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COMPETITION LAW AND PUBLIC BENEFITS

INTRODUCTION

AUSTRALIA'S restrictive trade practices laws, to be found primarily in Part IV of the *Trade Practices Act* 1974 (Cth) ('the Act'), are designed to promote competition among firms. The provisions are modelled largely on United States antitrust laws.[1] There are nevertheless significant points of departure from the United States' model and it is with arguably the most important of these that this article is concerned. This is the provision made in the Act for an administrative procedure to "authorise" certain conduct which otherwise may be in breach of the Act.[2] In general terms, if the conduct in question can be shown to create "public benefits" which outweigh any anti-competitive detriment, such conduct can be authorised by the Trade Practices Commission or, upon review, by the Trade Practices Tribunal. Authorised conduct is then immune from the prohibitions of Part IV of the Act.[3]

The authorisation procedure thus creates a second tier of regulation which is designed, by allowing a case by case analysis of conduct, to provide a safeguard against the prohibitory approach used in Part IV of the Act. This technique of combining, on the one hand, prohibitions enforced through

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1 In traditional Australian legislative style, as little as possible has been left to the judicial imagination and so, in contrast with the United States' approach, the prohibited conduct is generally defined in some detail. The substance of the law is, however, alike. United States antitrust law is contained in the following Acts, all of which have been amended from time to time: the *Sherman Act* 1890, the *Clayton Act* 1914 and the *Federal Trade Commission Act* 1914.

2 As explained below, not all conduct prohibited by Part IV can be authorised in this way.

3 See s88 of the *Trade Practices Act* 1974 (Cth).

courts of law with, on the other, an administrative procedure to allow exemptions from such prohibitions, is one also used in European competition law. There, anti-competitive agreements may be exempted from invalidity and prohibition by the Commission of the European Communities.[4]

It is the aim of this article to examine how the public benefit test has worked in practice. It will be seen that the rationale for the test is fundamental to the objectives and operation of Australia's competition laws. An assessment of the public benefit test is appropriate at this time.[5] In a recent review of the *Commerce Act* 1986 (NZ) significant changes to the New Zealand public benefit test have been agreed to by the New Zealand cabinet.[6] The existing New Zealand provisions adopt the Australian test. The proposed changes would (i) replace "benefit to the public" with "benefit to New Zealand", making it clear that private benefits as well as public would be recognised; and (ii) emphasise that "productive, allocative and dynamic efficiency will be the principal element" of the authorisation analysis. Further, Australia's competition laws have been reviewed recently by an independent committee

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4 See Art 85(3) of the Treaty of Rome. The test for exemption under European law is somewhat narrower. The applicant must show that the agreement will improve the production or distribution of goods or promote technical or economic progress and that consumers will receive a fair share of the resulting benefits. Further, the relevant restriction must be "indispensable" and not allow for the "possibility of eliminating competition". Exemption can be by individual application or, more commonly, a "block exemption" which applies to agreement types. See generally Whish, *Competition Law* (Butterworths, London, 2nd ed 1989) pp253-274; Bellamy & Child, *Common Market Law of Competition* (Sweet & Maxwell, London, 3rd ed 1987) ch3; Korah, *An Introductory Guide to EEC Competition Law and Practice* (ESC Publishing, Oxford 1986) pp31-33; Van Bael & Bellis, *Competition Law of the EEC* (CCH, 2nd ed) pp46-56.

5 A number of articles, though useful, are now out of date: see Pengilley, "Public Benefit in Anticompetitive Arrangements? Australian Experience Since 1974" (1978) 23 *Antitrust Bulletin* 187; Wallace, "Public Benefit and Authorisation Determinations Under the *Trade Practices Act*" (1976) 4 *ABLR* 175. Other writing of interest includes Adhar, "Authorisation and Public Benefit under the *Commerce Act* 1986: Some Emerging Principles" (1988) 16 *ABLR* 128; Hanks and Williams, "The Treatment of Vertical Restraints under the *Trade Practices Act*" (1987) 15 *ABLR* 147; Gentle, "Economic Welfare, the Public Interest and the Trade Practices Tribunal" in Nieuwenhuysen (ed), *Australian Trade Practices: Readings* (Croon Helm, London 1976) p59, originally published in *Economic Record*, June 1975.

6 NZ, Parl, Ministry of Commerce, the Treasury, Department of Justice, and Department of the Prime Minister and Cabinet, *Review of the Commerce Act 1986*.

of inquiry.[7] A number of submissions were made to the inquiry to alter the public benefit test along the lines of the New Zealand proposal, although the Report rejected these and has recommended only minor amendments.[8]

The writer's contention will be that it is desirable to provide an administrative procedure to recognise a range of benefits in a restrictive trade practices matter and that, on the whole, the public benefit test employed in the Act has proved to be workable and useful. However the requirement that such benefits be "public" in character is not one which can be justified and should be discarded.

The modest and immodest aspects of the task should perhaps be admitted at the outset. The article does not seek to provide a complete assessment of the authorisation process. Questions of procedure, relating to such matters as time limits and appeal mechanisms, are not considered here. Nor is there attempted a comprehensive empirical analysis of how the Trade Practices Commission and the Trade Practices Tribunal have weighed the net public benefit of the conduct which comes before them. What is attempted is a summary of the content given to the public benefit test, how the test has worked in practice and an assessment of its role in the Act. The immodesty arises through the writer's attempt to deal with the inevitable economic content of this assessment. The restrictive trade practices provisions of the Act, it is now well established, have economic objectives and employ economic concepts.[9] The public benefit test, as will be seen below, has been dominated by economic considerations. Nevertheless the economic objectives and content are employed, rightly or wrongly, in a legislative context and for this reason invite comment from legal as well as economic commentators.

