CHAPTER 6: AUTHORISATION

Background

Part VII of the Act provides that the ACCC may, in the public interest, authorise certain anti-competitive conduct which would otherwise be in breach of Part IV. The effect of authorisation is to grant an exemption from the relevant prohibitions.

Authorisation may be granted by the ACCC on the application of a party. The provision for authorisation is a statutory recognition of the fact that there may be public benefits associated with anti-competitive conduct that outweigh its detrimental effect. The authorisation process enables a broad range of matters, including efficiency gains, to be taken into account and weighed against any adverse impact on competition. Authorisation is not available for conduct that may constitute a misuse of market power under section 46 of the Act.

There are specific provisions relating to the authorisation of mergers which require certain matters to be regarded as public benefits. For other conduct that may be in breach of Part IV, the ACCC may grant an authorisation by applying one of two tests, depending on the conduct in question. For agreements that may substantially lessen competition, the applicant must satisfy the ACCC that the agreement would result in a benefit to the public that would outweigh any anti-competitive effect. For primary and secondary boycotts, third line forcing and resale price maintenance, the applicant must satisfy the ACCC that the conduct results in a benefit to the public such that it should be allowed to occur.

The Tribunal may review a determination by the ACCC in relation to an application for authorisation on the application of an interested party. Both the ACCC and the Tribunal are required to publish detailed reasons for their decisions. Authorisation will generally not take effect until any review is complete, although both the ACCC and the Tribunal may grant interim authorisation pending a decision.

To obtain authorisation, an application must be made to the ACCC. A fee of $7,500 is payable, although a fee of $15,000 applies for merger applications. Authorisation may be granted subject to conditions and for a specific period. There are no time limits imposed upon the ACCC in dealing with applications for the authorisation of conduct which does not constitute a merger.

Section 91B gives the ACCC power to revoke an authorisation. The ACCC must be satisfied that the authorisation was granted on the basis of evidence or information that was materially false or misleading, that a condition has not been complied with, or that there has been a material change of circumstances since it was granted. If, after a public review process, the ACCC is so satisfied, it may revoke the authorisation and, if appropriate, grant a substitute authorisation.

Issues

In relation to mergers, the concerns expressed about the authorisation process largely related to the time which may be taken by the ACCC to reach a decision and the risk of third party intervention by way of appeal to the Tribunal. The authorisation of mergers is examined in Chapter 2.

General dissatisfaction with the process of authorisation was expressed in a number of submissions, which went, for the most part, to the procedure rather than the eventual outcome. It was said that the process took too long and was too expensive both in the cost of preparing an application and the cost of filing it. However, some parties said that authorisation does not provide sufficient certainty because it is granted for a limited period only and is subject to appeal by third parties. In particular, it was contended that small businesses, including primary producers, should have access to a cheaper and more expeditious process for gaining statutory protection for collective bargaining.

Various suggestions were made to improve the process. Some submissions said that the authorisation process could be streamlined by reducing the filing cost for small business, by introducing limits on the time taken to determine applications and by limiting the right of third parties to appeal. Others said that a provision similar to section 45A(4) should be introduced to exempt the collective selling of goods or services from section 45A(1), leaving the relevant arrangement subject to a substantial lessening of competition test. Some said that collective bargaining by small businesses should be exempted from Part IV of the Act altogether.

The suggestion which attracted the most support, including that of the ACCC, was the creation of a notification process for collective bargaining by small businesses which would be modelled on the notification process available for exclusive dealing. This proposal is addressed in Chapter 7.

Some submissions suggested that authorisation was not a satisfactory means of dealing with collusive arrangements which may be necessary to enable

medical practitioners to provide comprehensive, high-quality health care, particularly in rural or remote communities. Concern was expressed that some common practices, such as roster arrangements, may be prohibited because they constitute price fixing or exclusionary arrangements.

The Wilkinson Review concluded that rural and regional doctors should not be excluded from Part IV and that the Act did not require amendment. However, it recommended that the authorisation process be streamlined within the current framework, with a greater emphasis on the needs of regional and rural communities to recruit and retain medical practitioners.

On 10 November 2002, the Government responded to the Wilkinson Review. It accepted most of the recommendations and, in particular, supported further action by the ACCC to ensure that it is widely understood that genuine rosters do not breach the Act. Two recommendations were referred to this Committee for consideration including Recommendation 12, which proposed the development by the ACCC of a 'pre-formal' authorisation assessment process to facilitate informal dialogue with potential applicants.

The Committee also received submissions on behalf of co-operative organisations arguing that the Act does not recognise the pro-competitive nature of co-operatives, which allow small businesses to compete with larger businesses. The co-operative federations variously argued in support of a notification process, the simplification of the authorisation process or an exemption from the competition provisions of the Act (particularly in the case of agricultural co-operatives).

Analysis

The significance of authorisation has increased in recent years. In 1995, following the report of the Hilmer Committee in 1993, Part IV was amended so that it extended to unincorporated entities, including the professions and many participants in the agricultural sector.

