



Australian  
Competition &  
Consumer  
Commission

# 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: 7 October 2010**

**Authorisation no.: A91224 &  
A91225**

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

**Commissioners:** Samuel  
Kell  
Schaper  
Dimasi  
Walker

## Summary

The ACCC has decided 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 conditions, which involve reporting requirements, will only apply to those accords with the potential to raise concerns under the *Trade Practices Act 1974*.

The ACCC grants authorisation until 7 October 2013.

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 for authorisation 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. Only those accords featuring price and/or supply controls will be subject to conditions.

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 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 grants authorisation subject to a number of conditions.

In order to ensure that price and supply controls are only adopted in local areas where there are relevant identified harms, the ACCC has imposed 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 are to relate to alcohol abuse in and around premises licensed to sell alcohol for on-site consumption in the local area covered by the accord. An exception to this is where a price or supply control mirrors a prohibition or requirement of Queensland legislation, in which case that fact will be sufficient justification to include the control in an accord.
- Where an accord contains price or supply controls, the accord is to identify the harms targeted or relevant Queensland legislative provisions. OLGR will develop indicators which will measure whether the controls have been implemented and whether they have had an impact on the identified harms. OLGR will also develop guidance on which price or supply controls in the pro-forma liquor arrangement mirror Queensland legislation.
- These identified harms, indicators and legislative provisions will be documented 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 relevant Queensland legislative provisions, the list of specific beverages targeted for serving or advertising and promotion bans (if any) with related reasons, all measurements of indicators, and the names of all businesses who are 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.
- Where the ACCC becomes aware that the accord body for an accord featuring price and/or supply controls has not complied with certain of the conditions above, and the ACCC has taken steps to remind the accord body of its obligations and provided an opportunity to remedy the noncompliance, the ACCC may give notice to that accord body that signatories to that accord are not protected from legal action in respect of those price and/or supply controls. Giving such notice would not affect the protection of signatories to other accords, and would be at the ACCC's discretion.

In order to mitigate the risk of incorrectly identifying a beverage, the ACCC has imposed 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.

As noted above, only those accords featuring price and/or supply controls are subject to these conditions.

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

# Contents

<b>1.</b>	<b>THE APPLICATION FOR AUTHORISATION.....</b>	<b>1</b>
	THE PRO-FORMA LIQUOR ACCORD ARRANGEMENT .....	1
	OTHER PARTIES .....	3
	DRAFT DETERMINATION .....	3
<b>2.</b>	<b>BACKGROUND TO THE APPLICATIONS.....</b>	<b>4</b>
	THE APPLICANT .....	4
	THE LEGISLATIVE FRAMEWORK IN QUEENSLAND .....	4
	THE ROLE OF THE ACCC.....	5
<b>3.</b>	<b>SUBMISSIONS RECEIVED BY THE ACCC .....</b>	<b>6</b>
	PRIOR TO THE DRAFT DETERMINATION .....	6
	Submissions in support of the applications for authorisation	6
	Submissions opposing the applications for authorisation	7
	Responses by the applicant	7
	FOLLOWING THE DRAFT DETERMINATION .....	8
<b>4.</b>	<b>ACCC EVALUATION .....</b>	<b>9</b>
	THE MARKET .....	9
	THE 'FUTURE-WITH-AND-WITHOUT TEST' OR COUNTERFACTUAL.....	10
	ACCORD ENFORCEMENT.....	11
	PUBLIC BENEFIT .....	11
	<i>Reducing overall alcohol consumption</i>	12
	<i>Reduced consumption of riskier beverages</i>	13
	ACCC conclusion on public benefits	14
	PUBLIC DETRIMENT.....	14
	Price controls	14
	Supply controls	15
	ACCC conclusion on public detriments	16
	BALANCE OF PUBLIC BENEFIT AND DETRIMENT .....	17
	CONDITIONS .....	18
	Submissions regarding conditions	18
	ACCC conclusions on conditions	19
	Wording of conditions	21
	LENGTH OF AUTHORISATION.....	24
	VARIATIONS TO THE PLAA.....	25
<b>5.</b>	<b>DETERMINATION .....</b>	<b>26</b>
	THE APPLICATION .....	26
	THE NET PUBLIC BENEFIT TEST .....	26
	CONDUCT FOR WHICH THE ACCC GRANTS AUTHORISATION.....	29
	CONDUCT NOT AUTHORISED .....	29
	DATE AUTHORISATION COMES INTO EFFECT.....	30
	ATTACHMENT A — THE AUTHORISATION PROCESS.....	31
	ATTACHMENT B — CHRONOLOGY OF ACCC ASSESSMENT OF APPLICATIONS.....	32
	ATTACHMENT C — THE TESTS FOR AUTHORISATION AND OTHER RELEVANT PROVISIONS OF THE ACT .....	33
	ATTACHMENT D — THE PRO-FORMA LIQUOR ACCORD ARRANGEMENT.....	37

## 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 application for authorisation

- 1.1. 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.
- 1.2. 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 **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.
- 1.3. Application A91224 was made under subsections 88(1) and 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 subsections 88(1) and 88(1A) 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, or
  - would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45).
- 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. The PLAA also includes the following definitions:

***Extreme discounts*** include practices such as half price drinks. This accord does not however, prohibit or restrict licensees from discounting drinks generally.