The article is divided into five parts. Following this introduction there is a brief explanation of the statutory framework which contains the public benefit test. The background to the present law is also traced, with a particular view to establishing the intended role of the test. The third and fourth parts examine the meaning given to, and the issues raised by, the respective terms "public" and "benefit". Finally, some tentative conclusions are drawn in the fifth part.

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7 Aust, Parl, Independent Committee of Inquiry, *National Competition Policy* (1993).

8 At 95-99.

9 *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177.

THE STATUTORY FRAMEWORK

Background

Australia's first Commonwealth[10] antitrust legislation, the *Australian Industries Preservation Act* 1906 (Cth), closely followed the terms of the *Sherman Act* 1890 (US). As with the *Sherman Act*, the Australian Act made no provision for an authorisation test which could override its prohibitions.[11] For various reasons, including a near-fatal constitutional challenge,[12] the 1906 Act was ineffectual.[13]

It was not until 1965 that the Federal Parliament passed the next restrictive trade practices legislation and it is to this legislation that the current authorisation procedure can be traced. The *Trade Practices Act* 1965 (Cth) rejected the proscriptive United States approach and turned instead to the prescriptive approach employed in the *Restrictive Trade Practices Act* 1956 (UK). With some exceptions,[14] anti-competitive conduct and agreements were not prohibited outright but were subject to scrutiny, on a case by case analysis, by the newly established Commissioner of Trade Practices. Parties to anti-competitive agreements or practices were required to register these with the Commissioner. If the Commissioner could convince the newly created Trade Practices Tribunal that the anti-competitive nature of the agreement or conduct was against the "public interest", the Tribunal could prohibit the conduct.[15] The public interest test to be applied by the Tribunal

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10 Various piecemeal State legislation has been ineffectual: see generally Walker, *Australian Monopoly Law: Issues of Law, Fact and Policy* (FW Cheshire Publishing Pty Ltd, Melbourne 1967) pp35-36.

11 Although the prohibitions themselves contained a requirement that the *Court* be satisfied that the conduct be "to the detriment of the public" this addition to the *Sherman Act* proved to be a significant factor in the Act's ineffectiveness: see Walker, *Australian Monopoly Law: Issues of Law, Fact and Policy* pp31-35; Hopkins, *Crime Law and Business: Sociological Sources of Australian Monopoly Law* (Australian Institute of Criminology, Canberra 1978) ch2.

12 *Huddart Parker & Co v Moorehead* (1909) 8 CLR 330.

13 See generally Hopkins, *Crime Law and Business: Sociological Sources of Australian Monopoly Law* ch2.

14 Collusive tendering and collusive bidding were prohibited per se by Part IX of the Act. In 1972, resale price maintenance was also prohibited per se.

15 Three decisions were made by the Tribunal - *Frozen Vegetables*, *Fibreboard Containers* and *Re Books*. In all three, the Tribunal found that the anti-competitive nature of the agreements was such that they should be prohibited. See generally Gentle, "Economic Welfare, the Public Interest and the Trade Practices Tribunal"; Davey, "Frozen Vegetables: Before and After Restrictive Trade Practices", both in Nieuwenhuysen J (ed), *Australian Trade Practices: Readings* (Croon Helm, London 1976) pp59, 37 respectively.

was set out in s50 and provided a smorgasbord of criteria. Under subsection (2),

> the matters that are to be taken into account ... are:
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> (a) the needs and interests of consumers, employees, producers, distributors, importers, exporters, proprietors and investors;
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> (b) the needs of small businesses;
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> (c) the promotion of new enterprises;
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> (d) the need to achieve the full and efficient use and distribution of labour, capital, materials, industrial capacity, industrial know-how and other resources;
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> (e) the need to achieve the production, provision, treatment and distribution, by efficient and economical means, of goods and services of such quality, quantity and price as will best meet the requirements of domestic and overseas markets; and
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> (f) the ability of Australian producers and exporters to compete in overseas markets.

The election of the Whitlam Labor Government in 1972 saw the repeal of this legislation and the introduction of an Act which, for the most part, returned to the United States proscriptive model. The *Trade Practices Act* 1974 (Cth), inspired by the then Senator Lionel Murphy, did however retain the public benefit test, although now in a different legislative setting. The test was a strict one and was rarely invoked with success.[16] An applicant was required to establish that conduct was likely to result in a "substantial" benefit to the public, being a benefit which would "not otherwise be available".

The election of the Fraser coalition Government saw the establishment of the Swanson Committee to review the 1974 Act. The Swanson Committee Report considered the authorisation test to be "too harsh upon applicants, particularly the elements of 'substantiality' and 'not otherwise available'".

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16 Pengilley, "Public Benefit in Anticompetitive Arrangements? Australian Experience Since 1974" (1978) 23 *Antitrust Bulletin* 187.

It therefore recommended that these requirements be deleted.[17] The amendments were effected by the *Trade Practices Amendment Act* 1977 (Cth). It is of particular interest to note the comments of the Committee on what it saw as the role of the public benefit test:

> The Committee is firmly of the view that the thrust of the restrictive trade practices provisions of the Act is, and should remain, that competitive behaviour is its primary aim. The Committee accepts that it is fundamental to our present economic political ideals and our social system of maximum freedom, including freedom of enterprise, that opportunities for competition should remain amongst various enterprises in as wide a field as possible. This is because competitive behaviour is to be valued for the benefits that it brings to the community at large. However, if in a given case it can be shown that public benefits, ie, not merely benefits to the parties to the restrictive conduct, are available, and that those benefits outweigh the benefits to the public foregone by the absence or restriction of competition, then that conduct should be permitted to continue. In other words, we still favour the maintenance of the primary position that competitive behaviour is to be preferred, but that many who engage in restrictions of competition should be able to obtain an authorisation if they can show that on balance there are public benefits that outweigh the effects on the public of the restrictions on competition.[18]

No definition was offered by the Committee as to what might constitute a "public benefit".

