Whether Australia continues to enjoy its good micro-economic performance in the period ahead depends on the willingness of governments to stand firmly behind competition law in the face of these pressures.

The authorisation process—its relevance to consumer representatives

The following is an edited version of a speech by Tim Grimwade, General Manager, Adjudication Branch of the ACCC to the Consumer Representatives' Forum in Melbourne on 29 May 2003.

The authorisation provisions of the Trade Practices Act

Essentially, as I'm sure most of you are well aware, Part VII of the Act provides the Commission with the power, through a process called authorisation, to grant immunity on public benefit grounds for conduct, including mergers, that might otherwise breach certain competition provisions of the Act.

There is a strong presumption in the Act that competition will enhance the welfare of Australian consumers. However, it is recognised that sometimes competition may not be consistent with the most efficient outcome and the Act acknowledges this by allowing the Commission to exempt anti-competitive conduct when it is in the broader public interest.

Authorisation is never granted lightly by the Commission. Businesses only apply for authorisation when they consider they might be in breach of the Act. Seen in this light an application for authorisation is effectively an application for approval to break the law.

When is authorisation available?

The TPA allows the Commission, on application, to grant authorisation in relation to:

- arrangements which substantially lessen competition, for instance market sharing or price fixing
- boycotts—that is, when competitors agree to restrict trade with a supplier or purchaser
- exclusive dealing—that is, when a person imposes certain restrictions on the ability of someone who it trades with in their dealings with others
- resale price maintenance
- anti-competitive mergers.

Misuse of market power may not be authorised.

Outline of the authorisation process

Authorisation may be granted only after a transparent and consultative assessment process. The key aspects are specified in the Act. Broadly the authorisation process is as follows:

- the parties to the anti-competitive conduct lodge an application and supporting submission with the Commission
- the Commission seeks the views of interested parties on the application.

This is obviously the key point at which consumer representatives will want to have input.

So, how do we identify interested parties? A variety of methods are used which include:

- use of existing databases and the ACCC's own industry knowledge
- parties are identified by the applicant or through other interested parties
- the ACCC may also seek submissions from interested parties through advertisements in newspapers and trade journals
- assistance by Catriona Lowe, ACCC Director of Consumer Liaison for applications which deal with consumer issues.

All authorisation applications received by the Commission are also made available on the Commission's website. I encourage all consumer representatives to proactively monitor applications received by the Commission.

I should add that clearly not everyone affected will be consulted. When groups of consumers may be directly affected—as in last year's proposal by banks to jointly agree a basic banking product for low income consumers—we will rely heavily on consumer representatives to provide the necessary input on how particular groups in the community are affected.

The authorisation process can be a lengthy one—largely because of the consultation process. It is always a challenge for the Commission to find the right balance between consulting all those who can inform it, and achieving this in a workable timeframe.

The Commission will consult to the extent that it considers necessary to be fully informed of the public benefit and detriments associated with the particular conduct. The quality of submissions is paramount. The quantity of submissions is not. Sometimes we'll receive pro forma letters from interested parties saying the same thing: this will not necessarily add to the weight of the argument.

- All consultation with interested parties (except submissions which have been granted confidentiality) is placed on the Commission's public register. The applicant is usually invited to lodge further submissions in response to submissions from other parties.
- The Commission assesses the conduct in view of submissions and the Commission releases a draft determination stating its preliminary views. Draft determinations are distributed to the applicant, all parties who made submissions and other interested parties.
- The Commission invites the applicant and interested parties to call a pre-decision conference. Conferences are not usually requested by those who agree with the proposed decision of the Commission. Conferences allow interested parties to discuss the application, to canvass points of view and to assist the Commission's weighting of issues and its interpretation of the given information. Records of conferences are placed on the public register.
- Whether or not a conference is called, applicants and interested parties may provide further submissions to the Commission.
- The Commission then issues a final determination which may: (i) deny authorisation, (ii) grant authorisation subject to conditions designed to ensure the conduct satisfies the net public benefit test; or (iii) grant authorisation unconditionally. Authorisation is usually granted for a limited time;
- Final determinations are forwarded to the applicant and to other interested parties. A copy is placed on the public register and on the internet. Copies are published by commercial legal reporting services.
- Any interested parties dissatisfied with a final authorisation decision may seek review of the merits of the matter by the Australian Competition Tribunal.

