

**Defining 'public benefit' - Social and  
Environmental Considerations in Part  
VII of the *Trade Practices Act 1974*  
(Cth)**

**A report by the Consumer Action Law Centre**

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This report has been produced as a result of a grant from the TPA Consumer Trust.

This document is a Report concerning the application of the 'public benefit' tests contained in Part VII of the *Trade Practices Act 1974* (Cth), with a focus on the definition of 'public benefit' and potential inclusion of social and environmental considerations in the public benefit test. This document has been written for the Consumer Action Law Centre by Galexia.

The Consumer Action Law Centre is an independent, not-for-profit casework and policy organisation. Based in Melbourne, Australia, it was formed in 2006 by the merger of the Consumer Law Centre Victoria and the Consumer Credit Legal Service and builds on the significant strengths of these two centres.

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# 1. Report background

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## Project background

This document is a Report concerning the application of the public benefit tests contained in Part VII of the *Trade Practices Act 1974* (Cth), with a focus on the definition of 'public benefit' and potential inclusion of social and environmental considerations in the public benefit test.

This document has been written for the Consumer Action Law Centre (Consumer Action) by Galexia with input from Consumer Action Law Centre and Professor Rhonda Smith of the University of Melbourne. This Report has been produced as a result of a grant from the TPA Consumer Trust.

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## Feedback

This Report is a contribution to the ongoing work of the Consumer Action Law Centre in the field of consumer and competition law, and comments on this Report are welcome. Please send any views or contributions to:

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## 2. Executive Summary

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The prevention of anti-competitive conduct is fundamental to the welfare of Australian consumers. The Consumer Action Law Centre (Consumer Action) believes that fair, effective and competitive markets generally deliver the best price, quality and access to goods and services to the majority of consumers.

However, Consumer Action also considers that competition policy is not an end in itself, but rather it is one of several means to achieve outcomes which satisfy consumer needs. Consumer welfare should be the central objective of economic and competition policy.

Part VII of the *Trade Practices Act 1974* (Cth) (the TPA) is explicit recognition that there are circumstances in which anti-competitive conduct will be permissible - on the basis that the detriment caused by the conduct is outweighed by other benefits to the public.<sup>1</sup> This is an important and sophisticated approach and one of the elements that put the TPA in the world-leading category at its inception.

Yet despite the importance of the public benefit test in the Act, there is very little statutory guidance as to what in fact, constitutes the public benefit. The definition of public benefit has largely been left to the Australian Competition and Consumer Commission (the ACCC) and the Australian Competition Tribunal (the Tribunal) to determine. The principles to be applied and the matters to be taken into consideration by the ACCC and the Tribunal in determining what constitutes the public benefit often lack certainty, and the test can appear limited when applied to some authorisations (and mergers) that raise public interest issues. Further, the guidance provided by the ACCC's *Guide to authorisation* (1995) is significantly out of date. The more recent *Authorisations and notifications – A summary* (2006) provides no guidance as to the type of public benefit claims the ACCC may consider.<sup>2</sup>

Indeed the interaction between the public interest, a general and far – reaching term, and ‘public benefit’, the terminology used in the TPA, may on its face seem complex. However, examination of the way the concepts of ‘public benefit’ and ‘public detriment’ have been applied in

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<sup>1</sup> Note that authorisation is not available for conduct that infringes section 46 of the TPA, the prohibition on misuse of market power.

<sup>2</sup> We note that since finalisation of this Report the ACCC has published the final version of its *Guide to Authorisation* (on 28 May 2007). The Guide is available at [www.accc.gov.au/content/index.phtml/itemID/788405](http://www.accc.gov.au/content/index.phtml/itemID/788405)

some instances, particularly by ACCC, indicates there is significant overlap between the concepts.

In practice, the ACCC and the Tribunal have adopted different approaches to interpreting the public benefit test. The international experience is also mixed, with no clear trend emerging from a comparison of the public benefit test in Australia, Canada, the European Union and the United States. Flexibility may be necessary and desirable given the broad range of applications for the public benefit test, however it needs to be flexibility within a well defined, understood and consistently applied framework.

This Report focuses on the potential broadening of the scope and application of the public benefit test (which currently focuses primarily on economic considerations) to include non-economic considerations, in particular, social and environmental concerns. The Report also considers the potential broadening of the application of the public benefit test to include consideration of a broader range of potential public harm that may be caused by the conduct.