Authorisation

The current authorisation process is dealt with in Parts VII and IX of the Act. Part VII empowers the Trade Practices Commission to authorise

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17 It was also the Swanson Committee which recommended the introduction of the notification procedure, discussed below.

18 Aust, Parl, Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (1976) paras 11.14, 11.15.

certain conduct[19] which may[20] otherwise be in breach of the Act.[21] The Commission may grant an interim authorisation or an authorisation for a limited time only.[22] An authorisation may be revoked where false or misleading information has been given to the Commission, where a condition imposed has not been complied with or where there has been a "material change of circumstances since the authorisation was granted".[23]

Not all conduct which may be in breach of Part IV can be authorised. Section 88 provides that the following conduct can be authorised:

(i) Entering or giving effect to a contract, arrangement or understanding which may be in breach of s45. The exception to this is price fixing of goods (but not services) as defined by s45A;

(ii) covenants which may be within s45B other than covenants relating to the price fixing of goods;

(iii) conduct which may be within s45D or s45E;

(iv) exclusive dealing which may be within s47;

(v) acquisitions which may be within s50 or s50A.

Thus conduct which cannot be authorised is that which may fall within ss46, 48 and 49 as well as the price fixing of goods.

The applicant, or any other person with a "sufficient interest", can apply to the Tribunal for a review of the Commission's decision.[24] This review

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19 Only future conduct can be authorised: s88(12).

20 It is not part of the task of the Commission or Tribunal to determine whether the conduct in question would constitute a breach of the Part IV provisions.

21 The procedure which governs an authorisation application is set out in ss89 and 90A.

22 See ss91(2), 91(1) respectively.

23 Section 90(4). For recent decisions where the Commission has revoked a prior authorisation, see *Fenwick* (1991) ATPR (Com) para 50-107; *Bankcard Interbank Agreement* (1990) ATPR (Com) para 50-093; *Re The Agricultural and Veterinary Chemicals Association of Australia Ltd* (1992) ATPR (Com) para 50-115; *Re Victorian Stock Agents' Association* (1993) ATPR (Com) para 50-128; *Stock and Station Agents' Association of NSW* (1993) ATPR (Com) para 50-129]

24 See s101.

process involves a public hearing and is governed by Part IX of the Act. The Tribunal can also grant interim authorisations pending a full review.[25]

The applicant must satisfy the Commission or Tribunal that the conduct will result in a "benefit to the public" such that "in all the circumstances" the conduct should be authorised. The actual wording of the public benefit test varies according to the conduct sought to be authorised.[26] Where the relevant Part IV prohibition which may apply to the conduct itself requires that there be a substantial lessening of competition, the public benefit test similarly requires that public benefits created by the conduct be weighed against a lessening of competition.[27] In contrast, where the relevant Part IV prohibition has no lessening of competition test, as in a primary boycott (ss4D, 45) and third line forcing (ss47(6), 47(7)), the Commission or Tribunal is to determine whether there is "such a benefit to the public" that the conduct should be allowed. It has been held by both the Tribunal and the Commission that the difference in these two types of test is not significant and both involve essentially the same test.[28]

Notification

A similar administrative procedure, referred to as "notification", is available in the case of conduct which might constitute exclusive dealing under s47. Under s93 a party to such conduct can "notify" the Commission of the relevant conduct. This notification itself automatically protects the party from action being taken against it under s47 by deeming such conduct not to substantially lessen competition. The procedure is not available in the case of third line forcing, although authorisation remains available for this. The Commission may in turn, however, if it considers that the notified conduct would have the purpose or likely effect of substantially lessening competition, and this would not be outweighed by a benefit to the public, notify the party of this determination. Notification by the Commission removes the protection previously held. Notification thus performs a similar function to authorisation but places the onus on the Commission to

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25 See *Re Queensland Timber Board* (1975) 24 FLR 205; *Re City Mutual Life Assurance Society Ltd* (1980) ATPR para 40-060; *Re International Air Transport Association* (1985) 58 ALR 721

26 See ss90(6)-90(9).

27 The exception is for merger authorisations which are in the same form as the per se breaches despite ss50 and 50A subjecting acquisitions to a substantial lessening of competition test.

28 *Re Media Council [No 2]* (1987) ATPR para 40-774; *Re The Agricultural and Veterinary Chemicals Association of Australia Ltd* (1992) ATPR (Com) para 50-115.

withdraw the immunity offered by the Act.[29] The notification provisions were introduced on the recommendation of the Swanson Committee in 1977.[30] The procedure has the advantage of bringing such practices to light for consideration by the Commission as well as providing more lenient treatment of vertical restraints.

WHEN WILL A BENEFIT BE "PUBLIC"?