A number of commentators have been critical of the authorisation process because of the time it takes to respond to applications for immunity. It can take many months for a final decision in some cases. For the most part this timing is driven by the Act which prescribes a process which requires extensive consultation with interested parties and the issue of written draft and final decisions.

The length of time the authorisation process will take also depends on the opposition to the arrangements and the Commission's decision. Delays can be associated with requests to call a pre-decision conference or with appeals of authorisation decisions to the Australian Competition Tribunal. Such appeals may be sought by any interested party, not just the applicant.

I would like to take a few moments to talk about the net public benefit test that the Commission applies in the authorisation process and what the Commission gives consideration to when assessing an application for authorisation.

The authorisation test

The applicant must satisfy the Commission that, in all the circumstances, the proposed conduct would be likely to result in a benefit to the public which outweighs the detriment to the public constituted by any lessening of competition resulting from the conduct.

The onus is on the applicant to satisfy the Commission that the public benefit test is met. The applicant must demonstrate that there is a nexus between the proposed conduct and the claimed public benefits.

In making its assessment, the Commission applies a 'future with-and-without test' to determine whether public benefits and detriments exist; that is, the existence of public benefits and detriments is assessed by comparing the position if the proposed conduct is authorised with the position if it is not authorised.

The Act does not define public benefit or detriment. However, the tribunal has defined these concepts broadly as being anything of value or harm to the community with an emphasis on contribution or impairment to economic efficiency, but recognising that broader and social public benefits can be taken into account.

Some of the public benefits the Commission has considered from a consumer perspective in recent years include:

- improvement in the quality and safety of goods and services and expansion of consumer choice
- supply of better information to consumers and business to permit informed choices in their dealings

- promotion of industry cost savings resulting in contained or lower prices at all levels in the supply chain

In particular circumstances the Commission has accepted quite a broad variety of public benefit arguments, for instance:

- the environmental benefits flowing from the establishment of a scheme to reclaim and destroy refrigerant and air-conditioning gases
- facilitating the transition to deregulation for industries undergoing reform, for example, in rural areas
- promoting public safety by, for example, ensuring the safe use of farm chemicals and national uniformity in the storage of farm chemicals.

Let me talk now about dispute resolution processes and how they can sometimes be relevant to an authorisation assessment.

We sometimes receive applications to authorise potentially anti-competitive provisions in codes of conduct which include dispute resolution procedures. In some cases the Commission can see a benefit flowing from the code, and those dispute resolution procedures. However, in others further improvements may be necessary to generate a net public benefit.

The authorisation process has some limitations in addressing codes of conduct, and should not be seen as an endorsement of a code as the optimal code. It is important to note that it is not the Commission's role to design the ideal code through the authorisation process. It is the Commission's role to determine whether conduct the subject of an application will result in a net public benefit.

For example, the Australian Direct Marketing Association Code of Practice requires direct marketers to adopt a customer complaint resolution procedure which complies with the Australian Standard for Complaints Handling. This code was the subject of an authorisation application. Through imposing minimum standards, the code has the potential to standardise the way in which participants in the direct marketing industry conduct their business, thereby limiting the opportunity for ADMA members to differentiate their businesses from one another. This may result in anti-competitive detriment, and so was submitted for authorisation.

The Commission authorised the code and in doing so it considered that the public was likely to benefit from the implementation, by direct marketers, of internal complaint handling procedures that comply with the standard. Whether this code was the perfect code for all or not is not the issue for the Commission; rather whether it will simply meet the authorisation test and be in the net public benefit.

However, there will be some cases where the Commission will consider adequate dispute resolution processes are necessary for a net public benefit to result, and will impose conditions to ensure this is so.

It did so in the recent draft determination for an application seeking authorisation of a co-insurance pooling arrangement offering public liability insurance to certain eligible not-for-profit organisations (NFPOs). The purpose of the arrangements, which involved potentially anti-competitive agreements between three competing insurance companies, is to increase the availability of public liability insurance to not-for-profit organisations.