This Report examines the application of the public benefit test in both theory and practice. The Report identifies issues in the scope and application of the test in Australia, and makes recommendations aimed at improving consideration of the public benefit in authorisations. The recommendations are:

#### **Recommendation 1: Certainty of the test**

**Explicit guidance on the public benefit test should be included in the legislation or formal guidelines. Such guidance should incorporate:**

- **Strong prompts to consider social and environmental criteria, including examples of the way in which such criteria arise in a range of case study scenarios, particularly scenarios where social and environmental considerations have not been taken into account.**
- **An inclusive checklist of factors to consider (of the sort presently contained in section 50(3) though obviously with significantly different focus and content).**

**Recommendation 2: Scope of the test**

The scope of the public benefit test should be expanded to include the specific inclusion of non-economic factors in consideration of both the public benefit and any counter-balancing detriment.

**Recommendation 3: Welfare Standard in the test**

In applying the public benefit test, a Welfare Standard should be selected that ensures consumer benefits are both considered and passed on.

**Recommendation 4: Public Guidance on the test**

Formal guidelines should be published by the ACCC and used to assist in interpretation of the public benefit test. Such guidelines should be suitable for use by consumer stakeholders as well as applicants.

**Recommendation 5: Stakeholder participation**

That consideration be given to initiatives to improve stakeholder participation, including the following:

- Guidance on presenting public benefits or detriments in a form that will be useful to the ACCC in its consideration;
- Recognition by the Tribunal of consumer interest in these issues and the standing of consumer organisations to present these issues to the Tribunal;
- Consideration of means by which to obtain information in relation to public benefits or detriments where such information is not provided by parties to the authorisation process.



This Report also reflects the fact that considerations of public benefit are also permitted by the TPA where a proposed merger is considered to infringe the prohibition contained in section 50. That is, a merger that infringes section 50 may be authorised by the Tribunal<sup>3</sup> on the basis of countervailing public benefit. This Report recommends that consideration be given to extending recommendations made in relation to the public benefit test framework in non-merger authorisations, to application of the test in a mergers context.

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<sup>3</sup> From 1 January 2007 merger authorisation applications are considered by the Tribunal. Prior to 1 January 2007 these applications were considered by the ACCC in the first instance.

## **3. The Public Benefit Test in Australia**

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In Australia, the public benefit test is relevant in an application for clearance of an otherwise prohibited merger and in an application for the authorisation of some other forms of conduct that might breach the provisions of the Trade Practices Act 1974 directed to prohibiting anti-competitive conduct (except breach of section 46 for which authorisation is not available).

This section examines the definition of 'public benefit' in the TPA and its interpretation and use in practice.

### **3.1 Context**

Australia's inclusion of a public benefit test in its competition law is not unique. Similar tests are included in some other jurisdictions. However, the strength and application of the tests may depend on the overall approach in the regulation regarding defences or exemptions to anti-competitive conduct.

Generally, competition regulation falls into three broad categories in relation to defences and exemptions:

- **No exemptions**  
At one end of the spectrum, a 'no tolerance' position can be identified. Such a competition regulation regime denies any room for defences or exemptions in competition regulation. Competition is the only test.
- **Efficiency benefits exemptions**  
In the middle of the spectrum, competition regulation includes exemptions or defences to competition provisions. This occurs when the conduct creates efficiency benefits above and beyond the costs of the detriments to competition. Typically, the efficiencies created through anticompetitive behaviour must outweigh the anti-competitive effects. This is the approximate position in the United States.

— **Public benefit exemptions**

Finally, at the other end of the spectrum, competition regulation may recognise public interest exemptions and defences. This stance is based on the premise that some social, environmental and economic inefficiencies could be exacerbated through the strict enforcement of competition regulation or, put another way, through enforcement as though competition were an end in itself. Consequently, jurisdictions acknowledging public benefit exemptions work to reconcile the goal of competition policy with the advancement of social welfare. This is the approximate position in New Zealand, Canada and the European Union.

Australian competition regulation fits within this last category, as it provides a potential exemption for some forms of anti-competitive conduct where a net public benefit may still result from the conduct. Note however, that no jurisdiction fits perfectly into these categories, and there is a significant degree of ‘blurring’ at the edges once individual determinations are considered.

