim authorisation.
13 May 2009	The ACCC granted interim authorisation.
18 May 2009	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
15 July 2009	Draft determination issued.

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.

- (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.²⁴

²⁴ *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.

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.²⁵

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).

Conditions

The Act allows the ACCC to grant authorisation subject to conditions.²⁶

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 future²⁷
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.²⁸

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation²⁹. 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

²⁵ 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.

²⁶ Section 91(3).

²⁷ Section 88(10).

²⁸ Section 88(6).

²⁹ Section 90(10A)

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.³⁰ 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.³¹

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 arrangements.

Revocation and revocation and substitution

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.³² The ACCC may also review an authorisation with a view to revoking it in certain circumstances.³³

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.³⁴ The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.³⁵

³⁰ Subsection 91A(1)
³¹ Subsection 87ZD(1).
³² Subsection 91B(1)
³³ Subsection 91B(3)
³⁴ Subsection 91C(1)
³⁵ Subsection 91C(3)