***Discounts of limited duration*** include happy hours with a duration of less than an hour or promotions that set a short timeframe (e.g. 15 minutes) in which liquor is discounted. This accord does not however, prohibit or restrict licensees from discounting or promoting happy hours generally.

***Drinks that, by their method of consumption, encourage irresponsible drinking habits and are likely to result in rapid intoxication*** include drinks that 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 includes drinking games involving 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).

***Very high alcohol substances*** – this term is intended to capture drinks that contain any more than 2 standard drinks per serve.

## **Other parties**

- 1.10. 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.
- 1.11. 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.

## **Draft determination**

- 1.12. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.
- 1.13. On 12 August 2010, the ACCC issued a draft determination proposing to grant conditional authorisation to the pro-forma liquor accord for three years.
- 1.14. A conference was not requested in relation to the draft determination.

## 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 two hours before 9pm, one 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 one 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 was introduced 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 lasting 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. A summary of the submissions received by the ACCC from the applicants and interested parties follows.

#### **Prior to the draft determination**

- 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 is 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.

### **Following the draft determination**

3.20. On 12 August 2010 the ACCC issued a draft determination proposing to grant authorisation subject to a number of conditions.

3.21. A conference was not requested in relation to the draft determination.

3.22. The ACCC received two public submissions in response to the draft determination from DSICA and OLGR.

3.23. OLGR provided an amended version of the PLAA, containing the definitions noted above at 1.9. It asked the ACCC to have regard to the burden that the proposed conditions would place on accord bodies, some of which have limited resources, and consider modifying the reporting obligations contained in those proposed conditions.

3.24. DSICA submitted that the reporting obligations imposed by the proposed conditions struck the right balance, and opposed modifying them.

3.25. The views of OLGR and interested parties are outlined 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.

## 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;

as well as with the tests found in sections 90(6) and 90(7) of the TPA which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public and
- that benefit, in the case of section 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision;

as well as with the test found in section 90(8) of the TPA which states that the ACCC shall not authorise a proposed exclusionary provision of a contract, arrangement or understanding, unless it is satisfied in all the circumstances that the proposed provision would result or be likely to result in such a benefit to the public that the proposed contract, arrangement or understanding should be authorised.

4.2. For more information about the tests for authorisation and relevant provisions of the TPA, 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. 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**.

- 4.5. 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.
- 4.6. None of the submissions commented on OLGR's market definitions, or obviously held a different view.
- 4.7. 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.
- 4.8. 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.
- 4.9. Accordingly, for the purpose of assessing these applications, the ACCC considers the relevant areas of competition affected by the proposed conduct to be the markets for the supply and service of alcohol to members of the public (18 years or over) in the drinking venues within local areas.

### **The 'future-with-and-without test' or counterfactual**

- 4.10. 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>1</sup>
- 4.11. 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'.
- 4.12. 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.
- 4.13. 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

---

<sup>1</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.

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 discounting and the unrestricted supply of alcohol products which are identified to cause particular harm.

## **Accord enforcement**

- 4.14. 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.
- 4.15. The ACCC has assessed the impact of the PLAA on the basis that it is voluntary and nonbinding.

## **Public benefit**

- 4.16. 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 principle elements ... the achievement of the economic goals of efficiency and progress.<sup>2</sup>

## **Minimising identified harms**

- 4.17. 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.
- 4.18. 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.
- 4.19. The ACCC recognises the value of consensus between local communities and traders toward achieving reductions in alcohol abuse.
- 4.20. 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.

---

<sup>2</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.

## Enabling OLGR to pursue community based harm minimisation strategies

- 4.21. 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.
- 4.22. 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.
- 4.23. 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 to adopt strategies aimed at minimising the harm that can be caused by the misuse of alcohol at their drinking venues.
- 4.24. 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

- 4.25. 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.
- 4.26. 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*

- 4.27. 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>3</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.
- 4.28. 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

---

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

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).

- 4.29. 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>4</sup>
- 4.30. 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.
- 4.31. 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.

#### ***Reduced consumption of riskier beverages***

- 4.32. 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.
- 4.33. 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>5</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.
- 4.34. 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.
- 4.35. 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.

---

<sup>4</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.

<sup>5</sup> NDRI, pp. 27-29 and 189.

4.36. 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.

4.37. This condition would only apply to those accords featuring price or supply controls.

### **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 is 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>6</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

---

<sup>6</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

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.
- 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 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 are to 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 identify 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 identified harms.
- These identified harms and indicators will be documented 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 for serving or advertising and promotion bans (if any) with related reasons, all measurements of indicators and the names of all businesses who are 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.
- Where the ACCC becomes aware that the accord body for an accord featuring price and/or supply controls has not complied with certain of the conditions above, and the ACCC has taken steps to remind the accord body of its obligations and provided an opportunity to remedy the noncompliance, the ACCC may give notice to that accord body that signatories to that accord are not protected from legal action in respect of those price and/or supply controls. Giving such notice would not affect the protection of signatories to other accords, and would be at the ACCC's discretion.