### 3.2 Definition

The Australian competition legislation specifically permits the Australian Competition and Consumer Commission (ACCC) to grant authorisation to anticompetitive conduct when there are possible conflicts in policy objectives. Parties that believe anticompetitive conduct may result in net public benefits are able to apply for authorisation for this conduct on a voluntary basis.

Section 88 of Part VII of the TPA empowers the ACCC to grant authorisation to a corporation to enter or give effect to contracts, arrangements or understandings that are anticompetitive, or engage in exclusive dealing<sup>4</sup> if the ACCC determines that there are public benefits outweighing the anticompetitive detriment of the conduct. Authorisation may also be extended to parties breaching boycotting provisions, engaging in price maintenance or effecting a merger that may adversely affect competition in a market in Australia under the public benefit test. Thus authorisation is not available in respect of conduct that would otherwise breach section 46 of the TPA, that is misuse of market power.

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<sup>4</sup> Applications relating to exclusive dealing are generally dealt with by notification not authorisation – that is conduct is notified to the ACCC and continues unless the ACCC indicates the notification cannot stand. (CF authorisation which requires a positive determination by the ACCC that conduct is authorised).

Section 90 of the TPA sets out the principal tests for authorisations and mergers of this type. There are numerous specific tests in section 90, each one matched against particular provisions and offences in the TPA. However, these tests generally require the ACCC to assess applications with reference to the benefits and detriments that flow from the conduct in question.

One provision, section 90(6), includes a second element to the test that prescribes a weighing of costs and benefits. The test applies in circumstances where the ACCC may grant an authorisation where conduct that might lessen competition is involved (typically, conduct that might otherwise breach section 45 or section 47(1)). The ACCC must be satisfied that the conduct in question would:

- [1] Result, or be likely to result, in a benefit to the public and that
- [2] that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result from such conduct.

Although there are three separate sub-sections setting out tests in section 90, they are collectively referred to as ‘the public benefit test’.<sup>5</sup> The tests have historically been regarded as the same in practice despite the different wording, however in *NSW Pathology*<sup>6</sup>, it has recently been recognised that some difference in interpretation may be appropriate. This is discussed in more detail in Section 3.4.

The TPA does not provide a specific definition of ‘public benefit’. However, section 90(9A) provides some limited guidance, albeit with respect only to mergers:

In determining what amounts to a benefit to the public for the purposes of subsections (8A), (8B) and (9) [mergers]:

- (a) The ACCC 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

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<sup>5</sup> Further, the wording in two of the three tests is identical with the result that reference is sometimes made to two tests.

<sup>6</sup> Australian Association of Pathology Practices Incorporated [2004] ACompT 4 (8 April 2004)

- (b) Without limiting the matters that may be taken into account, the ACCC must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

The principles to be applied and the matters to be taken into consideration by the ACCC and the Tribunal in determining what constitutes the public benefit often lack certainty, and the test can appear limited when applied to some authorisations (and mergers) that raise public interest issues. Further, the guidance provided by the ACCC's *Guide to authorisation* (1995) is significantly out of date. The more recent *Authorisations and notifications – A summary* (2006) provides no guidance as to the type of public benefit claims the ACCC may consider.

Indeed the interaction between the public interest, a general and far – reaching term, and 'public benefit', the terminology used in the TPA, may on its face seem complex. However, examination of the way the concepts of 'public benefit' and 'public detriment' have been applied in some instances, particularly by ACCC, indicates there is significant overlap between the concepts.

### 3.3 Welfare Standard

Legislation is typically targeted at progressing the welfare of the society in which it governs, and competition regulation (including exemptions) has an important role in this process. However, the way in which welfare is measured has been a contentious topic in the literature discussing the role of competition legislation.

Essentially, the contention revolves around the definition of benefits and the weighting of benefits. The issue of *whom* to recognise as a recipient of benefits and *which weight* different recipients of benefits should receive in the weighing process is of crucial importance.

In order to determine this question consistently across a range of circumstances, jurisdictions tend to adopt a single standard for measuring welfare in competition regulation. Often this standard is not explicitly set out in legislation, and arises from a combination of regulator and tribunal determinations.