The Act requires that the benefits created by the conduct be "public" benefits. The relevant public here is the Australian public, so that benefits flowing overseas are disregarded.[31]

The first Tribunal merger decision remains the most influential on the meaning of public in this context. In *Queensland Co-operative Milling Association*[32] the Tribunal adopted a very broad approach. It rejected an interpretation which would have limited the expression to the public as consumers.[33] While acknowledging that a "mere" benefit to the applicant may not be enough, the Tribunal stated that it "would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit." The Tribunal went on to describe a public benefit as being

> anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress. If this conception is adopted, it is clear that it could be possible to argue in some cases that a benefit to the members or employees of the corporations involved served some acknowledged end of public policy even though no immediate or direct benefit to others was demonstrable.[34]

Subsequent Tribunal decisions have reinforced and even extended this approach. In *Howard Smith* the Tribunal considered that efficiency gains

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29 See ss93(3), 93(5), 93(7).

30 Aust, Parl, Trade Practices Act Review Committee *Report to the Minister for Business and Consumer Affairs* (1976) paras 4.120-4.122.

31 *Re Howard Smith Industries Pty Ltd* (1977) 28 FLR 385.

32 (1976) 25 FLR 169; 8 ALR 481; ATPR para 40-012.

33 Such a restriction is found in Article 85(3) of the Treaty of Rome - see footnote 4 above.

34 *Queensland Co-operative Milling Association* at 182-183.

from a merger, even if not passed on in the form of lower prices to consumers, could be a public benefit. Failure to pass on the cost savings may be relevant to the weight to be given to the benefit but did not prevent the benefit from being a "public" one. Similarly, in *Rural Traders Co-operative (WA) Ltd*[35] and *Southern Cross Beverages*[36] the Tribunal rejected a definitive public/private distinction. In *Southern Cross* the Tribunal stated:

> Before a benefit can properly be regarded as a benefit to the public for the purposes of s102(4) of the Act, it must be seen as a benefit to the community generally. This does not mean that private benefit is necessarily irrelevant. The encouragement or enabling of an individual to pursue legitimate ends or to attain legitimate goals or to obtain legitimate rewards may well be beneficial to the community generally. When a benefit to a particular individual or segment of the community is pressed as a relevant benefit to the public for the purposes of s102(4), the Tribunal must assess whether the benefit to the individual or group can properly be so categorised. That assessment will involve consideration of whether the community generally has an interest in the individual or group being so benefited and of whether the benefit involves detriment to other individuals or groups.[37]

The Commission has generally expressed its approval of the Tribunal's broad approach. However the unhappy distinction between "public" and "private" has been one more readily made by the Commission in its decisions and there are indications that the Commission takes a narrower view than the Tribunal. This can be seen in the recent *ACI* decision.[38]

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35 (1979) 37 FLR 244.

36 (1981) 50 FLR 176.

37 At 212-213.

38 *Re ACI Operations Pty Ltd* (1991) ATPR (Com) para 50-108. See also the TPC circular no 27 issued in 1975 and revised in 1981 and 1978, *Annual Report* paras 2.76, 2.77. Contrast this with the recent acknowledgment by the Commission that "there will always be some blurring between private and public benefits - they are not mutually exclusive terms. The public benefit is not limited to a benefit to consumers. Individuals and companies pursuing private goals of efficiency and lower or contained unit costs of production can also achieve public benefits": *Re Macadamia Processing Company and Suncoast Gold Pty Ltd* (1991) ATPR (Com) para 50-109 at para 7.29.

Here, the Commission stated that:

> [I]n general, the Commission is rarely persuaded that there is sufficient overall public benefit to authorise a proposed acquisition unless the applicant can demonstrate that the acquisition is likely to result in benefits flowing to consumers or the community at large. An acquisition which will merely enhance the market power of the acquiring company, thereby enabling it to make higher profits, will result in a private benefit to the company and its shareholders, but this does not represent a public benefit.[39]

There would appear to be three primary justifications for the Commission's narrower interpretation. The first is a legalistic one, though none the less relevant for that. The employment of the term "public" by the legislature requires it to be given some meaning and the obvious, though admittedly difficult, approach is to contrast public with private benefits. For the Tribunal or Commission to usurp the legislative function can legitimately be queried. The second possible justification is more fundamental. Anti-competitive effects are "public" in nature and so the countervailing benefits, it may be argued, should similarly be public. A third justification is a matter of pragmatism. It will often be difficult to assess benefits, particularly where, as will generally be the case, the conduct that gives rise to the benefits is also anti-competitive. A requirement that the benefits be widespread may, in this sense, encourage only the more patent benefits to be recognised.

Despite this, there is much to be said for the broad view offered by the Tribunal. If private benefits, such as efficiencies gained through a merger, can be achieved, there seems a strong reason in principle to at least recognise these benefits. The requirement that the benefit be "public", in the sense of being passed on to the consuming public, assumes that one group (the "public") should be preferred over another (those engaging in the conduct in question). This is an assumption traditionally resisted by economists in the absence of empirical data supporting such a preference. Equally, insistence on benefits being public may also result in a rejection of efficiency as a ground for authorisation in a significant number of cases. Efficiencies created through a merger, for example, are often not inherently

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39 At 56,077. The Commission went on to say that it could play a part in transforming private into public benefits by requiring undertakings from the acquirer to pass on efficiency gains to customers in the form of lower prices (at 56,077).

or inevitably "passed on" to the wider community and so may not be "public" in the required sense.[40] In the view of the generally wide interpretation already given to "public" in this context, its deletion would not represent a major amendment.

WHAT WILL BE RECOGNISED AS A "BENEFIT"?

Unlike s50 of the 1965 Act, there is no attempt in the 1974 Act to delineate the types of benefits or groups of persons which the Commission or Tribunal should take into account when assessing public benefits. The exception is provided by s90(9A) which requires that, in the case of merger applications, benefits include export enhancement, import replacement and the promotion of international competitiveness generally.[41] This is an inclusive definition and does not limit other benefits which may be taken into account. This exception aside, it has been left to Commission and Tribunal to determine the range of benefits they will recognise. Their discretion also extends to the balancing process in which they weigh any benefits against the anti-competitiveness of the conduct under review.