- 4.57. These conditions would only apply to those accords featuring price and/or supply controls. They deal only with the balance of benefits and detriments. Other issues raised in submissions following the draft determination are discussed below at 4.67. To take those issues into account, the conditions above have been slightly modified, as can be seen in the Summary and at 4.82.
- 4.58. 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**

- 4.59. 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.
- 4.60. In the context of applying the net public benefit test in section 90(8)<sup>7</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>8</sup>
- 4.61. 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.
- 4.62. 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.
- 4.63. 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.
- 4.64. 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.
- 4.65. 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.

---

<sup>7</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>8</sup> *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

4.66. 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), 90(5B), 90(6), 90(7) and 90(8) will be satisfied.

## Conditions

4.67. The TPA allows the ACCC to grant authorisation subject to conditions.<sup>9</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.

### Submissions regarding conditions

4.68. Before the draft determination, no submissions were received regarding possible conditions, but various interested parties raised points which informed the proposed conditions. Following the draft determination, OLGR amended the PLAA to include certain definitions required by a proposed condition. It suggested modifications to other conditions, raising these points:

- Liquor accords vary in size, and the smaller accords may not have the resources to be able to meet the reporting requirements contained in the proposed conditions. It would also be problematic to record the natural persons responsible for administering accords, as these could change regularly.
- Placing the onus of enforcing compliance with conditions on OLGR is unfair, as it does not have any powers to enforce such compliance, and noncompliance by some may affect the ACCC's assessment of other accords.
- Queensland's liquor laws already contain some price and supply controls, and accord bodies which adopt them should be able to use that fact as the justification for doing so.
- It is not necessarily appropriate for the local police to consider or monitor price and supply controls, which would be the effect of requiring accord bodies to provide a 'no objection' statement from them.
- It is not necessarily appropriate to use generic criteria to assess the effectiveness of all accords, and the effectiveness of price and supply controls can be difficult to gauge because of the many factors which contribute to the incidence and severity of harms. As a compromise, OLGR proposed to supply accord bodies with a 'checklist and/or short survey (to be developed by OLGR) about project initiatives and price and supply controls implemented during the year and the benefits, issues and limitations associated with their implementation.'
- OLGR would only be willing to provide to the ACCC information that was in its possession and not deemed to be sensitive or confidential in nature.

---

<sup>9</sup> Section 91(3).

- 4.69. DSICA submitted that the proposed conditions struck the right balance ‘between supporting the formation of liquor accords where desired while providing safeguards against the unnecessary reduction of consumers’ choices and the competition between commercial rivals.’ On this basis, they opposed modifying the proposed conditions, especially if it involved weakening reporting obligations.
- 4.70. DSICA argued that conduct required or prohibited by Queensland liquor laws should not be included in accords, if they are voluntary agreements. It also argued that the local police already have an active role in regulating accord signatories so the proposed ‘no objection’ statement would not be an extra burden or authority for them. It submitted that the careful introduction of controls should enable accord bodies to determine the effectiveness of those controls. In relation to OLGR not wishing to provide confidential information, DSICA noted that information relating to anti-competitive conduct is often confidential.

### **ACCC conclusions on conditions**

- 4.71. The ACCC considers that, with the definitions added by OLGR to the PLAA, the intended meaning and scope of price and supply controls should now be clear enough to allow the PLAA to be implemented. No further definitions are required, and the relevant proposed condition is no longer required.
- 4.72. The ACCC has taken into account OLGR’s concerns regarding the potential burden placed upon accord bodies by the reporting obligations in the proposed conditions. The ACCC has modified these obligations to clarify that only those accords featuring price and/or supply controls will be subject to reporting obligations, and that the resources of the accord body can be taken into account. The ACCC has also clarified that there is no obligation to advise the names or details of natural persons, only which businesses or other entities are signatories to the accord
- 4.73. The ACCC notes OLGR’s concerns in relation to its ability to require accord bodies to comply with conditions, including the concern that the failures of a few may threaten the immunity of many. The ACCC has therefore amended the conditions to reflect OLGR’s anticipated role of assisting accord bodies with their obligations rather than directly enforcing those obligations.
- 4.74. Also, the ACCC would regard the consequences of noncompliance as limited by the scope of that noncompliance. For example, if an accord body failed to provide OLGR with necessary documents, despite requests by OLGR and the ACCC, the ACCC could determine that the signatories to that accord were not protected from legal action in respect of any price and/or supply controls they implemented. It would then be open to the ACCC or private parties to take legal action to remove the price and/or supply controls. Such a situation would not by itself be grounds for revocation of the authorisation of the PLAA. The conditions have been amended accordingly.
- 4.75. The ACCC recognises that accords can be useful documents to remind signatories of their obligations, even though signing and implementing an accord will be voluntary. Controls adopted in this manner will be a means of complying with existing obligations. The ACCC has decided to retain the requirement to justify any price and/or supply controls by reference to identified harms in the local area, except where those controls mirror obligations or prohibitions under Queensland laws. Accord

bodies who implement such mirror controls will still have to report to OLGR, but will not have to identify harms targeted by those mirror controls.