David Round highlights the complications that can arise in relation to the choice of such a standard:

The key question, of course, is what exactly are public benefits? Are only final consumers to be included in public? How about intermediate buyers? And does the size of the buyer matter? How is small business taken into account here? And does the distribution of benefits between different buyers matter?

Importantly, do efficiency gains in the hand of the merged firm count as public benefits? Must the firm pass through all of the gains to consumers? Some of the gains? Do retained benefits count if they are passed on to domestic shareholders? Is there any direct domestic gain if the benefits initially are passed onto overseas shareholders? What if the gains are retained in the firm to fund future growth or innovation? Are these public benefits?<sup>7</sup>

This section summarises the four key standards that are used in order to measure welfare, as these competing standards provide the theoretical basis for implementing the public benefit test in competition regulation.

There are four standards currently used in the application of competition policy exemption tests:

- **Total Welfare Standard** (also known as the Total Surplus Standard);
- **Price Standard**;
- **Consumer Welfare Standard** (also known as the Consumer Surplus Standard); and
- **Weighted Surplus Standard** (also known as the Balancing Weights Approach).

## Total Welfare Standard

The Total Welfare Standard is, as indicated by its title, concerned with the total benefits (or costs) of an outcome, regardless of the classification of the recipient of the benefit/cost. Under the Total Welfare Standard, if, as a result of a certain change in the market, efficiency gains exceed any net loss in the sum total of consumer and producer

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<sup>7</sup> Round, D.K., *Whither Efficiencies: What is in the Public Interest*, presented at the Fifteenth Annual Workshop of The Competition Law and Policy Institute of New Zealand, Auckland, 13-15 August 2004, p 4.

surplus, this particular conduct will be considered beneficial and thus a preferred outcome.

This Standard requires that all recipients of gains be treated equally in a net cost-benefit analysis. For example, if as a result of the increased market power subsequent to a merger a firm is able to command a higher price for the product without passing on any of its cost savings, there will be a net transfer of consumer surplus to the producer. This welfare transfer is just that however – a transfer – and as such is treated as neutral in the analysis.<sup>8</sup> Under the Total Welfare Standard only the net effect of anticompetitive effects are counted as a loss - those referring to “the part of the total loss incurred by the buyers and sellers that is not merely a transfer from one party to another, but represents a loss to the party as a whole”.<sup>9</sup>

### Price Standard

The Price Standard is likely to generate very different results to the Total Welfare Standard. Essentially for a merger to be given clearance under the Price Standard, efficiency gains must be large enough so that “the downward pressure on price due to decreased marginal costs offsets the upward pressure on price due to increased market power”.<sup>10</sup> This Standard necessitates that some of the efficiency gains generated from the merger be passed on to consumers and used to maintain or lower the prices they face. Effectively, in contrast to the Total Welfare Standard, in measuring welfare changes this Standard “assigns a distributional weight of zero to producers, while assigning an infinitely large weight to consumers”.<sup>11</sup>

### Consumer Welfare Standard

The Consumer Welfare Standard requires that the gains in efficiency exceed the total loss in consumer surplus, including any wealth transfer

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<sup>8</sup> Williamson, O.E., *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 American Economic Review, 18, 1968. p 24.

<sup>9</sup> Trebilcock, M., *The Great Efficiencies Debate in Canadian Merger Policy: A Challenge to the Economic Foundations of Canadian Competition Law or a Storm in a Teacup?*, presented at the Fifteenth Annual Workshop of The Competition Law and Policy Institute of New Zealand, Auckland, 13-15 August 2004, p 7.

<sup>10</sup> Trebilcock, M., *The Great Efficiencies Debate in Canadian Merger Policy: A Challenge to the Economic Foundations of Canadian Competition Law or a Storm in a Teacup?*, presented at the Fifteenth Annual Workshop of The Competition Law and Policy Institute of New Zealand, Auckland, 13-15 August 2004, p 33.

<sup>11</sup> Trebilcock, M., *The Great Efficiencies Debate in Canadian Merger Policy: A Challenge to the Economic Foundations of Canadian Competition Law or a Storm in a Teacup?*, presented at the Fifteenth Annual Workshop of The Competition Law and Policy Institute of New Zealand, Auckland, 13-15 August 2004, p 33.

to other parties.<sup>12</sup> Here the Consumer Welfare Standard is distinguished from the Total Welfare Standard in that for an outcome to be acknowledged as superior, any gains in efficiency have to be greater than any losses accruing to consumers. Thus any welfare transfer from consumers to producers is counted as a welfare loss.

