



Australian  
Competition &  
Consumer  
Commission

# **Draft** Determination

## **Applications for authorisation**

**lodged by**

**The State of Queensland acting through  
the Office of Liquor and Gaming Regulation**

**in respect of**

**a pro-forma liquor accord arrangement**

**Date: 12 August 2010**

**Authorisation no.: A91224 &  
A91225**

**Public Register no.:C2010/420**

**Commissioners:** Samuel  
Kell  
Schaper  
Court  
Dimasi  
Walker  
Willett

## Summary

The ACCC proposes to conditionally authorise a pro-forma liquor accord arrangement which is proposed to form the basis of liquor accords between stakeholders in local areas in Queensland. The ACCC proposes to grant authorisation for three years.

The State of Queensland, through the Office of Liquor and Gaming Regulation (**OLGR**), has applied for authorisation of a pro-forma liquor accord arrangement. Liquor accords are agreements signed between licensed premises and local authorities which aim to deal with harm resulting from alcohol abuse. The pro-forma accord includes a number of measures for which authorisation is not requested, including provisions to combat underage drinking and record security incidents. The applications cover:

- price controls (that is, a ban on drink cards, extreme discounts and discounts of limited duration, and a requirement to offer smaller serves of full strength drinks and serves of lower alcohol beverages at lower prices than full strength beverages) and
- supply controls (that is, a ban on serving alcohol in nonstandard containers such as water pistols or test tubes, on drinking games, and on advertising or allowing promotions of particular drinks).

OLGR will not be a signatory to any individual accord, but will advise on and oversee their implementation. Accord membership will be voluntary and will only apply to premises that sell alcohol for on-site consumption. Compliance with the terms of an accord will not be enforced. Each accord will cover only the local area, and will contain only those terms from the pro-forma accord that the signatories choose to implement.

The ACCC considers that there is a public benefit in allowing local accord bodies to agree to and implement arrangements containing price and supply controls to minimise alcohol-related harms. The ACCC also considers that there is a public benefit in enabling OLGR to pursue community based harm minimisation strategies.

The ACCC considers that the price and supply controls are also likely to result in some public detriment through potential effects on price and consumer choice.

However, the ACCC considers that these detriments will be mitigated as the price and supply controls are confined in their operation to drinking venues (not liquor retailers) in areas where there are relevant identified harms. Further, participating in an accord will be voluntary and the terms of each accord will be nonbinding.

To further minimise any detriment the ACCC proposes to grant authorisation subject to the following conditions.

In order to ensure that price and supply controls are only adopted in local areas where there are relevant identified harms, the ACCC proposes to impose conditions with the following effects:

- Liquor accords based on the pro-forma arrangement are to include price and/or supply controls only where such controls are required to deal with identified harms. These harms should be set out in the accord document and relate to alcohol abuse in and around premises licensed to sell alcohol for on-site consumption in the local area covered by the accord.

- Where an accord contains price or supply controls, the accord is to document the harms targeted. OLGR will develop indicators which will measure whether the controls have been implemented and whether they have had an impact on the harms.
- These indicators will be measured when the accord is initiated, and every twelve months after that for the life of the accord.
- Copies of all accord documentation, including the arrangement, the list of identified harms, the list of specific beverages targeted (if any) with related reasons and approvals, all measurements of indicators and the names of all signatories to the accord must be supplied to OLGR as they are produced, with copies being kept by the accord body for the life of the accord. Copies of this documentation must be supplied by the applicant to the ACCC on request.

In order to mitigate the risk of incorrectly identifying a beverage, the ACCC proposes to impose a condition with the following effect:

- Where specific beverages are targeted for serving or advertising and promotion bans, the reasons for this targeting must be recorded in the accord arrangement. Specific beverages must not be targeted solely because more profitable alternatives are available.

In order to minimise potential ambiguity, the ACCC proposes to impose a condition with the following effect:

- The pro-forma liquor accord arrangement is to include definitions of the following terms and phrases (along the lines proposed by OLGR):
  - ‘Extreme discounts’
  - ‘Discounts of limited duration’
  - ‘Drinks that, by their method of consumption, encourages irresponsible drinking habits and are likely to result in rapid intoxication’
  - ‘Very high alcohol substances’
  - ‘High alcohol carbonated drinks’

Overall, the ACCC considers that the overall public benefit associated with the pro-forma liquor accord arrangement is likely to outweigh any public detriment.

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 a conference be held to make oral submissions on the draft determination.

# Contents

<b>1. THE APPLICATIONS FOR AUTHORISATION.....</b>	<b>1</b>
THE PRO-FORMA LIQUOR ACCORD ARRANGEMENT .....	1
THE CONDUCT.....	4
OTHER PARTIES .....	4
<b>2. BACKGROUND TO THE APPLICATIONS.....</b>	<b>5</b>
THE APPLICANT .....	5
THE LEGISLATIVE FRAMEWORK IN QUEENSLAND .....	5
THE ROLE OF THE ACCC .....	6
<b>3. SUBMISSIONS RECEIVED BY THE ACCC .....</b>	<b>7</b>
Submissions in support of the applications for authorisation.....	7
Submissions opposing the applications for authorisation .....	8
Responses by the applicant.....	8
<b>4. ACCC EVALUATION .....</b>	<b>10</b>
THE MARKET.....	10
THE COUNTERFACTUAL.....	11
ACCORD ENFORCEMENT .....	11
PUBLIC BENEFIT.....	12
<i>Reducing overall alcohol consumption.....</i>	<i>13</i>
<i>Reduced consumption of riskier beverages .....</i>	<i>14</i>
ACCC conclusion on public benefits .....	15
PUBLIC DETRIMENT.....	15
Price controls.....	15
Supply controls.....	16
ACCC conclusion on public detriments.....	16
BALANCE OF PUBLIC BENEFIT AND DETRIMENT .....	17
LENGTH OF AUTHORISATION.....	21
VARIATIONS TO THE PLAA.....	21
<b>5. DRAFT DETERMINATION.....</b>	<b>22</b>
THE APPLICATIONS .....	22
THE NET PUBLIC BENEFIT TEST.....	22
CONDUCT FOR WHICH THE ACCC PROPOSES TO GRANT AUTHORISATION.....	24
CONDUCT NOT PROPOSED TO BE AUTHORISED .....	24
FURTHER SUBMISSIONS .....	25
ATTACHMENT A — THE AUTHORISATION PROCESS .....	26
ATTACHMENT B — CHRONOLOGY OF ACCC ASSESSMENT FOR APPLICATIONS - A91224 AND A91225 .....	27
ATTACHMENT C — THE TESTS FOR AUTHORISATION AND OTHER RELEVANT PROVISIONS OF THE ACT.....	28