- 4.76. The ACCC does not intend police to monitor price or supply controls. According to OLGR, local police already have a role in many accords. The ACCC considers that they are an appropriate, independent authority with knowledge of the circumstances in their accord area. If they deemed that price or supply controls were particularly suitable or entirely unnecessary, that view should be considered. However, the ACCC does not aim to bind the police to any kind of monitoring role. The conditions have been amended to clarify this intent.
- 4.77. The ACCC further notes OLGR's concerns in relation to its proposed obligation to determine criteria by which price and supply controls can be assessed. It is true that there are unique elements to every situation which prompts the introduction of price and/or supply controls. It is also true that there are many factors which can affect that situation, not all of which will be readily identifiable or even related to liquor accords.
- 4.78. However, the ACCC considers that there are likely to be at least some common reasons for introducing price and supply controls, and some common ways of identifying or even measuring the extent of the resultant harms. As the body responsible for overseeing liquor accords in Queensland, OLGR will see all of those put forward by the various accord bodies, and so will be best placed to consider any common elements. The ACCC is of the view that OLGR, more so than any individual accord body, will be aware of any situations where price and/or supply controls have proven to be either particularly effective or unsuitable.
- 4.79. The ACCC considers that, if such circumstances can be identified, it would be beneficial for such knowledge to be passed on to accord bodies who would otherwise be making decisions based solely on their own experiences. The ACCC notes that OLGR's proposal for a checklist and/or short survey (to be developed by OLGR) has the potential to achieve this. In developing the checklist OLGR will also inform accord bodies which price and/or supply controls mirror current Queensland legislative requirements or prohibitions.
- 4.80. The ACCC notes OLGR's concerns regarding sensitive or confidential information in relation to the condition requiring OLGR to provide or furnish information, documents or materials to the ACCC if so directed. However, the ACCC believes it is important that judgements regarding the conduct which is the subject of this authorisation are as well-informed as is possible in the relevant circumstances. The ACCC also notes that OLGR may be legally constrained in what it can provide.
- 4.81. In making use of material provided, the ACCC will have regard to any sensitivities identified by OLGR, as well as its own obligations and policies relating to confidential information<sup>10</sup>.
- 4.82. For the reasons noted above, the ACCC grants authorisation subject to conditions with the following effects:

---

<sup>10</sup> Such material would be subject to section 155AAA of the TPA and the *ACCC and AER information policy – the collection, use and disclosure of information*, available from the publications section of the ACCC website.

- 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 are to relate to alcohol abuse in and around premises licensed to sell alcohol for on-site consumption in the local area covered by the accord. An exception to this is where a price or supply control mirrors a prohibition or requirement of Queensland legislation, in which case that fact will be sufficient justification to include the control in an accord.
- Where an accord contains price or supply controls, the accord is to identify the harms targeted or relevant Queensland legislative provisions. OLGR will develop indicators which will measure whether the controls have been implemented and whether they have had an impact on the identified harms. OLGR will also develop guidance on which price or supply controls in the PLAA mirror Queensland legislation.
- These identified harms, indicators and legislative provisions will be documented 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 relevant Queensland legislative provisions, the list of specific beverages targeted for serving or advertising and promotion bans (if any) with related reasons, all measurements of indicators and the names of all businesses who are 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.
- Where the ACCC becomes aware that the accord body for an accord featuring price and/or supply controls has not complied with certain of the conditions above, and the ACCC has taken steps to remind the accord body of its obligations and provided an opportunity to remedy the noncompliance, the ACCC may give notice to that accord body that signatories to that accord are not protected from legal action in respect of those price and/or supply controls. Giving such notice would not affect the protection of signatories to other accords, and would be at the ACCC's discretion.