Effectively, the efficiency or cost savings of the merger would have to be larger than the loss in consumers' surplus, though it may be argued this standard may also take account of non price benefits to consumers in assessing net 'loss' to consumers. "This standard is looser than the price standard – some mergers that raise price can still be approved if the efficiencies are great enough – but it is certainly tighter than the total surplus standard".<sup>13</sup> This Standard in effect gives a weight of 100 per cent to changes in consumer surplus, and of zero to that for producers.

### Weighted Surplus Standard

The Weighted Surplus Standard is comparatively a mid-way approach. The Weighted Surplus Standard "attempts to find a 'balance' between the wealth transfers from less well off consumers to wealthier producers by assigning relative weights to the consumers' losses and the producers' gains".<sup>14</sup> Unlike the Total Welfare Standard, the balancing weights approach does not treat the redistributive effects of a merger as neutral. However this approach can theoretically still recognise gains to producers that are not matched by those to consumers as gains.

Such an approach attempts to measure the difference in value between a dollar in the hands of a producer and a dollar in the hands of a consumer, and is therefore subject to political/subjective interpretation in application. Generally consumers can be subdivided into a number of categories, including low income and even business consumers, and producers can be similarly disaggregated according to many potentially influential attributes. The establishment of a weight for the gains and losses of each group of participants is therefore necessary in each case.<sup>15</sup>

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<sup>12</sup> Trebilcock, M., *The Great Efficiencies Debate in Canadian Merger Policy: A Challenge to the Economic Foundations of Canadian Competition Law or a Storm in a Teacup?*, presented at the Fifteenth Annual Workshop of The Competition Law and Policy Institute of New Zealand, Auckland, 13-15 August 2004, p 33.

<sup>13</sup> Everett, A. & Ross, T.W., *The Treatment of Efficiencies in Merger Review: An International Comparison*, November 22 2002, p 22.

<sup>14</sup> Trebilcock, M., *The Great Efficiencies Debate in Canadian Merger Policy: A Challenge to the Economic Foundations of Canadian Competition Law or a Storm in a Teacup?*, presented at the Fifteenth Annual Workshop of The Competition Law and Policy Institute of New Zealand, Auckland, 13-15 August 2004, p 26.

<sup>15</sup> The Competition Tribunal in Canada has suggested that the appropriate weight could be inferred from that embodied in the tax system.



## Comparison of Welfare Standards

The following table provides a brief summary of the four standards:

| Standard                         | Overview  | Consumer Weight   | Producer Weight   | Jurisdictions                               |
|----------------------------------|---|-------------------|-------------------|---|
| <b>Total Welfare Standard</b>    | Efficiency gains are measured in total, regardless of the classification of the recipient of the benefits.  | Equivalent weight | Equivalent weight | Australia (Tribunal)<br>New Zealand         |
| <b>Price Standard</b>            | Efficiency gains must be large enough so that “the downward pressure on price due to decreased marginal costs offsets the upward pressure on price due to increased market power”.                  | 100%              | 0%                | US (approx)                                 |
| <b>Consumer Welfare Standard</b> | Efficiency gains must exceed the total loss in consumer surplus, including any wealth transfer to other parties.  | 100%              | 0%                | Australia (ACCC)<br>European Union (approx) |
| <b>Weighted Surplus Standard</b> | Efficiency gains must be balanced between the wealth transfers from less well off consumers to wealthier producers by assigning relative weights to the consumers’ losses and the producers’ gains. | Varies            | Varies            | Canada                                      |

### 3.4 Practice

Essentially, the authorisation provisions in the TPA allow for a careful case-by-case analysis of conduct where applicants are seeking release from the prohibitions on anti-competitive conduct contained in Part IV of the TPA. Each case requires consideration of the application of the public benefit test, and the definition of public benefit has largely been left to the ACCC and the Tribunal to determine.

#### Process

Authorisation may be granted by the ACCC under one of two tests.<sup>16</sup> The first test asks whether the public benefit outweighs the anti-competitive detriment. This test applies to:

- Contracts, arrangements or understandings which substantially lessen competition;<sup>17</sup>

<sup>16</sup> Latimer, P., *Australian Business Law*, CCH Australia Limited, Sydney, 2002, p 689.