In their statements on the meaning of benefits in this context both the Commission and the Tribunal have expressly adopted the widest possible conception of benefit. No attempt has been made to limit consideration of benefits to what might be considered directly economic benefits and certainly not to efficiency criteria. In *Queensland Co-operative Milling Association* the Tribunal stated that public benefit may constitute "anything of value to the community generally, any contribution to the aims pursued by the society".[42] This approach has been entrenched by subsequent Tribunal and Commission decisions expressly adopting this formulation.[43]

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40 See generally *Re Henderson Springs* (1987) ATPR (Com) para 50-054 and *Re ACI*, where the authorisation was conditional upon the company "passing on" its efficiency gains through long term supply contracts. See also *Re Ardmona, Letona and SPC* (1988) ATPR (Com) para 50-068; *Re Pacific Chemical Industries Ltd [No 2]* (1990) ATPR (Com) para 50-090.

41 See also s50A(1B) which duplicates this list for the purposes of overseas mergers assessed by the Tribunal under s50A.

42 *Queensland Co-operative Milling Association* (1976) ATPR para 40-012 at 17,242

43 For recent Commission decisions on this point see, for example, *Re Fletcher Challenge Ltd* (1988) ATPR (Com) para 50-077; *ACI Operations Pty Ltd* (1991) ATPR (Com) para 50-108; *Re Travel Industries Automated Systems Pty Ltd* (1993) ATPR (Com) para 50-131 at 56,378.

The Commission has summarised the benefits which have been recognised by it and the Tribunal as including the following:

- the promotion of competition in an industry;
- economic development, for example in natural resources through encouragement of exploration, research and capital investment;
- fostering business efficiency, especially where this results in improved international competitiveness;
- industry rationalisation resulting in more efficient allocation of resources and in lower or contained unit production costs;
- expansion of employment or prevention of unemployment in efficient industries and employment growth in particular regions;
- industrial harmony;
- assistance to efficient small business, for example guidance on costing and pricing or marketing initiatives which promote competitiveness;
- 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 equitable dealings in the market;
- promotion of industry cost savings resulting in contained or lower prices at all levels in the supply chain;
- development of import replacements;
- growth in export markets;
- steps to protect the environment.[44]

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44 See the Trade Practices Commission *Authorisation* pamphlet (March 1990). Similar lists have been referred to in a number of Commission decisions. For recent examples see *ACI Operations Pty Ltd* (1991) ATPR (Com) para 50-108 at

It can be seen from this that the public benefit criterion has been stated and employed in the widest terms possible. And it is this which gives rise to disquiet. A major concern is that the prohibitions contained in Part IV of the Act, which are designed to promote competition, may be undermined by the Commission or Tribunal authorising anti-competitive conduct which is considered to have some redeeming, ill-defined public benefit.

A more effective and principled approach, it has been suggested, would be to tackle cases of market failure, that is where the promotion of competition has socially undesirable consequences, in specific legislation. Thus environmental concerns, for example, would be dealt with systematically in environmental legislation, leaving competition law undiluted and so more effective in its attempt to promote competition.

Such an approach would be more in line with the United States' antitrust provisions. Under s1 of the *Sherman Act* and the judicial gloss added by the so-called "Rule of Reason", only "unreasonable" restraints of trade are prohibited.[45] When faced with the argument that a restraint which promoted public health, safety and welfare was therefore "reasonable", the Supreme Court responded by rejecting the argument as a "fundamental misunderstanding of the Rule of Reason". The Court went on to say that "contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favour of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions."[46]. As explained by one commentator:

> Rule of Reason analysis is only concerned with the competitive significance of the restraint, and neither requires nor permits the consideration of other social or economic factors. Arguments based upon the overriding importance of these factors in a particular industry or profession are properly addressed not to the courts, but to Congress, which may choose to create an appropriate exemption. Absent such an exemption, however, the challenged restraint's

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56,067; *Re Travel Industries Automated Systems Pty Ltd* (1993) ATPR (Com) para 50-131 at 56,379.

45 The judicial gloss was made to prevent the section having an excessive and unworkable coverage and emanates from the well known Supreme Court decision in *Re Standard Oil Co of New Jersey v United States* (1911) 221 US 1 .

46 *National Society of Professional Engineers v United States* 435 US 679 at 681, 688 respectively. But cf fn 73 below.

> competitive impact is the only proper subject for evaluation under the Rule of Reason.[47]

The charge, then, is that the pro-competition objective of the restrictive trade practices provisions is undermined by the public benefit criterion which itself has no identifiable objectives. A trenchant criticism made of the 1965 "public interest" test could also be levelled at the current Act:

> [T]he use of the term "public interest" in laws for the control of monopolistic conditions has a long, colourful, but not always distinguished history. It is a vague term that amounts to little more than a mellifluous buck-passing device. In Australia it has been interpreted from a variety of viewpoints involving questions of ideology, justice, morality and fairness as well as economic concepts of welfare.[48]

The writer goes on to state that "resort in legislation to loose terms like 'the public interest' invites conflict between economics and the law, by indicating government unwillingness to specify clear economic objectives for anti-monopoly policy."[49]

Despite the force of these arguments, it is suggested that a case, largely along pragmatic lines, can be made for retaining the authorisation process, although some modification of its terms will be suggested. The first point to be made is that recognised benefits are weighed against the anti-competitiveness of the conduct in question and so where conduct is significantly anti-competitive, it is less likely to be authorised. The countervailing public benefit in such a case must be correspondingly more substantial. The decisions bear this out.[50] Similarly, it is where the conduct has little anti-competitive effect that public benefits will be most

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47 Kintner, *A Treatise on the Antitrust Laws of the United States: Federal Antitrust Law* Vol 1 (Anderson Publishing Co, Cincinnati 1980) pp361-362.