## List of definitions

Code of Practice	The Queensland Code of Practice for the Responsible Service, Supply and Promotion of Liquor, agreed in 2005
drinking venue	Premises licensed to sell alcohol for on-site consumption
DSICA	The Distilled Spirits Industry Council of Australia
liquor accord	An agreement between licensed premises, local government, police and other local stakeholders to curb alcohol related harms
Liquor Act	The <i>Liquor Act 1992 (QLD)</i>
Liquor Regulation	The <i>Liquor Regulation 2002 (QLD)</i>
liquor retailer	Premises licensed to sell alcohol for off-site consumption
NDRI	The National Drug Research Institute
OLGR	The Office of Liquor and Gaming Regulation
PLAA	The pro-forma liquor accord arrangement
price controls	Bans on drink cards, extreme discounts and discounts of limited duration; and requirements to charge lower prices for smaller serves of full strength beverages and for low or non alcoholic beverages
signatory	One who signs a liquor accord
supply controls	Bans on offering certain beverages; and bans on advertising or promoting certain beverages
TPA	The <i>Trade Practices Act 1974</i>

# 1. The applications for authorisation

- 1.1. 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 **TPA**). 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.
- 1.2. On 15 April 2010, the State of Queensland through the Office of Liquor and Gaming Regulation (**OLGR**) lodged application for authorisation A91224 with the ACCC. OLGR lodged A91225 on 23 April 2010 in relation to the same conduct.
- 1.3. Application A91224 was made under section 88(1A) of the TPA to make and give effect to a provision of a contract, arrangement or understanding, a provision of which is, or may be, a cartel provision and which is also, or may also be, an exclusionary provision within the meaning of section 45.
- 1.4. Application A91225 was made under section 88(1) of the TPA 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.
- 1.5. OLGR has applied for authorisation of a pro-forma liquor accord arrangement (**PLAA**). Liquor accords are signed by licensed premises and others in a particular area and contain strategies to reduce the harms caused by the abuse of alcohol. Signatories to accords include those businesses in an area which are licensed to serve alcohol for consumption on site, as well as that area's police, local government body and any other significant community stakeholders who are affected by the abuse of alcohol. Liquor accords are used in many jurisdictions around Australia and can involve a variety of measures to improve the safety and amenity of all those in the accord area.
- 1.6. OLGR seeks authorisation for a period of five years or 'until revoked by the State of Queensland'.

## The pro-forma liquor accord arrangement

- 1.7. The PLAA would form the basis of local liquor accords throughout Queensland. OLGR advises that such accords will be voluntary and nonbinding. Businesses licensed to sell alcohol for off-site consumption would not be affected.
- 1.8. The section of the PLAA for which authorisation is sought is titled 'Responsible Service of Alcohol' and makes up only a small part of the document. The provisions in that section which have been identified as potentially raising concerns under the TPA are as follows:

### Discourage Activities that Encourage Excessive Drinking

- *Ban practices and promotions that may encourage rapid or excessive consumption of liquor, for example:*
  - *‘drink cards’ that provide a multiple of free drinks*
  - *extreme discounts or discounts of limited duration*
  - *any other promotions or gimmicks that encourage rapid intoxication.*
- *Ensure smaller serves of drinks (e.g. half nips) are available at differential (lower) prices.*

### Not Promote or Sell Alcoholic Beverages that may Encourage Rapid or Excessive Consumption of Liquor

- *Avoid offering drinks that, by their method of consumption, encourages irresponsible drinking habits and are likely to result in rapid intoxication.*
- *Not advertise or allow promotions of very high alcohol substances - such as overproof rum and high alcohol carbonated drinks.*

### Promote Non or Low Alcohol Beverages and Food

- *Offer and promote low alcohol beer at differential (lower) prices compared to full strength.*
- *Offer and promote a range of non alcoholic drinks at differential (lower) prices.*

1.9. After a request from the ACCC, OLGR supplied the following clarifications of terms used in the PLAA.

- *‘Extreme discounts’ – e.g. two for one drinks and half price drinks. It does not prohibit or restrict licensees from discounting drinks.*
- *‘Discounts of limited duration’ – Examples of such discounts include “happy hours” for half an hour or promotions that set a small time (e.g. 15 minutes) where liquor is discounted. The phrase does not prohibit or restrict licensees from discounting or having happy hours.*
- *‘Drinks that, by their method of consumption, encourages irresponsible drinking habits and are likely to result in rapid intoxication’ – This phrase contemplates scenarios where drinks are offered in objects or items that are non-standard glasses certified by Weights and Measures (e.g. “test tubes” and “water pistols”). It also contemplates drinking games requiring the consumption of liquor in a short period of time which can lead to rapid and/or excessive consumption of liquor (e.g. skolling games and ‘laybacks’ as prescribed in section 41 of the Liquor Regulation 2002).*
- *‘Very high alcohol substances’ – Examples of high level alcohol pre-mix drinks include:*

○ DNA Cosmo	250ml	10.0%	2 standard drinks
○ Long Island Teas	275ml	10.0%	2 standard drinks

*Some pre-mixes have a lower alcohol percentage but larger containers can have a greater standard drink percentage:*

○ Vodka Cruiser	660ml	5.0%	2.6 standard drinks
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- *Wild Turkey Bourbon and cola*            375ml    8.0%            2.4 standard drinks
- *Johnnie Walker Premium*                375ml    6.9%            2.0 standard drinks

*The alcohol strength of some ready to drink (RTD) products has increased to 6-9 percent alcohol by volume. Some of these so-called “premium” RTD products (e.g. Smirnoff, Bundaberg Rum and Johnnie Walker) contain 2 standard drinks, while some bourbon and cola RTD products (e.g. Woodstock Blue) contain nearly 3 standard drinks.*

- *‘High alcohol carbonated drinks’ – this term refers to energy drinks (e.g. Red Bull) mixed with alcohol ... Some alcoholic energy drinks (e.g. Pulse) contain as much as 8 percent alcohol.*

- 1.10. The ACCC also requested clarification of the enforceability of the PLAA, specifically regarding the following material taken from the section in the PLAA titled ‘Commitment To Being Good Neighbours’.

*Actively Monitor and Promote the Accord*

- *Notify the Police, or other relevant authorities where appropriate, of any event or practice detected that may impact on the Accord or any other licensing law or regulation.*

- 1.11. OLGR provided the following clarifications.

- *‘Any event or practice detected that may impact on the Accord’ – This phrase refers to events or practices (e.g. which lead to the rapid and/or excessive consumption of liquor, or which attract under aged persons) that has an impact on Accord licensees in a locality who are working to comply with the Liquor Act 1992 or the obligations and responsibilities of their respective licence authorities. Some example events or practices include ‘all you can drink’ promotions and under aged events not authorised with the appropriate measures to control under aged persons.*
- *The role of Police and other relevant authorities – Police and other relevant authorities across the State are active stakeholders of Accords. They help licensees to drive, manage and promote Accords by providing education, information and assistance to licensees at Accord meetings on legislation, legislative amendments, and local issues or trends. They do not take on the roles of the executive committee but may be on committees to assist in the management of the Accord.*

- 1.12. These clarifying statements do not currently form any part of the PLAA. They do not always accord with the ordinary meanings of the words in the PLAA. For these reasons, in order to minimise any ambiguity, the ACCC proposes to impose a condition with the following effect:

- The pro-forma liquor accord arrangement is to include definitions of the following terms and phrases (along the lines proposed by OLGR):
  - ‘Extreme discounts’
  - ‘Discounts of limited duration’
  - ‘Drinks that, by their method of consumption, encourages irresponsible drinking habits and are likely to result in rapid intoxication’
  - ‘Very high alcohol substances’
  - ‘High alcohol carbonated drinks’

## **The conduct**

- 1.13. The PLAA provisions requiring bans on drink cards, extreme discounts and discounts of limited duration, as well as those requiring signatories to charge lower prices for smaller serves of full strength beverages and for low or non alcoholic beverages will be referred to as the **price controls**. The provisions requiring signatories not to offer or advertise particular beverages will be referred to as the **supply controls**.
- 1.14. The provisions in the PLAA describing conduct for which authorisation is sought, consisting of the price controls and the supply controls, will be referred to as the **relevant provisions**.