<sup>17</sup> *Trade Practices Act 1974* (Cth), sections 45 (2)(a)(ii) and 45(2)(b)(ii).

- Price fixing of goods and services;<sup>18</sup>
- Covenants running with land that have the purpose or effect of substantially lessening competition;<sup>19</sup>
- Covenants in relation to prices;<sup>20</sup>
- Exclusive dealing;<sup>21</sup> and
- Mergers.<sup>22</sup>

The second test relates to the question of whether or not the public benefit justifies authorisation in relation to certain *per se* breaches of the TPA. Whilst anticompetitive effects are not explicitly considered in the test wording, they are arguably implicit given the test applies to conduct which, where proved, automatically breaches the TPA in the absence of authorisation. This test applies to:

- Primary boycott/exclusionary provision;<sup>23</sup>
- Secondary boycotts;<sup>24</sup>
- Third line forcing;<sup>25</sup> and
- Resale price maintenance.<sup>26</sup>

Although there are minor variations in the public benefit tests, in the past the Tribunal has treated the tests as essentially the same. See for example former ACCC Chair Professor Allan Fels referencing the Tribunal decision in *Re Rural Traders Cooperative (WA) Limited* (1979) ATPR 40-110 - “the Commission adopts the view taken by the Australian Competition Tribunal that in practice the tests are essentially the same”.<sup>27</sup> However, the Tribunal in recent years has sought to distinguish aspects of the tests in Section 90(6) and Section 90(8). In *Australian Association of Pathology Practices Incorporated* (2004) they stated:

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<sup>18</sup> *Trade Practices Act 1974* (Cth), section 45A.

<sup>19</sup> *Trade Practices Act 1974* (Cth), section 45B.

<sup>20</sup> *Trade Practices Act 1974* (Cth), section 45C.

<sup>21</sup> *Trade Practices Act 1974* (Cth), section 47(1).

<sup>22</sup> *Trade Practices Act 1974* (Cth), section 50.

<sup>23</sup> *Trade Practices Act 1974* (Cth), sections 45(2)(a)(ii) and 45(2)(b)(i).

<sup>24</sup> *Trade Practices Act 1974* (Cth), section 45D.

<sup>25</sup> *Trade Practices Act 1974* (Cth), section 47(6), (7).

<sup>26</sup> *Trade Practices Act 1974* (Cth), section 48.

<sup>27</sup> Fels, A., *The Public Benefit Test in the Trade Practices Act (1974)*, ACCC National Competition Policy Workshop, 12 July 2001, p 5.

In *Re Rural Traders* and subsequent cases have proceeded upon the basis that where the phrase 'such a benefit to the public' is used in s 90, the reference is to a net benefit even though the subsection does not specifically designate a weighing of benefit and detriment. We agree with that view. But it does not follow, with respect, that the two tests are precisely the same. That is because s 90(6) limits the consideration of detriment to 'the detriment to the public constituted by any lessening of competition' resulting from the relevant conduct, whereas no such limitation is to be found in s 90(8).<sup>28</sup>

This appears to leave open the interpretation that a broader range of detriments may be considered under the Section 90 (8) test (or that the degree of public benefit required under the Section 90(8) test may be higher). This could be said to be appropriate in view of the *per se* nature of the offences to which it applies.

### Interpretation of the Welfare Standard

In determining the constitution of 'public' in the public benefit test, the ACCC has tended to require that the benefits that accrue from the conduct in the form of efficiencies be at least in part passed onto consumers in the form of cost savings or product quality improvement. Resource savings have also been seen as giving rise to societal benefit. In essence this is an application of the Consumer Welfare Standard:

In general, the ACCC 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.<sup>29</sup>

There is strong support for the use of the Consumer Welfare Standard from many commentators<sup>30</sup> and it is suggested this choice of standard does better reflect the objectives of the TPA. Section 2 of the *Trade Practices Act 1974* states:

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<sup>28</sup> *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4 (8 April 2004), paragraph 93.

<sup>29</sup> *Re ACI Operations Pty Ltd* (1991) ATPR (Com) para 56, 077.

<sup>30</sup> Recently, Gans has supported the use of the Consumer Welfare Standard, but has suggested improvements in its practical application. See Gans, J, *Reconsidering the Public Benefit Test in Merger Analysis: the Role of Pass Through*, Melbourne Business School Working Papers, 2005.