4.83. As noted above, these conditions will only apply to accords featuring price and/or supply controls.

### **Wording of conditions**

4.84. These conditions will read as follows.

1. The Applicant (i.e., the State of Queensland, acting through OLGR) must ensure that:

- a. each Relevant Liquor Accord Body that establishes or implements a Relevant Liquor Accord provide it with the following:
    - i. a copy of the executed Relevant Liquor Accord upon establishment and every 12 months thereafter if there are any changes to the terms of the accord; and
    - ii. a list of all parties who are signatories to the Relevant Liquor Accord upon establishment and every 12 months thereafter if there are changes to those signatories;
  - b. where a Relevant Liquor Accord includes:
    - i. a Price and/or a Supply Control which is not a Mirror Control, that the Price and/or Supply Control deals with Identified Harms, and those Identified Harms set out in the accord document itself, along with an explanation about how the Price and/or Supply Controls are intended to address the Identified Harms; and/or
    - ii. a Mirror Control, the accord document identifies the legislative requirement for that Mirror Control with reference to the relevant Queensland Act and/or Subordinate Legislation.
  - c. the Applicant develops and provides to the Relevant Liquor Accord Bodies:
    - i. criteria against which the appropriateness and effectiveness of Relevant Liquor Accords can be assessed by the Relevant Liquor Accord Body in the report to be prepared by the Relevant Liquor Accord Body under condition 2; and
    - ii. a list of all potential Mirror Controls which identifies the legislative requirement for each Mirror Control with reference to the relevant Queensland Act and/or Subordinate Legislation.
  - d. upon receipt of the report prepared by the Relevant Liquor Accord Body under condition 2, the Applicant satisfies itself that, among other things, the inclusion of a Price Control and/or Supply Control that is not a Mirror Control in a Relevant Liquor Accord is not disproportionate to the Identified Harms sought to be addressed by that accord. In making this assessment, the Applicant should have regard to the views, if any have been expressed, of the Police in that Relevant Liquor Accord's local area.
2. The Applicant must ensure that each Relevant Liquor Accord Body provide it with a written report every twelve months, in relation to Price and/or Supply Controls which are not Mirror Controls:
- a. identifying:
    - i. whether the Relevant Liquor Accord's Price and/or Supply Control(s) have been implemented,
    - ii. whether the Relevant Liquor Accord's Identified Harms are still relevant,
    - iii. whether there have been any changes to the Identified Harms; and

- b. assessing the accord against the criteria developed by the Applicant under condition 1.c.i. and, if necessary, providing any further details regarding the effectiveness of the Price and/or Supply Control(s) and the Identified Harms, having regard to the resources of the Relevant Liquor Accord Body<sup>11</sup>.
3. a. If the ACCC becomes aware that a Relevant Liquor Accord Body is in default of its obligations to provide the Applicant with:
- i. the things referred to in condition 1.a.; and/or
  - ii. a written report referred to in condition 2,
- the ACCC may, in its sole discretion, give the Relevant Liquor Accord Body a written notice:
- iii. stating that the Relevant Liquor Accord Body is in default of its obligations under the relevant condition(s); and
  - iv. requiring the Relevant Liquor Accord Body to remedy the default within 20 Business Days from the date of the notice.
- b. If the Relevant Liquor Accord Body does not remedy the default within the time specified in condition 3.a.iv., the ACCC may, without further notice to the Relevant Liquor Accord Body, determine that this authorisation no longer has effect as if it were an authorisation in the same terms to the Relevant Liquor Accord Body, and any other party to the Relevant Liquor Accord, pursuant to section 88(6) of the *Trade Practices Act 1974* (Cth).
4. a. 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.
- b. 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.
- c. The power of the ACCC in this condition may be exercised by an employee of the ACCC.
5. In these conditions:
- a. **Business Day** means a day other than a Saturday or Sunday on which banks are open for business generally in Queensland.

---

<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.

- b. **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.
- c. **Mirror Control** means a Price Control and/or a Supply Control which puts into effect any legislative requirement under a Queensland Act and/or Subordinate Legislation.
- d. **Price Control** means a provision requiring parties to the accord to ban 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.
- e. **Relevant Liquor Accord** means a liquor accord containing at least one provision which is a Price Control, a Supply Control and/or a Mirror Control.
- f. **Relevant Liquor Accord Body** means the incorporated body responsible for new and/or established Relevant Liquor Accords in Queensland or, for accords for which there is no such incorporated body, any party who is a signatory to a Relevant Liquor Accord.
- g. **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

- 4.85. 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.
- 4.86. In this instance, OLGR sought authorisation for five years ‘or until revoked by the State of Queensland.’ It submitted 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.
- 4.87. 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.
- 4.88. As such, the ACCC grants authorisation to the PLAA until 7 October 2013.

---

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

## **Variations to the PLAA**

- 4.89. The ACCC notes that any amendments to the PLAA during the 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 authorisation and substitute one covering the amended PLAA.
- 4.90. 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.
- 4.91. Signatories should also note that completely omitting the relevant provisions from their accord arrangement should not have any trade practices implications.

## 5. Determination

### The application

- 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 subsections 88(1) and 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 subsections 88(1) and 88(1A) 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, or would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45).
- 5.4. In particular, OLGR sought 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.