## **Other parties**

- 1.15. OLGR will not be a signatory to any arrangement based on the PLAA, although it would advise signatories on how to set up such arrangements and attend meetings to assist in their management.
- 1.16. Under section 88(6) of the TPA, 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. OLGR asks that authorisation be extended to those who sign a document identical to the PLAA.

## **Effect of authorisation**

- 1.17. The PLAA is a template document which signatories are encouraged to amend for their own purposes to take into account the particular problems in their area. Authorisation only means that signatories will have protection from legal action over conduct that would otherwise be illegal under the TPA. It does not change the nature of the underlying arrangements, make joining them mandatory or their terms enforceable, or grant additional powers to signatories or regulators.
- 1.18. Signatories should note that any modification to the relevant provisions or conduct based on such modification would not be covered by the authorisation, and any contraventions of the TPA so caused could result in enforcement action by the ACCC or private action by those affected. However, signatories should also note that the relevant provisions form only a small part of the PLAA, and other parts can be amended without affecting the protection afforded by the authorisation. Signatories should further note that the removal of price or supply controls from their accord arrangement would not, by itself, contravene the TPA.

## 2. Background to the applications

### The applicant

- 2.1. OLGR is part of the Queensland Department of Employment, Economic Development and Innovation. It is responsible for administering legislation and drafting policy to manage gambling and alcohol in Queensland. This includes managing licences to supply alcohol, auditing compliance with licence conditions and prosecuting for failures to comply. Although it does not propose to enter or approve individual accord agreements, it will advise signatories on their setup and management, and serves as overseer of the policy initiative.

### The legislative framework in Queensland

- 2.2. Liquor accords are permitted under section 224 of the *Liquor Act 1992 (QLD)* (the **Liquor Act**). The section reads:

#### **224 Liquor accord**

- (1) *Any 2 or more interested persons may be parties to a liquor accord for a locality in which licensed premises are situated.*
- (2) *In this section—*
- liquor accord**, for a locality, means an agreement, memorandum of understanding or other arrangement entered into for the purposes of—
- (a) *promoting responsible practices in relation to the sale and supply of liquor at licensed premises situated in the locality; and*
- (b) *minimising harm caused by alcohol abuse and misuse and associated violence in the locality; and*
- (c) *minimising alcohol-related disturbances, or public disorder, in the locality.*

- 2.3. The Liquor Act provides no further guidance as to the contents of liquor accords, whether they are to be voluntary or can be enforced. It also does not specifically authorise accord signatories to engage in conduct which would otherwise contravene the TPA. This means that authorisation is still required for any such conduct.

- 2.4. The Liquor Act is accompanied by the *Liquor Regulation 2002 (QLD)* (the **Liquor Regulation**), and both documents contain a number of requirements or prohibitions which are potentially replicated by the PLAA. These include:

- Happy hours being limited to a maximum of 2 hours before 9pm, 1 hour between 9pm and 1am, and banned thereafter.
- Bans on any ‘activity that encourages rapid or excessive consumption of liquor’, for example:
  - skolling games
  - laybacks
  - consumption of liquor from a water pistol
- Bans on ‘serving, supplying or promoting liquor in a container that encourages rapid or excessive consumption of liquor’, for example

- serving liquor in a yard glass for consumption at 1 draught
  - serving liquor in a test tube shaped glass without providing a stand on which the glass can be placed.
  - Bans on supplying an ‘undesirable liquor product’, which is declared by the relevant Minister on the basis that:
    - the product is likely to be attractive to minors or young people or
    - it is otherwise in the public interest to declare the product undesirable.
- 2.5. The Queensland legislative regime covering alcohol, including the Liquor Act and the Liquor Regulation, are currently under review following an inquiry by the Law, Justice and Safety Committee of the Legislative Assembly of Queensland into alcohol-related violence. Recommendation 35 of that inquiry’s final report stated:
- The Committee endorses the liquor accord concept, recommends its further development, and encourages Government agencies and local authorities to support and provide assistance to accords where possible.*
- 2.6. The supply of alcohol in Queensland is also covered by the Code of Practice for the Responsible Service, Supply and Promotion of Liquor (the **Code of Practice**), which came about in 2005. The Code of Practice was agreed between the Queensland Government, police, alcohol manufacturers and industry groups such as Cabarets Queensland, the Queensland Hotels Association and Clubs Queensland, but appears not to be enforceable.
- 2.7. The Code of Practice notes the obligations of licensees under the Liquor Act and provides guidance on which practices and promotions are to be regarded as acceptable and which are not. It also defines some terms which are used but not defined in the Liquor Act and the Liquor Regulation, such as ‘rapid’, ‘excessive’ and ‘promotion’. In this context it describes discounts of less than one hour as low risk.

## **The role of the ACCC**

- 2.8. The ACCC is responsible for administering the TPA. This includes granting immunity from legal action for conduct that might otherwise raise concerns under the competition provisions of that Act, through the authorisation process. It is not the role of the ACCC to assess the effectiveness of liquor accords in general as a strategy for decreasing the harm caused by alcohol abuse, nor to consider whether the PLAA contains the best possible combination of measures to achieve that aim. The ACCC did not draft the PLAA.

### **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, OLGR submits that the benefit of reducing harm caused by alcohol in the community outweighs any detriment. It claims that eliminating certain discounts on alcohol purchases will reduce consumption, which will in turn reduce harm resulting from that consumption. It also claims that bans on advertising and promotion of certain alcoholic drinks that are claimed to encourage harmful behaviour will lead to lower consumption of those beverages and reduced resultant harm.
- 3.3. The ACCC sought submissions from 65 interested parties potentially affected by or interested in the applications, including representatives of liquor retailers and wholesalers, licensed venues, local, state and federal governments, as well as substance abuse support workers and researchers. A summary of the public submissions received from interested parties are set out below.

#### **Submissions in support of the applications for authorisation**

- 3.4. The Alcohol and other Drugs Council of Australia supports the applications. It declined to comment on the PLAA specifically but supports liquor accords in general, provided they are part of a wider community strategy, feature appropriate enforcement and are properly evaluated.
- 3.5. The Alcohol and Drug Foundation Queensland supports the applications, stating the PLAA has obvious benefits to the community, even on a voluntary basis.
- 3.6. The City of Brisbane supports the applications, though it wishes to ensure that sufficient flexibility within the pro-forma is allowed so that local circumstances can be reflected.
- 3.7. Clubs Queensland supports liquor accords in principle and the PLAA in particular, provided membership remains voluntary.
- 3.8. Coles Liquor supports the applications but raised concerns about the vagueness of some aspects of the PLAA.
- 3.9. The Commonwealth Department of Health and Ageing supports the applications, noting the harm caused by alcohol and the positive effects that liquor accords can have.
- 3.10. Gold Coast City Council supports the applications, suggesting that the PLAA will help the development of liquor accords and the monitoring of their effectiveness. It notes that it already participates in a local accord and that the voluntary partnership with those in the industry helps identify potential solutions to the problems of violence and vandalism that the Gold Coast is currently experiencing.