48 Gentle, "Economic Welfare, The Public Interest and the Trade Practices Tribunal" in Nieuwenhuysen (ed), *Australian Trade Practices: Readings* (Croon Helm, London 1976) p59, originally published in *Economic Record* June 1975.

49 As above.

50 There are obvious difficulties in generalising in this manner but illustrations can be seen in recent Commission decisions such as *Re West Australian Newspapers Ltd* (1990) ATPR (Com) para 50-101; *Re Australian Tobacco Leaf Corporation Pty Ltd* (1992) ATPR (Com) para 50-124 and *Re Victorian Stock Agency Association* (1993) ATPR (Com); Tribunal decisions such as *Re Ford Motor Company of Australia* (1977) 32 FLR 65; *Re John Dee (Export) Pty Ltd* (1989) 87 ALR 321; *Re AC Hatrick Chemicals Pty Ltd* (1978) ATPR para 40-057; *Re Koppers Australia Pty Ltd* (1981) ATPR para 40-203.

telling. And yet in such a case the conduct may well not have been in breach of the Part IV prohibitions in any event.[51]

The second point is that, despite the range of benefits said by the Commission to have been recognised in its authorisation decisions, an examination of those decisions suggests that economic analysis dominates.[52] Benefits are weighed in their market context. In particular, a benefit given considerable weighting is efficiency - if the conduct creates efficiencies these may override a resultant lessening of competition. Efficiencies are commonly argued in merger cases[53] but are not confined to them.[54] As the primary, some would say the sole, point of promoting competition is to achieve efficiencies, few will object to this being taken into

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51 Many decisions can be referred to illustrate this point. Useful recent examples can be found in *Re The Agricultural and Veterinary Chemicals Association of Australia Ltd* (1990) ATPR (Com) para 50-104; *Re The Private Hospitals Association of NSW Inc* (1990) ATPR (Com) para 50-097 and *Re Commonwealth Serum Laboratories Commission* (1985) ATPR (Com) para 50-088; and *Re Australian Transmission Rebuilders Association* (1992) ATPR (Com) para 50-121. This argument does not hold where authorisation is sought for a per se breach - that is, a breach which does not require proof of a lessening of competition. Exclusive dealing (ss45, 4D) and third-line forcing (ss47(6), (7)) can be authorised. However the point remains that if such conduct is not significantly anti-competitive it should not be prohibited in any event: see generally Pengilley, "Trade Associations and Collective Boycotts in Australia and New Zealand - a Mistranslation of the *Sherman Act* Downunder" (1987) 33 *Antitrust Bulletin* 1019.

52 This is not to suggest that there is a simple distinction to be drawn between economic and non-economic benefits. As Posner has demonstrated, a whole range of benefits may be subject to economic analysis. See generally Posner, *Economic Analysis of Law* (Little, Brown & Co, Boston, 3rd ed 1986). However the argument here being considered is whether Australia's restrictive trade practices laws should be concerned solely with competition, or efficiency, or whether it can legitimately take into account a range of other values.

53 Recent Commission decisions illustrating this point are *Re Henderson's Federal Spring Works Pty Ltd* (1987) ATPR (Com) 50-054, *Re Ardmona, Letona and SPC* (1988) ATPR (Com) para 50-068, *Re Pasminco Ltd Australian Mining and Smelting Ltd* (1988) ATPR (Com) para 50-082, *ACI Operations Pty Ltd* (1991) ATPR (Com) para 50-108; *Re Howard Smith Industries Pty Ltd* (1991) ATPR (Com) para 50-111.

54 See, for example, *Re BHP Petroleum Pty Ltd* (1992) ATPR (Com) para 50-116; *Qantas Airways Ltd* (1986) ATPR (Com) para 50-109; *Re The Examiner Newspaper Pty Ltd* (1985) ATPR (Com) para 50-099; *Re Hatrick Chemicals Pty Ltd* (1978) 16 FLR 255.

account. Indeed, the failure of United States antitrust law to provide expressly for efficiencies to be considered has created its own difficulties.[55]

It is when we move away from efficiency considerations that more scope for disagreement arises. Quite apart from whether such benefits are properly taken into account in competition law, various practical difficulties also arise. How is the Commission or Tribunal to assess effects of the anti-competitive conduct on the environment or on the health and safety of the community for example? What evidence does it accept? And further, what qualifications do members of the Commission or Tribunal have, in any event, to make such assessments? To some extent these problems also occur in the more traditional economic analysis. As stated by the Commission in the *ACI* merger application:

> In order to make its assessment of the overall public benefit (or public detriment) likely to result from the proposed acquisition, the Commission must compare two alternative situations - the situation that would be likely to arise if the acquisition does not proceed, compared with the likely outcome if it does. This comparison is seldom easy. It involves the close and detailed examination of two alternative future scenarios, neither of which can be forecast with certainty. ... Another difficulty of the assessment is that any major acquisition is likely to have very different effects on different groups in the community. For example, an acquisition which permits more rapid rationalisation of an industry may have some adverse short-term effects on current employees, but bring considerable long term benefits to consumers through lower prices. Again, if the acquisition is one that will lead to a monopoly in the industry, this may result in benefits to the shareholders of both the acquiring and the target company, but little if any benefit to purchasers of the product concerned.[56]

These difficulties are exacerbated where a greater range of benefits are taken into account.