### The net public benefit test

- 5.5. For the reasons outlined in Chapter 4 of this 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.
- 5.6. The ACCC therefore **grants** authorisation to applications A91224 and A91225 **on condition that:**
  1. The Applicant (i.e., the State of Queensland, acting through OLGR) must ensure that:
    - a. each Relevant Liquor Accord Body that establishes or implements a Relevant Liquor Accord provide it with the following:
      - i. a copy of the executed Relevant Liquor Accord upon establishment and every 12 months thereafter if there are any changes to the terms of the accord; and

- ii. a list of all parties who are signatories to the Relevant Liquor Accord upon establishment and every 12 months thereafter if there are changes to those signatories;
  - b. where a Relevant Liquor Accord includes:
    - i. a Price and/or a Supply Control which is not a Mirror Control, that the Price and/or Supply Control deals with Identified Harms, and those Identified Harms set out in the accord document itself, along with an explanation about how the Price and/or Supply Controls are intended to address the Identified Harms; and/or
    - ii. a Mirror Control, the accord document identifies the legislative requirement for that Mirror Control with reference to the relevant Queensland Act and/or Subordinate Legislation.
  - c. the Applicant develops and provides to the Relevant Liquor Accord Bodies:
    - i. criteria against which the appropriateness and effectiveness of Relevant Liquor Accords can be assessed by the Relevant Liquor Accord Body in the report to be prepared by the Relevant Liquor Accord Body under condition 2; and
    - ii. a list of all potential Mirror Controls which identifies the legislative requirement for each Mirror Control with reference to the relevant Queensland Act and/or Subordinate Legislation.
  - d. upon receipt of the report prepared by the Relevant Liquor Accord Body under condition 2, the Applicant satisfies itself that, among other things, the inclusion of a Price Control and/or Supply Control that is not a Mirror Control in a Relevant Liquor Accord is not disproportionate to the Identified Harms sought to be addressed by that accord. In making this assessment, the Applicant should have regard to the views, if any have been expressed, of the Police in that Relevant Liquor Accord's local area.
2. The Applicant must ensure that each Relevant Liquor Accord Body provide it with a written report every twelve months, in relation to Price and/or Supply Controls which are not Mirror Controls:
- a. identifying:
    - i. whether the Relevant Liquor Accord's Price and/or Supply Control(s) have been implemented,
    - ii. whether the Relevant Liquor Accord's Identified Harms are still relevant,
    - iii. whether there have been any changes to the Identified Harms; and
  - b. assessing the accord against the criteria developed by the Applicant under condition 1.c.i. and, if necessary, providing any further details regarding the effectiveness of

the Price and/or Supply Control(s) and the Identified Harms, having regard to the resources of the Relevant Liquor Accord Body<sup>13</sup>.

3. a. If the ACCC becomes aware that a Relevant Liquor Accord Body is in default of its obligations to provide the Applicant with:
  - i. the things referred to in condition 1.a.; and/or
  - ii. a written report referred to in condition 2,the ACCC may, in its sole discretion, give the Relevant Liquor Accord Body a written notice:
  - iii. stating that the Relevant Liquor Accord Body is in default of its obligations under the relevant condition(s); and
  - iv. requiring the Relevant Liquor Accord Body to remedy the default within 20 Business Days from the date of the notice.
- b. If the Relevant Liquor Accord Body does not remedy the default within the time specified in condition 3.a.iv., the ACCC may, without further notice to the Relevant Liquor Accord Body, determine that this authorisation no longer has effect as if it were an authorisation in the same terms to the Relevant Liquor Accord Body, and any other party to the Relevant Liquor Accord, pursuant to section 88(6) of the *Trade Practices Act 1974* (Cth).
4. a. 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.
- b. 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.
- c. The power of the ACCC in this condition may be exercised by an employee of the ACCC.
5. In these conditions:
  - a. **Business Day** means a day other than a Saturday or Sunday on which banks are open for business generally in Queensland.
  - b. **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.

---

<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.

- c. **Mirror Control** means a Price Control and/or a Supply Control which puts into effect any legislative requirement under a Queensland Act and/or Subordinate Legislation.
- d. **Price Control** means a provision requiring parties to the accord to ban 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.
- e. **Relevant Liquor Accord** means a liquor accord containing at least one provision which is a Price Control, a Supply Control and/or a Mirror Control.
- f. **Relevant Liquor Accord Body** means the incorporated body responsible for new and/or established Relevant Liquor Accords in Queensland or, for accords for which there is no such incorporated body, any party who is a signatory to a Relevant Liquor Accord.
- g. **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 grants authorisation**

- 5.7. The ACCC grants authorisation to liquor accord arrangements in the form of the PLAA until 7 October 2013. 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.
- 5.8. Further, the 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 authorisation would not be covered by the authorisation.
- 5.9. This determination is made on 7 October 2010.
- 5.10. Section 90(4) requires that the Commission state in writing its reasons for a determination. The attachments form part of the written reasons for this determination.

## **Conduct not authorised**

- 5.11. The 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.
- 5.12. The authorisation does not extend to price or supply controls being implemented at premises licensed to sell alcohol for off-site consumption.
- 5.13. 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.

### **Date authorisation comes into effect**

- 5.14. This determination is made on 7 October 2010. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 29 October 2010.

## **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 TPA). A key objective of the TPA 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 TPA, 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 TPA. 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 of applications**

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.
2 September 2010	Closing date for submissions from interested parties in relation to the draft determination.
7 October 2010	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.
- (5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:
  - (a) that the provision would result, or be likely to result, in a benefit to the public; and
  - (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
    - (i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and
    - (ii) the provision were given effect to.
- (5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:
  - (a) that the provision has resulted, or is likely to result, in a benefit to the public; and
  - (b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.
- (6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to

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

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

as the case may be.