- 3.11. Independent Distillers is supportive of the applications but raised concerns about the lack of definitions of particular terms in the PLAA. Independent Distillers also states that total alcohol consumption in Australia increased after the 2009 increase in the excise on Ready To Drink beverages.
- 3.12. The National Drugs Research Institute (**NDRI**) supports the goals of liquor accords, but notes that their effectiveness is limited when they are not mandatory and compliance is not enforced. It notes that compliance with the PLAA would be a disadvantage for those competing with businesses who did not comply.
- 3.13. Queensland Health supports the applications, noting the similarity between some of the measures in the PLAA and the alcohol prevention programs it implements.
- 3.14. The Queensland Police Service stated that it had no issues to raise concerning the applications.
- 3.15. St Vincent de Paul Society Queensland supports the applications, noting its direct experience with the harms caused by alcohol and the benefits of measures to reduce these harms.

#### **Submissions opposing the applications for authorisation**

- 3.16. The Distilled Spirits Industry Council of Australia (**DSICA**) opposes the applications on a number of grounds, including that the accords would not be voluntary, the claimed benefits are not supported by research and the authorisation would extend accords to areas where they are not needed. It notes that many of the requirements or prohibitions duplicate measures under existing laws, while some concepts, such as the risk from discounts of less than one hour, differ between the Code of Practice and the PLAA.
- 3.17. The Queensland Hotels Association (**QHA**) opposes the applications, claiming the PLAA will be binding on signatories, its voluntary nature could change and its potential benefits do not outweigh the detriments to competition. QHA also believes that a pro-forma is not appropriate, as the problems facing communities vary from location to location, and each community should be able to come up with its own solution.

#### **Responses by the applicant**

- 3.18. OLGR provided two sets of responses to interested party submissions. The first stated:
  - There is no intent to set prices for beverages or make liquor advertising illegal. Only some discounts are affected by the price controls.
  - The recent Queensland inquiry into liquor reform was made aware of the PLAA.
  - The PLAA was developed in response to industry requests.
  - The definitions in the PLAA have been and will continue to be clarified.
  - The effectiveness of accords continues to be assessed.
  - There is no intent to make liquor accords mandatory or binding (but the PLAA does include measures which are enforceable under the Liquor Act or the Liquor Regulation).

- 3.19. The second specifically responded to a number of assertions by DSICA, stating:
- There is no intent to include all measures in the PLAA in all liquor accords.
  - Accords should extend to venues not experiencing problems, for the sake of preventing risks from occurring.
  - The PLAA works in tandem with other regulatory measures and does not ignore them. It is consistent with the Code of Practice. Discounts involving very short timeframes such as 15 minutes can create different risks from those lasting for two hours or those taking place after 9pm, but all such risks need to be managed.
  - DSICA overstates the economic incentives to join accords containing supply controls, and does not provide any evidence regarding potential OLGR or police coercion regarding accord participation.
  - The term ‘Very high alcohol substances’ does not refer only to RTDs. It refers to those beverages which contain 2 or more standard drinks per serve. RTDs were chosen as an example because of their rising popularity.
  - The proposition that violence in and around drinking venues is a problem is supported by research.
- 3.20. The views of OLGR and interested parties are taken into account in the ACCC’s evaluation of the PLAA in Chapter 4 of this determination. Copies of public submissions may be obtained from the ACCC’s website ([www.accc.gov.au/AuthorisationsRegister](http://www.accc.gov.au/AuthorisationsRegister)) and by following the links to this matter<sup>1</sup>.

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<sup>1</sup> The full list of consulted parties can be found as an attachment to the letter **ACCC to Interested Parties re Consultation Process - 28.04.10** on the **ACCC Correspondence** page.

## 4. ACCC evaluation

- 4.1. The ACCC's evaluation of the PLAA is in accordance with tests found in sections 90(5A) and 90(5B) of the TPA 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.
- 4.2. For more information about the tests for authorisation and relevant provisions of the TPA, please see [Attachment C](#).
- 4.3. As noted above, the ACCC's analysis is confined to the particular price and supply provisions of the PLAA for which authorisation is sought.

### The market

- 4.4. 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.
- 4.5. OLGR submits the relevant area of competition is the market for 'the supply and service of alcohol to members of the public (18 years or over) within a "destination drinking venue" which may extend to venues that supply entertainment and/or the service of meals'. OLGR states that these venues do not compete in the same market as retailers who sell alcohol for consumption off site. The former will be referred to as **drinking venues**, the latter as **liquor retailers**.
- 4.6. OLGR notes that because the PLAA is intended for use throughout Queensland there are many different markets involved. Some will be in rural areas such that consumers may have to travel large distances to escape the accord's coverage, and others will be in urban areas where consumers are likely to be readily able to attend licensed premises not covered by an accord.
- 4.7. None of the submissions received so far has commented on OLGR's market definitions, or obviously held a different view.
- 4.8. The ACCC considers that the main competitors to drinking venues are other drinking venues. They compete not only on price and range of beverages, but also on the basis of different bundled services (such as seating, food, music, games, televisions and so on) and the quality of those services.
- 4.9. The ACCC largely accepts the markets contemplated by OLGR. Liquor accords are repeatedly referred to in the PLAA and elsewhere as 'local', without any definition of

that term. The ACCC would expect accord signatories to interpret the term in a common-sense way, taking into account the factual basis on which the need for the accord was recognised – for example, if alcohol-related problems do not extend past a particular boundary, neither should the accord.

- 4.10. Accordingly, for the purpose of assessing these applications, the ACCC considers the relevant area of competition affected by the proposed conduct to be the market for the supply and service of alcohol to members of the public (18 years or over) in the drinking venues within a local area.

## **The counterfactual**

- 4.11. 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 conduct for which authorisation has been sought.<sup>2</sup>
- 4.12. 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’.
- 4.13. OLGR submits that, in the absence of ACCC authorisation, there will be ‘some uncertainty as to the scope of initiatives that may be adopted by accord members.’ Interested parties have not expressed views about the counterfactual.
- 4.14. The ACCC considers that the applications for authorisation arose from a recognition that there is a potential TPA compliance risk with liquor accords containing the relevant provisions. As such, the ACCC is of the view that the most likely counterfactual is that new accords would not contain the price and supply control provisions contemplated by the PLAA, and that drinking venues would continue to engage in price discounting and the free supply of alcohol products which are identified to cause particular harm.