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55 See *FTC v Proctor & Gamble Co* (1967) 386 US 568 at 580 discussed in Areeda & Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* Vol IV (Little, Brown & Co, Boston 1978) para 941b.

56 (1991) ATPR (Com) para 50-108 at 56,077.

In practice the difficulties of adequately dealing with a broad range of vague benefits has tended to mean that, as noted above, such benefits have been given little weight. They tend to be cited in support of other benefits and to be given most weight only where the anti-competitiveness of the conduct is relatively insignificant. Some of the self-regulatory agreements fall within this category. Thus the setting of standards for private hospitals,[57] for agricultural and veterinary chemicals,[58] for insulin[59] and for automatic transmission repair[60] were seen as creating a variety of public benefits but, significantly, had little anti-competitive effect.

Nevertheless, it remains true that both the Commission and the Tribunal appear to have given weight to a range of non-efficiency criteria in their decisions. Not surprisingly, in these cases the Commission appears readier to accept benefits in which Government policy is clearly identified, either through legislation[61] or otherwise.[62] Many illustrations can be given of non-efficiency factors being given weight. In *Abbott Australia Pty Ltd and Nestlé Australia Ltd*,[63] for example, various Australian manufacturers and importers of infant formula entered into an arrangement to restrict the promotion and marketing of infant formula. The Commission considered the arrangement to be anti-competitive but authorised it because of the public benefits created. The benefits accepted related to proper nutrition for infants. In other decisions the Commission has also indicated that conduct which can be shown to have positive environmental effects will treated as giving rise to a public benefit, although such a consideration will rarely, if ever, be determinative.[64]

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57 *Re The Private Hospitals Association of NSW Inc* (1990) ATPR (Com) para 50-097.

58 *Re The Agricultural and Veterinary Chemicals Association of Australia Ltd* (1990) ATPR (Com) para 50-104.

59 *Re Commonwealth Serum Laboratories Commission* (1985) ATPR (Com) para 50-088.

60 *Re Australian Transmission Rebuilders Association* (1992) ATPR (Com) para 50-121.

61 See, for example, *Re Tasmanian Oyster Research Council Ltd* (1991) ATPR (Com) para 50-106; *Agricultural and Veterinary Chemical Association of Australia Ltd* (1990) ATPR (Com) para 50-104.

62 See, for example, *Re Henderson's Federal Spring Works Pty Ltd* (1987) ATPR (Com) para 50-054; *Re Abbott Australia Pty Ltd* (1992) ATPR (Com) para 50-123; *Re TRW Australia Holdings Ltd* (1992) ATPR (Com) para 50-127.

63 (1992) ATPR (Com) para 50-123.

64 See generally *Re Pacific Chemical Industries Ltd [No 2]* (1989) ATPR (Com) para 50-090; *Re Fletcher Challenge Ltd* (1988) ATPR (Com) para 50-077 at paras 10.50-10.56; *Re BHP Petroleum Pty Ltd* (1992) ATPR (Com) para 50-116.

One of the most significant groups of decisions in this context are those concerning industries which seek to self-regulate.[65] In *Agricultural and Veterinary Chemical Association of Australia Ltd*,[66] for example, an association consisting of manufacturers and distributors of farm chemicals introduced a system of accreditation for premises which held such chemicals. The accreditation scheme was designed to supplement and enforce compliance with various State and Territory dangerous goods legislation. Sanctions to enforce the scheme included a refusal to deal with those operating unaccredited premises. The Commission considered the arrangement to be substantially anti-competitive but nevertheless authorised it on the grounds of the public benefits created - the safe use of farm chemicals.

The Tribunal's decision in *Re Media Council of Australia [No 2]*[67] perhaps best makes the point. In this case the Tribunal considered a number of advertising "codes" created by the Media Council - a body constituted by representatives of all Australian media proprietors. The Codes were of two types. The first was a general code of advertising ethics applicable to all advertising. The second was a series of five codes relating to specific products - cigarettes, alcohol, therapeutic products, slimming products and domestic insecticides.

The codes prescribed standards of advertising as well as procedures to ensure compliance by advertisers and advertising agents. By a separate accreditation system, advertising agents were "accredited" by the Council (which status gave certain benefits to the agents). A condition of accreditation was that they comply with the Codes. Although they were not directly involved in the formulation of the Codes, agents and advertisers, through their representative associations, agreed to be bound by the Codes. Various sanctions were employed to enforce compliance including penalties and, ultimately, a loss of accreditation.

The codes themselves were of diverse form. The Tribunal categorised them into four types:

(i) rules reflecting the law v other rules;

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65 On the Commission's approach to self-regulation and the public benefits it may create, see generally *Re Australian Transmission Rebuilders Association* (1989) ATPR (Com) 50-084.

66 (1990) ATPR (Com) 50-104.

67 (1987) ATPR 40-774.

(ii) precisely expressed rules ("hard" codes) v generally expressed rules ("soft" codes);

(iii) rules proscribing misleading and deceptive advertisements v rules proscribing "harmful" and "offensive" advertisements; and

(iv) consumer protection rules v producer protection rules (for example, "unfair" advertising in the sense of inadmissible competitive methods).

At issue before the Tribunal was the content of the codes and, specifically, whether they created public benefits which outweighed any anti-competitive detriment. The application was made under s88(1) as it was thought that the codes might substantially lessen competition or constitute an exclusionary provision within s45 of the Act. The Commission had authorised the Codes[68] and a review of that decision was now sought by the Australian Consumers' Association. The accreditation system was not directly under review as it had previously been authorised by the Tribunal.[69]

The Tribunal had no doubt that the codes were substantially anti-competitive. This was explained as follows.