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

(8) The Commission shall not:

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

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

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

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

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

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

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

## Variation in the language of the tests

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

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

---

<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>

---

<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)

**Attachment D — the pro-forma liquor accord arrangement**

## ADOPTION OF LIQUOR ACCORD PRO-FORMA ARRANGEMENT

### Information for liquor accord participants

This pro-forma liquor accord arrangement has been developed for voluntary adoption in full or in part by liquor accord bodies in Queensland. It is current as at [insert date].

[TO INSERT ONLY ONCE ACCC AUTHORISATION HAS BEEN OBTAINED]

This pro-forma arrangement has received authorisation from the Australian Competition and Consumer Commission. You are not compelled to implement all or any of the accord strategies contained in this document. You will still receive the benefit of authorisation if you choose to give effect to only some of the strategies.

If this document is adopted by your local liquor accord body and Section 1 'Responsible service of alcohol' is not amended in any material way, you will not be liable for a breach of the *Trade Practices Act 1974*. However, if your local liquor accord body wishes to vary the contents of this pro-forma liquor accord arrangement, you are advised to seek legal advice on the implications of trade practices laws and other legal requirements before adopting the amendments.

Liquor accord bodies are encouraged to tailor liquor accord arrangements to suit circumstances unique to licensees and your local community or precinct.

## PRO-FORMA LIQUOR ACCORD ARRANGEMENT

Stakeholders of the [insert name of local liquor accord body] endorse and will seek to uphold the strategies as listed below in our local area as a way of:

- promoting responsible practices in relation to the sale and supply of liquor at licensed premises
- minimising harm from the misuse of alcohol
- minimising alcohol-related disturbances, or public disorder, in the locality.

### DEFINITIONS

The following definitions apply to this accord:

**Extreme discounts** include practices such as half price drinks. This accord does not however, prohibit or restrict licensees from discounting drinks generally.

**Discounts of limited duration** include happy hours with a duration of less than an hour or promotions that set a short timeframe (eg. 15 minutes) in which liquor is discounted. This accord does not however, prohibit or restrict licensees from discounting or promoting happy hours generally.

**Drinks that, by their method of consumption, encourage irresponsible drinking habits and are likely to result in rapid intoxication** include drinks that are offered in objects or items that are non-standard glasses certified by Weights and Measures (eg. test tubes and water pistols). It also includes drinking games involving the consumption of liquor in a short period of time which can lead to rapid and/or excessive consumption of liquor (eg. skolling games and laybacks).

**Very high alcohol substances** – This term is intended to capture drinks that contain any more than 2 standard drinks per serve.

Accord stakeholders are encouraged to refer to the *Liquor Act 1992*, *Liquor Regulation 2002* and the Code of Practice for the Responsible Service, Supply and Promotion of Liquor for further guidance.

### STRATEGIES

#### 1. Responsible service of alcohol

##### No unduly intoxicated patrons

- Refuse to serve alcohol to, or allow entry of, persons who are unduly intoxicated.
- Encourage patrons to drink responsibly, and let them know they will be asked to leave if they become unduly intoxicated, disorderly, violent or quarrelsome.
- Promptly and politely ask patrons to leave when they are showing signs of being unduly intoxicated.
- Offer to call unduly intoxicated patrons a taxi and/or provide water while they wait in a safe environment.

### No underage drinking

- Actively monitor all patrons to ensure they are not underage by checking proper proof of age identification (ID) at the door.
- Prominently display signage about restrictions on minors.
- Apply the following standards when checking ID:
  - The ID is removed from a wallet/purse or cardholder and held by the staff member conducting the check
  - The ID is checked to ensure it is current and is an approved form of identification - photographic driver's licence; or a proof of age card issued by a Government Department or approved entity (e.g. 18+ card, Keypass); or an Australian or foreign passport
  - The date of birth is checked to establish the age of the patron
  - The date of birth is checked for any tampering
  - The photo is checked to ensure it is the person presenting the ID
  - The photo is checked to ensure it has not been substituted or tampered with
  - The ID is checked overall for any bumps or raised areas which may indicate the identification has been tampered with.
- If staff believe that a document being presented is false, defaced or in the possession of a person who is not the owner of the ID and who is falsely claiming to be 18 years of age, the document will be confiscated and forwarded to the Office of Liquor and Gaming Regulation.

### Discourage activities that encourage excessive drinking

- Ban practices and promotions that may encourage rapid or excessive consumption of liquor, for example:
  - 'drinkcards' that provide multiple of free drinks
  - extreme discounts or discounts of limited duration
  - any other promotions or gimmicks that encourage rapid intoxication.
- Provide snack food during 'happy hours' where practical.
- Avoid serving drinks that offer alcohol in non-standard measures.
- Ensure smaller serves of drinks (eg half nips) are available at differential (lower) prices.