In addition, legislative reforms by the Commonwealth, State and Territory Governments in the context of the National Competition Policy have resulted in a wider range of industries becoming subject to Part IV of the Act. Some collective marketing arrangements which previously existed for agricultural products, including dairy products, have been dismantled. Overall, a greater proportion of the Australian economy is now subject to Part IV.

Against this background, the ACCC has granted authorisations to enable collective bargaining in a range of industries, including those of chicken, dairy

and sugar cane farmers, lorry owner-drivers and small private hospitals. In assessing these applications, the ACCC identified and examined public benefits associated with collective bargaining. Since 1 July 1995 the ACCC has denied only two applications for the authorisation of collective bargaining and has imposed conditions in less than half the cases in which it has granted authorisation. The average length of time for which authorisation has been granted has been approximately four years. Since 1 July 1995, the ACCC has not revoked any authorisation dealing with collective bargaining and there has been only one application for review before the Tribunal. In that case, the Tribunal authorised dairy farmers to collectively negotiate terms of supply with processors of raw milk.

The main concerns with the authorisation process are that it:

- is too expensive because of the costs of preparing and filing an application;
- takes too long, both in terms of the time required to prepare an application and the time taken by the ACCC to consider it; and
- does not provide sufficient certainty because an authorisation is only granted for a limited period and is subject to appeal by third parties.

Consideration should be given to the level of the fee for filing an application for authorisation. The fee is levied to recover the cost of dealing with the application, which is in accordance with general government policy on cost recovery. The Productivity Commission has recently looked at fees charged by Commonwealth Government agencies, including the ACCC.[1] It found that current charges by the ACCC have little, if any, impact on competition and economic efficiency. The fees did not appear to the Productivity Commission to unduly restrict access to the ACCC or to impose a significant burden on applicants, given the potential benefits from authorisation.

However, the Committee considers that the fee should not be set at such a high level as to discourage applications for authorisation, the granting of which would be in the public interest. While it may be appropriate to levy a fee on cost recovery grounds, the Committee suggests that the fees for the filing of applications for authorisation be reviewed from time to time to ensure that they are not deterring the submission of appropriate proposals for authorisation. The ACCC should be given a discretion to waive the fee for

1 Productivity Commission 2002, *Cost Recovery by Government Agencies.*

filing an application, in whole or in part, where it considers that it imposes an unduly onerous burden upon an applicant in all the circumstances.

The main expense involved in an application for authorisation would appear to be the legal costs associated with the preparation of the application and subsequent negotiations with the ACCC. The imposition of time limits for the consideration of applications for non-merger authorisation would, the Committee thinks, improve the process and may help to reduce these costs. Section 90 of the Act already allows the Minister to require the ACCC to make a determination on an application within four months, but the provision appears to have been little used. Recognising that an overly-tight time frame would increase the risk of regulatory error in an important area and may have an adverse impact upon those applicants with limited resources to satisfy the requirements of the ACCC, the Committee recommends that the Act be amended to impose a time limit of six months upon the consideration of non-merger applications for authorisation. Failure to observe the time limit should result in the application being deemed to be granted.

The Committee recognises that there is some uncertainty and delay engendered by the availability to third parties of a right of review by the Tribunal of a decision by the ACCC to grant authorisation. However, authorisation is an important process which involves balancing the public interest against any lessening of competition. The Committee considers that these rights of review should be retained in order that the relevant interests may be fully considered, but is of the view that consideration should be given to imposing a time limit on the review process.

The Committee sees merit in Recommendation 12 of the Wilkinson Review. That recommendation is that the ACCC establish a pre-formal authorisation assessment process to facilitate informal dialogue with professions and prospective applicants about current or proposed arrangements which potentially fall within the ambit of the Act. Such a process of consultation would enable prospective applicants to approach the ACCC without making any formal commitment. The ACCC would be able to provide guidance about the authorisation process and, where appropriate, suggest any modification of the application necessary to meet the requirements of the Act. The Committee understands that the ACCC already provides assistance to applicants, but, with the medical profession in particular, it would appear that there is scope for the use of an informal process to foster a greater understanding of the requirements of the Act and the role of the ACCC.

Conclusions

- Authorisation continues to be an important aspect of the Act, particularly given the broadening of the scope of the competition provisions in 1995.
- Concerns about the authorisation process would be alleviated by the introduction of a time limit for the consideration of non-merger applications for authorisation. The level of fee charged for filing applications should be reviewed and the ACCC should be given a discretion to waive the fee, in whole or in part, where it would impose an unduly onerous burden on an applicant.
- Third party rights of review should be retained, but consideration should be given to imposing a time limit on the review process.
- The ACCC should establish a process to enable parties contemplating an application for authorisation to seek informal guidance from the ACCC before lodging an application.

Recommendations

6.1 The Act should be amended to include a time limit of six months for the consideration of non-merger applications for authorisation by the ACCC, and consideration should be given to imposing a time limit on any review by the Tribunal.

6.2 The ACCC should be given a discretion to waive, in whole or in part, the fee for filing a non-merger application for authorisation where it would impose an unduly onerous burden on an applicant.

6.3 The ACCC should develop an informal system of consultation with non-merger applicants for authorisation designed to provide those persons with guidance about the authorisation process and the requirements of the Act.