## **Accord enforcement**

- 4.15. OLGR has repeatedly advised that accords will be voluntary (that is, signatories will be free to choose whether or not to join) and that they will not be enforceable (that is, each signatory will be free to choose whether or not to implement any measure in an accord, without being influenced by whether or not any other signatory to that accord has implemented that measure). DSICA and QHA dispute this, claiming that regulators will bring pressure to bear on signatories to join accords and implement the measures in the PLAA.
- 4.16. The ACCC has assessed the impact of the PLAA on the basis that it is voluntary and nonbinding.

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<sup>2</sup> *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.

## **Public benefit**

- 4.17. Public benefit is not defined in the TPA. 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 principal elements ... the achievement of the economic goals of efficiency and progress.<sup>3</sup>

## **Minimising identified harms**

- 4.18. The price and supply controls in the PLAA are intended to assist in minimising harm from the misuse of alcohol and minimising alcohol-related disturbances, or public disorder, in and around licensed premises.
- 4.19. Submissions from interested parties are universally supportive of measures which seek to reduce alcohol related harms. Even those opposing the applications, DSICA and QHA, endorse the strategy of local solutions to local problems.
- 4.20. The ACCC recognises the value of consensus between local communities and traders toward achieving reductions in alcohol abuse.
- 4.21. Accordingly, the ACCC accepts that there is a public benefit in allowing local accord bodies to implement accords containing the price and supply controls in circumstances where those controls contribute to minimising identified harms in and around drinking venues in the local area.

## **Enabling OLGR to pursue community based harm minimisation strategies**

- 4.22. The ACCC notes the submission by OLGR that the voluntary use of liquor accords and the range of strategies included in the PLAA represent only one of a suite of harm minimisation measures. OLGR also states that liquor accords work in tandem with legislation and other measures to:
- reduce the harmful social, health and economic consequences of excessive alcohol consumption and
  - educate and promote responsible attitudes in relation to the sale, supply and consumption of alcohol.
- 4.23. The ACCC recognises that there is a high level of community concern about the harm caused by alcohol abuse, including instances of violence and anti-social behaviour around drinking venues. Drinking venues have an important role to play in promoting the responsible consumption of alcohol. In this context alcohol accords have been widely recognised as potentially playing an important role in assisting local communities deal with problems associated with alcohol abuse.
- 4.24. The ACCC accepts that there is a public benefit in allowing drinking venues in a local area to work together with the support of the State government liquor regulatory body

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<sup>3</sup> *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.

to adopt strategies aimed at minimising the harm that can be caused by the misuse of alcohol at their drinking venues.

- 4.25. The ACCC considers that the PLAA provides a transparent, State government endorsed framework within which this local, community based cooperative effort can take place.

### **Public benefits claimed by OLGR**

- 4.26. OLGR submits that liquor accords containing the relevant provisions will deliver public benefits including:

- Reduced overall alcohol consumption, which will lead to reduced harms.
- Reduced consumption of particular beverages which are more likely than others to cause harms (**riskier beverages**), which will lead to reduced harms.

- 4.27. For the purposes of this assessment, these public benefits relate only to the abuse of alcohol (and related harms) in and around drinking venues in each accord area.

### ***Reducing overall alcohol consumption***

- 4.28. Research by the NDRI and others indicates that, as overall alcohol consumption in a given population rises or falls, so do the incidence and gravity of related harms<sup>4</sup>. In the absence of the ability to directly target those who abuse alcohol, lowering the overall level of use appears to be an imprecise but ultimately effective way of reducing harms.

- 4.29. The ACCC notes that the price controls in the PLAA would eliminate some forms of discounting, meaning that if consumers were to purchase the same amount of the beverages they had bought before, their total spending would be higher. The effect would be the same as a small rise in the prices of those beverages at that venue (though they would not raise the prices displayed).

- 4.30. There is strong evidence that a rise in the price of all alcohol will generally be followed by a decrease in consumption, and price falls are likely to increase use.<sup>5</sup>

- 4.31. The ACCC accepts that the small effective price rise resulting from eliminating discounts, along with preferential pricing for lower alcohol beverages, is likely to result in reduced consumption. The evidence available to the ACCC suggests that this in turn is likely to contribute to a reduction in alcohol related harms, where those harms are present. The ACCC considers that this produces a public benefit.

- 4.32. The ACCC emphasises that the price controls in this case need to be considered in the context of the harms they are intended to address. It is essential to note that nothing in this authorisation gives drinking venues legal protection to agree on prices more generally.

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<sup>4</sup> National Drug Research Institute, *Restrictions on the Sale and Supply of Alcohol: Evidence and Outcomes*, NDRI, 2007, Perth, pp. 1-3.

<sup>5</sup> *ibid.*, pp. 21-23. Also see David Crosbie, Tim Stockwell, Alex Wodak, Ilse O'Ferrall, Alcohol, Taxation Reform and Public Health in Australia: A submission to the Federal Parliamentary Inquiry into Substance Abuse in Australian Communities, Australian Parliament House, Canberra, 2000, p. 10 citing P Gruenewald, T Stockwell, E Dyskin & A Beel 'Beverage sales and drinking and driving: The role of on-premise drinking places', *Journal of Studies on Alcohol and Drugs*, 60, 1, 47-53, Center of Alcohol Studies, New Jersey, 1999.

### *Reduced consumption of riskier beverages*

- 4.33. The ACCC notes that the price controls would not affect particular beverages differently from any other. Any reduction in the consumption of riskier beverages would only occur as part of a fall in consumption of all beverages. As such, only the supply controls will be considered in relation to this claimed benefit.
- 4.34. Research by the NDRI appears to support the notion that certain beverages are more associated with harms than others, independent of their alcohol content. According to the NDRI, ‘regular strength beer has been strongly associated with drink-driving and road crashes, particularly among young males, for whom it is usually a preferred beverage.’ Cheap cask and fortified wine has also been associated with significant problems<sup>6</sup>. Non-standard containers such as test tubes and water pistols have been banned under the Liquor Regulation and described as high or unacceptable risks by the Code.
- 4.35. However, the research is not entirely clear on whether harms are a function of the beverages themselves or of their popularity with people who abuse alcohol. Where restrictions on the sale of certain beverages have been attempted, it is not always clear from the research that a fall in the purchases of those beverages has been accompanied by a fall in abuse-related harms.
- 4.36. The ACCC notes the submission by DSICA that drinking venues make more from selling beverages they have mixed themselves than they do from RTDs, and that this could influence their judgement.
- 4.37. The ACCC considers that if there is a clear causal connection between a particular beverage and harms, then there is likely to be a public benefit from restricting the availability of that beverage. The bans on beverages in nonstandard containers and advertising or promoting particular beverages give local accords the flexibility to deal with the harms they are experiencing by directly targeting a cause of those harms. In order to mitigate the risk of incorrectly identifying a beverage, the ACCC proposes to authorise such targeting, subject to a condition to the effect that:
- Where specific beverages are targeted for serving or advertising and promotion bans, the reasons for this targeting must be recorded in the accord arrangement. Specific beverages must not be targeted solely because more profitable alternatives are available.

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<sup>6</sup> NDRI, pp. 27-29 and 189.