> [The] economic structure of the system ... consists essentially in three tiers. First, the system is founded on the strategic role of the media in the advertising industry, that is, its collective power to refuse publication or transmission of advertising messages by virtue of its "bottleneck" position in the economy. Second, this is buttressed by the pre-existing authorisation of the Media Council's Rules Governing Accreditation which ensures that media proprietors are bound into the self regulation system and can exercise a degree of control over the great bulk of advertising agencies. The third tier lies in the membership coverage and formal organisation, including governance, of the Media Council system ... The three-tiered structure gives rise to very significant market power. That market power is exercised by the Media Council in the implementation of its Code system. What we observe is a system of private regulation by the Media Council, in supersession of the market, that

68 (1986) ATPR (Com) para 40-107.
69 (1978) ATPR para 40-058.

> may or may not be in society's interest. In any event, it is anti-competitive.[70]

Essentially two public benefits were argued by the Media Council, and accepted by the Tribunal, as being generated by the codes. The first concerned cost efficiencies. These included an effective system created by the codes which neatly identified and explained often disparate and complex legal requirements as well as providing a system to scrutinise inappropriate or illegal advertisements. The second was that the codes "might improve the quality of advertising messages".[71] It is this more general ground that is of particular interest here. Certain features of advertising, notably the vulnerability of certain age groups targeted, the forced consumption of the advertising message and the lack of information in the case of some consumers, meant that there were "deficiencies in the functioning of the market for advertising messages ('market failure' in some degree) [which provided] a potential rationale for regulatory intervention (whether public or private) and thus for important aspects of the 1986 Codes."[72] In this sense anti-competitiveness was not necessarily seen as a public detriment - it could be a benefit.

This consideration of the "quality of advertising messages" went beyond economic considerations and attempted to identify other community values. The Tribunal stated that "the public interest requires the existence of mechanisms ... which give adequate assurance that standards reflect evolving community values and that decisions give rise to the provision of messages which the community wants".[73] The Tribunal sought to tackle this directly.

> A finding of benefit to the public implies that we can view constraints upon freedom of expression with some degree of equanimity; indeed, as preserving and fostering other values which require some sacrifice of freedom of expression. It is plain that the community generally, and the law itself, sometimes takes that view. We think of the law of obscenity, the law of defamation, the law of misrepresentation, the law of sedition and the law of contempt of court. If leaving advertising decisions to a free market would produce the kinds of advertisements that the

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70 *Re Media Council [No 2]* at 48,433-48,434.
71 At 48,438.
72 At 48,433.
73 At 48,438.

> community would prefer not to see or hear, there is a case in principle for censorship of the broad character of the Code system.[74]

In the end, the Tribunal, while recognising these public benefits, considered that there were deficiencies in the codes, such as with some of the "soft" rules and a need for wider community representation on the Media Council. It thus required modification to the codes before authorisation could be granted.[75]

CONCLUSION

The authorisation (and notification) procedures are perhaps the most distinctive feature of Australian competition law and that which distinguishes it most sharply from United States antitrust law. Certainly it is the feature most at odds, at least potentially, with a view of competition law which sees the promotion of efficiency as its only proper goal.[76] Despite the obvious difficulties in drawing conclusions from the range of issues raised in the above material, it is suggested that some tentative points can be made by way of summary and conclusion on the Australian experience with authorisation.

At its best, the Australian approach can be characterised as flexible and pragmatic. It allows an economic analysis, on a case by case basis, by specialist bodies constituted by economists as well as lawyers. In its least contentious role, it allows an assessment of efficiency criteria to be weighed against anti-competitive conduct. Even when moving away from efficiency related criteria, such as when considering the effects of anti-competitive conduct on employment, the environment or health and safety, the process has the virtue of pragmatism: the Commission or Tribunal can deal directly with these issues rather than having them left to be hopefully picked up by other legislative intervention.[77] On the other hand, the concern is that the

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74 *Re Media Council [No 2]* at 48,439.

75 Authorisation was subsequently granted, subject to conditions: *Re Media Council [No 3]* [1989]ATPR para 40-933.

76 This view has become identified primarily with the Chicago School of Economics: see generally Posner, "The Chicago School of Antitrust Analysis" (1979) 127 *U Pa LR* 925 and Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books, New York 1978).

77 In fact this approach is not so far removed from the United States' approach where, in limited cases, a range of benefits have been recognised. See, for example, *Costello Publishing v Rotelle* (1981) 670 F 2d 1035 (balancing freedom of religion against restraint of trade); *University Life Insurance v*

authorisation process allows a range of ill-defined values to muddy the scope and objectives of competition law. This possibility seems undeniable but, for reasons explained, the Australian experience gives little cause for concern. Implementation of the recent recommendation of the Hilmer Report, that "primary emphasis should be placed on economic efficiency considerations", would not, it is suggested, usher in significant change. One reform, however, which seems justified is the removal of the present requirement that benefits be "public". This requirement seems unduly cautious and, ironically, creates most difficulties when efficiencies are being argued - a benefit that perhaps is the most readily justifiable.

Unimarc (1983) 699 F 2d 846 (social and economic factors which benefited consumers taken into account); *Indiana Dentists Federation v FTC* (1984) 754 F 2d 207 (quality of dental care held to override the relevant restraint); see generally Areeda, *Antitrust Law: An Analysis of Antitrust Principles and their Application* Vol VII (Little, Brown and Co, Boston 1978) para 1504.