Conditional interim authorisation was granted by the Commission on 28 November 2002 enabling the parties to offer public liability insurance to eligible NFPOs while the Commission considered the merits of the application. Public liability insurance policies have been provided to approximately 230 eligible NFPOs under the interim authorisation (as at 31 March 2003). In late April the Commission issued its draft decision proposing to authorise the arrangements subject to certain conditions.

The Commission has proposed imposing a condition requiring the parties covered by the application to ensure their existing internal dispute resolution scheme complies with the Australian standard. It should be noted that in this particular case the arrangements already contained an internal dispute resolution mechanism without the condition. However, this mechanism was not included in the formal contractual arrangements between the insurance companies and therefore without the condition, was not subject to the authorisation application.

Some limitations of the authorisation process

Having said this, the Commission can't automatically require dispute resolution procedures in every case where it might be beneficial. In authorisations it may only impose conditions when it is necessary to ensure there is a net public benefit. If there is already a net public benefit in conduct without, say, a dispute resolution process, it couldn't then impose such a condition. The authorisation process can therefore be of limited value if it is being viewed as a mechanism to impose or improve dispute

resolution processes in codes of conduct. In addition, the Commission cannot require someone to pursue an application for authorisation.

For instance, last year the Commission considered a proposal by the Australian Bankers Association for a standardised basic bank account for low-income earners through the authorisation process. The Commission issued a draft determination proposing to deny because the proposal did not, in its view, result in a net public benefit. The Commission was concerned that the proposed arrangements had the potential to dampen competition in the emerging market for basic banking products and may have resulted in the minimum features becoming the de facto industry standard. The Commission held the view that such a result may have had the effect of reducing the features of basic banking products currently available to low-income consumers and reduce consumer choice. The Commission stressed that it would welcome a revised proposal which addressed its concerns outlined in the draft decision. However, the Australian Bankers Association withdrew the application and the Commission no longer had a role in considering this proposal.

Another issue that is relevant to consumers in the application of the public benefit test is the extent to which the Commission considers there can be a public benefit if consumers do not benefit. While efficiency gains that accrue to a particular firm through, say, an anti-competitive merger will not be ruled out as being a benefit, benefits which flow ultimately to consumers are likely to be given greater weighting by the Commission than those which result in a benefit solely to an organisation. This is because in a competitive market you would expect efficiency gains/cost savings to ultimately be passed through as lower prices to consumers or in the form of some other benefit (e.g. high quality and better service), as competing firms jockey for business. If these gains are not being passed through it may signal market power of the firm engaging in that conduct. Without competitive pressure, those gains may not endure—they might dissipate and so may be accorded less weight by the Commission.

How to participate in the process

There are two ways in which you can participate in the authorisation process, either as an applicant or a party providing comments on an application. I suspect you are more interested in the latter, so I shall briefly take you through the role you can play in the Commission's assessment of applications.

As I have mentioned earlier, the Commission conducts a public and transparent assessment of authorisation application which involves public consultation at multiple stages of the process. The Commission relies on information and views contained in submissions from interested parties. We invite any party who may have an interest in an authorisation to provide comments on applications and draft determinations.

Submissions can be made in a variety of ways, including:

- in writing, by mail, fax or email
- verbally, by telephone, interview or pre-decision conference.

A request to keep sensitive information confidential can also be made to exclude information from the public domain. The Commission is predisposed to transparency and is reluctant to grant confidentiality unless information is commercial in confidence or there is a real risk of retaliatory conduct if a person's views are publicised.

Conclusion

The public benefit test is expressed broadly, and the processes used by the Commission and tribunal when applying it are open, transparent and consultative. These factors have allowed the public benefit test to adapt to economic and social changes. As such, the public benefit test and the authorisation process remain a valuable and unique part of the TPA. They have ensured that the Act is not a blunt instrument against anti-competitive conduct by making the public interest the paramount concern.

Having said this, the Commission is always open to constructive input about how it applies the test. In this regard the Commission will shortly be revising its *Guide to authorisations and notifications* published in November 1995. Among other things, the revised guide will discuss the Commission's approach to the assessment of public benefits under the authorisation process, as well as the manner in which public detriment is considered. The Commission proposes to consult with relevant stakeholders as part of the process.