## **ACCC conclusion on public benefits**

- 4.38. The ACCC considers that there is a public benefit in allowing local accord bodies to agree on and implement accords containing price and supply controls to minimise identified harms in and around licensed premises in a local area. The ACCC also considers that there a public benefit in enabling OLGR to pursue community based harm minimisation strategies.
- 4.39. The ACCC accepts that the PLAA is also likely to result in public benefits arising from an overall reduction in alcohol consumption and from serving, advertising and promotion bans which are correctly targeted at riskier beverages.

## **Public detriment**

- 4.40. Public detriment is also not defined in the TPA 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.<sup>7</sup>

## **Price controls**

- 4.41. Agreements between competitors which influence the pricing decisions of market participants have the potential to result in prices moving 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.
- 4.42. In this instance, eliminating some discounts will mean that, if consumers wish to purchase the same amount of alcohol, they will need to pay slightly more. The effect will be the same as a small price rise across all of the venue's products.
- 4.43. OLGR submits that the relevant provisions in the PLAA will not cause any detriment to consumers. It notes that drinking venues may complain about not having the freedom to price as they choose, but states that these need to be considered in the context that liquor accord arrangements are voluntary and non-binding.
- 4.44. The ACCC considers that the extent of any detriment arising from the price controls is likely to be mitigated by the fact that they will only operate within the boundaries of accords where they are adopted (which will only be those accords where there are relevant identified harms), and even then the voluntary and nonbinding nature of the accord will limit their application. In order to ensure that price controls are only adopted in the presence of relevant identified harms, the ACCC proposes to impose a number of conditions which are set out at the end of this section.
- 4.45. The ACCC notes that the price controls only target specific types of discounts and do not affect normal price competition between drinking venues. If a drinking venue was generally cheaper than another before the introduction of price controls, it should remain cheaper after they are introduced. Agreements between venues to raise their prices are not part of the current applications.

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<sup>7</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- 4.46. There is also no requirement that all non alcoholic beverages be cheaper than full-strength alcoholic beverages. The relevant provision states that drinking venues will offer ‘a range of non alcoholic drinks at differential (lower) prices.’

### **Supply controls**

- 4.47. Agreements between competitors which impose restrictions on their decisions as to what they deal in, or with whom they deal, can result in allocative inefficiencies. Such agreements distort market signals and can suppress competitive dynamics that would exist in a competitive market.
- 4.48. In this instance, the first supply control is a ban on drinks that by their method of consumption encourage irresponsible drinking habits and are likely to result in rapid intoxication.
- 4.49. The exclusion of a class of beverages is likely to reduce consumer choice and distort the competitive pressures that would otherwise have prevailed. However, OLGR’s clarification that this ban is aimed at novelty containers and drinking games means that consumers will still have access to all the beverages they had previously, just not in the same form or context. The ACCC regards the detriment from this exclusion as minimal, especially as many such methods of consumption are already banned under the Liquor Act and the Liquor Regulation.
- 4.50. The second supply control is a ban on advertising or promotion of very high alcohol substances such as overproof rum and high alcohol carbonated drinks.
- 4.51. DSICA submits that the ability to promote their beverage in drinking venues, directly to people who have already decided to purchase some sort of alcohol, is very important for manufacturers.
- 4.52. The ACCC notes that the restriction is only on advertising and promotions, not availability per se. Consumers will still be able to purchase the same range of products, although their attention will not necessarily be drawn to the same ones.
- 4.53. The ACCC accepts that the ability of targeted manufacturers to compete in that accord area may be diminished, but notes that this will be ameliorated by the ability of manufacturers to advertise and hold promotions everywhere outside drinking venues and the voluntary and nonbinding nature of accords. The condition requiring OLGR consideration of supply controls should limit the exposure of manufacturers to any possible conflict of interest affecting signatories.

### **ACCC conclusion on public detriments**

- 4.54. The ACCC considers that the price and supply controls are also likely to result in some public detriment through potential effects on price and consumer choice.
- 4.55. However, the ACCC considers that these detriments will be mitigated as the price and supply controls are confined in their operation to drinking venues (not liquor retailers) in areas where there are relevant identified harms. Further, participating in an accord will be voluntary and the terms of each accord will be nonbinding.

- 4.56. In order to ensure that accords are only adopted where there are relevant identified harms, the ACCC proposes to impose conditions with the following effects:
- Liquor accords based on the pro-forma arrangement are to include price and/or supply controls only where such controls are required to deal with identified harms. These harms should be set out in the accord document and relate to alcohol abuse in and around premises licensed to sell alcohol for on-site consumption in the local area covered by the accord.
  - Where an accord contains price or supply controls, the accord is to document the harms targeted. OLGR will develop indicators which will measure whether the controls have been implemented and whether they have had an impact on the harms.
  - These indicators will be measured when the accord is initiated, and every twelve months after that for the life of the accord.
  - Copies of all accord documentation, including the arrangement, the list of identified harms, the list of specific beverages targeted (if any) with related reasons and approvals, all measurements of indicators and the names of all signatories to the accord must be supplied to OLGR as they are produced, with copies being kept by the accord body for the life of the accord. Copies of this documentation must be supplied by the applicant to the ACCC on request.
- 4.57. The ACCC is concerned to ensure that these measures do not impose an unnecessary burden on accord bodies. However, the ACCC considers that the type of information set out above would be readily available to accord bodies since it should be core to their decision to introduce an accord containing price and/or supply controls.

## **Balance of public benefit and detriment**

- 4.58. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the PLAA is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
- 4.59. In the context of applying the net public benefit test in section 90(8)<sup>8</sup> of the TPA, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>9</sup>
- 4.60. For the reasons outlined in this chapter, the ACCC considers that there is a public benefit in allowing local accord bodies to agree on and implement accords containing price and supply controls to minimise identified harms in and around licensed premises in a local area. The ACCC also considers that there is a public benefit in enabling OLGR to pursue community based harm minimisation strategies.

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

<sup>9</sup> *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

- 4.61. The ACCC accepts that the PLAA is also likely to result in public benefits arising from an overall reduction in alcohol consumption and from serving, advertising and promotion bans which are correctly targeted at riskier beverages.
- 4.62. The ACCC considers that the price and supply controls are also likely to result in some public detriment through potential effects on price and consumer choice.
- 4.63. However, the ACCC considers that these detriments will be mitigated as the price and supply controls are confined in their operation to drinking venues (not liquor retailers) in areas where there are relevant identified harms. Further, participating in an accord will be voluntary and the terms of each accord will be nonbinding.
- 4.64. The benefits will be secured and the detriments mitigated by the proposed conditions, which seek to ensure the price and supply controls are implemented in circumstances where they are appropriate.
- 4.65. Overall, the ACCC considers the public benefit that is likely to result from the conduct is likely to outweigh the public detriment, provided certain conditions are met. The ACCC is therefore satisfied that, in those circumstances, the tests in sections 90(5A) and 90(5B) will be satisfied.