### Not promote or sell alcoholic beverages that may encourage rapid or excessive consumption of liquor

- Avoid labelling or promotions that may encourage patrons to consume liquor irresponsibly and excessively to an unduly intoxicated state.
- 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.
- Not allow stockpiling of 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.
- Ensure bottled water is available free or for purchase at reasonable prices.
- Provide and promote reasonably priced snacks and food throughout operating hours.

### **2. Improve safety and security**

Provide and maintain a safe environment in and around the licensed premises, for example:

#### Maintain proper standards of behaviour

- Have a phone available for the use of patrons in a location where patrons using the phone can be heard above noise within the premises.
- Display phone numbers for taxis, police, ambulance and fire brigade adjacent to the phone.
- Have the name of the duty manager prominently displayed at each bar in the premises.
- Do not promote activities that might encourage harassment by patrons of the staff or other patrons.
- Clearly display a list of acceptable and unacceptable behaviour on premises (house policy), such as the non acceptance of excessive consumption of alcohol or any illicit drug use.
- Assign staff to actively monitor patrons and at regular intervals move through premises to assess any potential problems (monitoring should also include toilets).
- Actively liaise with police and other licensed premises when disorderly patrons have been ejected or are moving through the area.
- Ensure internal and external security procedures are well maintained and functioning effectively.
- Encourage phased and an orderly exit of patrons from premises when closing.

#### Maintain safety and security

- Conduct regular risk assessments of premises and surrounding environments.
- Ensure entrances and exits of premises are well lit and that immediate surrounds are safe and allow good visibility.
- Implement appropriate surveillance systems, such as closed circuit television systems, on premises.
- Ensure staff, including security staff are clearly identifiable (for example, distinctive t-shirts, uniforms, name tags etc.).
- Serve drinks in containers which minimize potential harm to customers.
- Fully cooperate with the police and other accord members on ways to improve public safety.

- Prevent criminal activity and disorderly conduct from occurring on premises.
- Notify the police immediately if something illegal or suspicious does occur.
- Door/security or reception personnel will, in addition to restricting entry by minors or unduly intoxicated persons to the premises:
  - wear clear ID at all times
  - not harass or intimidate passers-by or potential customers
  - refuse re-entry to the premises to those who have caused a disturbance
  - immediately contact police and other premises to inform them of potential 'problem' patrons in the vicinity
  - check for the unlawful removal of alcohol from premises
  - assist patrons in accessing safe transportation out of the area
  - uphold any statutory requirements relating to security personnel and enter details of any safety incidents in the Premises Incident Register.

Maintain records of incidents and have appropriate communication with the police and other authorities

- Maintain a register of all safety and security incidents noting the time, date and nature of the incident in and around the premises and the response by staff and management (the 'incident register').
- Notify the police and other relevant authorities of any special events likely to significantly increase the number of people in the area. This should happen well in advance of the event.
- Train all staff to know help procedures and emergency numbers and when and how to fill out the incident register.
- Encourage all staff members to undertake first aid courses and, where possible, ensure one staff member with a first aid certificate is rostered on to each shift.
- Establish open communication with security at other venues via venue to venue radio and or a telephone contact listing.
- Ensure close liaison and open communication with the Office of Liquor and Gaming Regulation.

**3. Commitment to being good neighbours**

Improve the local amenity

- Assist patrons in accessing safe transportation out of the area (for example, door staff should volunteer information about access to a railway station, late night bus services and taxi ranks and encourage patrons to use these quickly and quietly when departing).
- Minimise noise generating from the premises.
- Educate patrons, including through signage, about the need to respect the local amenity and to arrive and depart the area in a quiet and orderly manner.
- Prevent the unlawful removal of liquor (other than packaged where permitted) from licensed premises.
- Ensure staff, specifically door and security staff are briefed on local environmental issues, including potential traffic, noise or security problems.

- Ensure police are informed of regular closing hours and any variations such as for special events or new activities.
- Respond to legitimate complaints and resident concerns and take all reasonable steps to ensure premises are functioning as a 'good neighbour'.

#### Patron responsibility

- Post signage that clearly explain licensee and patron responsibilities regarding the responsible service of alcohol (for example 'No More it's the Law' signage).
- Ensure staff are trained appropriately to advise patrons when they will no longer be served alcohol and will be asked to leave the premises.

#### Staff at licensed premises (including outsourced staff eg. security)

- Ensure all employees and applicable security staff have completed a Queensland approved Responsible Service of Alcohol course.
- Maintain a register of staff that have completed a Queensland approved Responsible Service of Alcohol course.
- Provide regular updates to new staff and training on the accord and related responsible service of alcohol and harm minimisation policies and practices.
- Ensure strict reference checks are conducted on all staff, including outsourced security staff, in the context of recruitment practices.
- Ensure all staff are familiar with the incident register and are aware of how to use it when required.
- Ensure staff have access to relevant literature on the accord, Queensland liquor laws and regulations.

#### Actively monitor and promote the accord

- Provide an ongoing commitment to the accord and to the continued proper management and conduct of the licensed premises.
- 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.
- Establish and maintain effective complaints procedures.
- Promote educational and information items in the community to discourage the irresponsible service and consumption of alcohol.