### **Conditions**

- 4.66. The TPA allows the ACCC to grant authorisation subject to conditions.<sup>10</sup> Generally, the ACCC may impose conditions to ensure that the net public benefit test is met or continues to be met over the proposed period of authorisation.
- 4.67. To date, no submissions have been received regarding possible conditions, but various interested parties raised points which inform these conditions.
- 4.68. For the reasons noted above, the ACCC proposes to grant authorisation subject to conditions with the following effects:
- The pro-forma liquor accord arrangement is to include definitions of the following terms and phrases (along the lines proposed by OLGR) :
    - ‘Extreme discounts’
    - ‘Discounts of limited duration’
    - ‘Drinks that, by their method of consumption, encourages irresponsible drinking habits and are likely to result in rapid intoxication’
    - ‘Very high alcohol substances’
    - ‘High alcohol carbonated drinks’
  - Liquor accords based on the pro-forma arrangement are to include price and/or supply controls only where such controls are required to deal with identified harms. These harms should be set out in the accord document and relate to alcohol abuse in and around premises licensed to sell alcohol for on-site consumption in the local area covered by the accord.

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<sup>10</sup> Section 91(3).

- Where an accord contains price or supply controls, the accord is to document the harms targeted. OLGR will develop indicators which will measure whether the controls have been implemented and whether they have had an impact on the harms.
- These indicators will be measured when the accord is initiated, and every twelve months after that for the life of the accord.
- Where specific beverages are targeted for serving or advertising and promotion bans, the reasons for this targeting must be recorded in the accord arrangement. Specific beverages must not be targeted solely because more profitable alternatives are available.
- Copies of all accord documentation, including the arrangement, the list of identified harms, the list of specific beverages targeted (if any) with related reasons and approvals, all measurements of indicators and the names of all signatories to the accord must be supplied to OLGR as they are produced, with copies being kept by the accord body for the life of the accord. Copies of this documentation must be supplied by the applicant to the ACCC on request.

4.69. These conditions will read as follows.

1. The pro-forma liquor accord arrangement must include definitions of the following terms and phrases (along the lines proposed by OLGR):
  - a. 'Extreme discounts';
  - b. 'Discounts of limited duration';
  - c. 'Drinks that, by their method of consumption, encourages irresponsible drinking habits and are likely to result in rapid intoxication';
  - d. 'Very high alcohol substances'; and
  - e. 'High alcohol carbonated drinks'.
2. The Applicant (ie, the State of Queensland, acting through OLGR) must ensure that:
  - a. each Liquor Accord Body that establishes or implements a liquor accord provide it with the following:
    - i. a copy of the executed accord; and
    - ii. a list of all persons who are parties to the accord;
  - b. if a liquor accord contains a provision that is a Price Control and/or a Supply Control:
    - i. those controls deal with Identified Harms, which are set out in the accord document itself, along with an explanation about how the controls are intended to address the Identified Harms; and

- ii. the Liquor Accord Body provide the Applicant with a written statement from the Police in the accord's local area stating that the Police do not object to the accord;
  - c. the Applicant develops criteria against which the effectiveness of liquor accords can be assessed by the Applicant, in order to enable the Applicant, among other things, to be satisfied that the inclusion of a Price Control and/or Supply Control in a liquor accord is not disproportionate to the Identified Harms sought to be addressed by that accord.<sup>11</sup>
3. The Applicant must ensure that each Liquor Accord Body provide it with a written report every twelve months identifying:
- a. whether there has been any change to the terms of the accord; in which case, the Liquor Accord Body must provide a copy of the revised accord;
  - b. whether there has been any change to the list of persons who are parties to the accord (and if so, identifying those changes); and
  - c. reviewing the operation of the accord against the criteria developed by the Applicant under condition 2(c).
4. (1) The ACCC may, at any time during the term of this authorisation, direct in writing the Applicant to, and the Applicant must, furnish or produce information, documents or materials to the ACCC relating to the conduct the subject of this authorisation in the time and in the form requested by the ACCC.
- (2) Nothing in this condition requires the provision of information, documents or materials in respect of which the Applicant has a claim of legal professional privilege.
- (3) The power of the ACCC in this condition may be exercised by an employee of the ACCC.
5. In these conditions:
- a. **Identified Harms** means any social harms that relate to alcohol abuse, alcohol misuse or excessive consumption of alcohol in and around premises licensed to sell alcohol for on-site consumption in the local area covered by the accord.
  - b. **Liquor Accord Body** means the incorporated body responsible for new and/or established liquor accords in Queensland or, for accords for which there is no such incorporated body, any party to the accord.
  - c. **Price Control** means a provision requiring parties to the accord to ban on drink cards, extreme discounts and discounts of limited duration, or requiring parties to the accord to charge lower prices for smaller serves of full strength beverages or for low or non alcoholic beverages, as set out in the pro-forma liquor accord arrangement.

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<sup>11</sup> It is the ACCC's expectation that such criteria, and the reviews of liquor accords conducted against the criteria, will form part of the information provided to the ACCC as part of any application for revocation and substitution of the authorisation.

**d. Supply Control** means a provision requiring parties to the accord not to offer or advertise particular beverages, as set out in the pro-forma liquor accord arrangement.

## **Length of authorisation**

- 4.70. The TPA allows the ACCC to grant authorisation for a limited period of time.<sup>12</sup> 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.
- 4.71. In this instance, OLGR seeks authorisation for five years ‘or until revoked by the State of Queensland.’ It submits that the period is suitable given the nature of liquor accord arrangements and that benefits are derived from them. DSICA opposed the applications, and further stated that if authorisation were granted, it should be for an unspecified shorter period, and independent measurement of its benefits should be required.
- 4.72. Given the potential scope of the PLAA and the conditions which must be complied with before its benefits will be experienced, the ACCC considers that a shorter period than five years is appropriate. The ACCC considers that authorisation for a three year period would allow sufficient time to observe its effects and assess its effectiveness. This assessment would be expected to form part of any application to reauthorise the PLAA.
- 4.73. As such, the ACCC proposes to grant authorisation to the PLAA for three years.

## **Variations to the PLAA**

- 4.74. The ACCC notes that any amendments to the PLAA during the proposed term of this authorisation would not be covered by the proposed authorisation. If OLGR wished to amend the PLAA, it would need to apply to the ACCC to revoke the proposed authorisation and substitute one covering the amended PLAA.
- 4.75. Signatories to liquor accord arrangements based the PLAA should note that any differences between relevant provisions in the PLAA and in their arrangement will not be covered by this authorisation. Signatories should seek legal advice regarding any trade practices implications of such differences before adopting them.
- 4.76. Signatories should also note that completely omitting the relevant provisions from their accord arrangement should not have any trade practices implications.

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<sup>12</sup> Section 91(1).

## 5. Draft determination

### The applications

- 5.1. On 15 April 2010, the State of Queensland through the Office of Liquor and Gaming Regulation lodged application for authorisation A91224 with the Australian Competition and Consumer Commission (the ACCC). OLGR lodged A91225 on 23 April 2010 in relation to the same conduct.
- 5.2. Application A91224 was made using Form A, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88(1A) of the TPA to make and give effect to a provision of a contract, arrangement or understanding, a provision of which is, or may be, a cartel provision and which is also, or may also be, an exclusionary provision within the meaning of section 45.
- 5.3. Application A91225 was made using Form B, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88(1) of the TPA 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.
- 5.4. In particular, OLGR seeks authorisation for a pro-forma liquor accord arrangement which imposes controls on the price and supply of alcoholic beverages to consumers. Signatories would be expected to refrain from some types of discounting and preferentially price lower alcohol beverages. They would also be expected to refrain from supplying alcoholic beverages in certain containers and contexts, and ban advertising for certain types of alcoholic beverages.
- 5.5. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

### The net public benefit test

- 5.6. For the reasons outlined in Chapter 4 of this draft determination, and subject to the conditions below, the ACCC considers that in all the circumstances the conduct 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 conduct.
- 5.7. The ACCC therefore **proposes to grant** authorisation to applications A91224 and A91225 **on condition that:**
  1. The pro-forma liquor accord arrangement must include definitions of the following terms and phrases (along the lines proposed by OLGR):
    - a. 'Extreme discounts';
    - b. 'Discounts of limited duration';

- c. 'Drinks that, by their method of consumption, encourages irresponsible drinking habits and are likely to result in rapid intoxication';
  - d. 'Very high alcohol substances'; and
  - e. 'High alcohol carbonated drinks'.
2. The Applicant (ie, the State of Queensland, acting through OLGR) must ensure that:
- a. each Liquor Accord Body that establishes or implements a liquor accord provide it with the following:
    - i. a copy of the executed accord; and
    - ii. a list of all persons who are parties to the accord;
  - b. if a liquor accord contains a provision that is a Price Control and/or a Supply Control:
    - i. those controls deal with Identified Harms, which are set out in the accord document itself, along with an explanation about how the controls are intended to address the Identified Harms; and
    - ii. the Liquor Accord Body provide the Applicant with a written statement from the Police in the accord's local area stating that the Police do not object to the accord;
  - c. the Applicant develops criteria against which the effectiveness of liquor accords can be assessed by the Applicant, in order to enable the Applicant, among other things, to be satisfied that the inclusion of a Price Control and/or Supply Control in a liquor accord is not disproportionate to the Identified Harms sought to be addressed by that accord.<sup>13</sup>
3. The Applicant must ensure that each Liquor Accord Body provide it with a written report every twelve months identifying:
- a. whether there has been any change to the terms of the accord; in which case, the Liquor Accord Body must provide a copy of the revised accord;
  - b. whether there has been any change to the list of persons who are parties to the accord (and if so, identifying those changes); and
  - c. reviewing the operation of the accord against the criteria developed by the Applicant under condition 2(c).
4. (1) The ACCC may, at any time during the term of this authorisation, direct in writing the Applicant to, and the Applicant must, furnish or produce information, documents or

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<sup>13</sup> It is the ACCC's expectation that such criteria, and the reviews of liquor accords conducted against the criteria, will form part of the information provided to the ACCC as part of any application for revocation and substitution of the authorisation.

materials to the ACCC relating to the conduct the subject of this authorisation in the time and in the form requested by the ACCC.

(2) Nothing in this condition requires the provision of information, documents or materials in respect of which the Applicant has a claim of legal professional privilege.

(3) The power of the ACCC in this condition may be exercised by an employee of the ACCC.

5. In these conditions:

**a. Identified Harms** means any social harms that relate to alcohol abuse, alcohol misuse or excessive consumption of alcohol in and around premises licensed to sell alcohol for on-site consumption in the local area covered by the accord.

**b. Liquor Accord Body** means the incorporated body responsible for new and/or established liquor accords in Queensland or, for accords for which there is no such incorporated body, any party to the accord.

**c. Price Control** means a provision requiring parties to the accord to ban on drink cards, extreme discounts and discounts of limited duration, or requiring parties to the accord to charge lower prices for smaller serves of full strength beverages or for low or non alcoholic beverages, as set out in the pro-forma liquor accord arrangement.

**d. Supply Control** means a provision requiring parties to the accord not to offer or advertise particular beverages, as set out in the pro-forma liquor accord arrangement.

## **Conduct for which the ACCC proposes to grant authorisation**

5.8. The ACCC proposes to grant authorisation to liquor accord arrangements in the form of the PLAA for a period of three years. Under section 88(6) of the TPA, 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. This authorisation will extend to parties to liquor accords containing price and/or supply controls.

5.9. Further, the proposed authorisation is in respect of the PLAA as it stands at the time authorisation is granted. Any changes to the PLAA during the term of the proposed authorisation would not be covered by the proposed authorisation.

5.10. This draft determination is made on 12 August 2010.

5.11. The attachments to this determination are part of the draft determination.

## **Conduct not proposed to be authorised**

5.12. The proposed authorisation does not extend to OLGR or accord signatories making or giving effect to agreements as to the actual price of beverages. It also does not extend to making or giving effect to agreements not to supply particular beverages.

- 5.13. The proposed authorisation does not extend to price or supply controls being implemented at premises licensed to sell alcohol for off-site consumption.
- 5.14. The ACCC expects that any accords containing the relevant provisions will be responses to identified local problems, and would expect that the relevant provisions would not feature in every liquor accord in Queensland. If price or supply controls came to cover all or even a majority of Queensland, the ACCC would consider reviewing the decision to authorise the PLAA. Such circumstances would indicate widespread problems more appropriately dealt with via changes to the Liquor Act or the Liquor Regulation, not via competition policy.

### **Further submissions**

- 5.15. 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 TPA.

## **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 - A91224 and A91225**

The following table provides a chronology of significant dates in the consideration of the applications by OLGR.

<b>DATE</b>	<b>ACTION</b>
15 April 2010	Lodgement of A91224 and supporting submission.
23 April 2010	Lodgement of A91225.
28 April 2010	Public consultation process begins
21 May 2010	Closing date for submissions from interested parties in relation to the substantive applications for authorisation.
11 June 2010	Final interested party submission received
18 June 2010	Submission received from OLGR in response to some interested party submissions.
2 July 2010	Submission received from OLGR in response to final interested party submission
12 August 2010	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 authorisation:
- (a) make a determination in writing granting such authorisation 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 authorisation 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 authorisation 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 authorisation 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 authorisation 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 authorisation under subsection 88(7) or (7A) in respect of proposed conduct; or
  - (iii) an authorisation 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 authorisation 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 authorisation 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.<sup>14</sup>

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.<sup>15</sup>

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.<sup>16</sup>

## 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 future<sup>17</sup>

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<sup>14</sup> *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.

<sup>15</sup> *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.

<sup>16</sup> Section 91(3).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>18</sup>

## **Six- month time limit**

A six-month time limit applies to the ACCC's consideration of new applications for authorisation<sup>19</sup>. 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.<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup> The ACCC may also review an authorisation with a view to revoking it in certain circumstances.<sup>23</sup>

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.<sup>24</sup> The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.<sup>25</sup>

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<sup>17</sup> Section 88(10).

<sup>18</sup> Section 88(6).

<sup>19</sup> Section 90(10A)

<sup>20</sup> Subsection 91A(1)

<sup>21</sup> Subsection 87ZD(1).

<sup>22</sup> Subsection 91B(1)

<sup>23</sup> Subsection 91B(3)

<sup>24</sup> Subsection 91C(1)

<sup>25</sup> Subsection 91C(3)