The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

In contrast, however, the Australian Competition Tribunal has been more prepared to accept private benefits accruing from the conduct in question as public benefits in line with the argument that an improvement in resource usage is crucial in determining whether a public benefit has resulted.<sup>31</sup> This represents an application of the Total Welfare Standard (albeit a modified one).

The Tribunal noted in the *Chicken Growers Decision*

The Tribunal also has adopted a definition of "the public" which would include all members of society in all their roles – for example, as investors, shareholders or workers as well as consumers, and also as people incidentally affected by market outcomes. Moreover, it also has taken the view that, by and large, there should be no differences in the weight attached to benefits or costs, irrespective of who are the beneficiaries or who bear the detriments. We accept and adopt all of those perspectives.<sup>32</sup>

It is possible that both the ACCC and the Tribunal have found room to incorporate some elements of the Weighted Surplus Standard in their determinations, without explicitly adopting the Weighted Surplus Standard in the same way as it is formally adopted in Canada. Indeed there is a considerable blurring of the distinctions between all three standards in individual decisions of both the ACCC and the Tribunal.

The recent high profile decision in *Qantas/Air New Zealand* is a case in point. It illustrates the Tribunal's approach to interpreting the public benefit test in Australia, including the choice of welfare standard to be applied. In the Qantas decision, the debate over wealth transfers arose because a substantial proportion of the efficiencies claimed seemingly accrued to the applicants and their shareholders. Should these cost savings still be counted as public benefits where there was no guarantee they would be passed on to the wider public, namely consumers of airline services?<sup>33</sup>

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<sup>31</sup> Smith, R.L. & Grimwade, T.P., *Authorisation: Some Issues*, Australian Business Law Review, 25, p 360.

<sup>32</sup> Re VFF Chicken Meat Growers' Boycott Authorisation [\[2006\] ACompT 2](#) at para 75.

<sup>33</sup> Adhar, R., *'Wing Tip' Adjudication, but Divergent Destinations: A comment on Ian Tonking, "The Flying Kiwi"*, Competition Law and Policy Institute of New Zealand Sixteenth Annual Workshop, Christchurch, 5-7 August 2005, p 3.

The application of Qantas and Air New Zealand was also considered by competition authorities in New Zealand.<sup>34</sup> The resulting New Zealand decision accepted that the proposed arrangement could proceed by applying the Total Welfare Standard that is a recognised part of New Zealand competition law.

In Australia, the arrangement was subject to an initial determination of the ACCC in which authorisation was denied.

The arrangement was then considered by the Tribunal. Generally, they purported to apply a Total Welfare Standard in their decision:

The Tribunal, consistent with its previous determinations, adopted a test of assessing the benefits to the public said to be generated from the Alliance by considering the benefits which flowed not only to ultimate consumers but also to the parties and their shareholders.<sup>35</sup>

However, some elements of the Weighted Surplus Standard can *also* be seen in the decision:

We consider that the phrase “benefit to the public” is to be given a broad definition which, in addition to group interests, takes into account (with appropriate weighting) individual interests to the extent that such interests are considered by society to be worthy of inclusion and measurement.<sup>36</sup>

And:

In our view, the objective and statutory language of the TPA, as well as precedent, support the use of a form of the total welfare standard as the most appropriate standard for identifying and assessing public benefit. We say a ‘form of’ the total welfare standard because... whilst the Tribunal does not require that efficiencies generated by a merger or set of arrangements necessarily be passed on to consumers, it may be that, in some circumstances, gains that flow through only to a limited number of members in the community will carry less weight.<sup>37</sup>

The result of this decision may be that, despite the efforts of the ACCC to apply a Consumer Welfare Standard, the key standard to be applied in Australia is the Total Welfare Standard, perhaps modified to consider the ‘weight’ of some types of benefits.

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<sup>34</sup> *Air New Zealand v Commerce Commission*, (2004) HC AK CIV 2003 404 6590, 17 September 2004.

<sup>35</sup> *Qantas Airways Ltd*, [2004] ACompT 9, para 8.

<sup>36</sup> *Qantas Airways Ltd*, [2004] ACompT 9, para 8, p 187.

<sup>37</sup> *Qantas Airways Ltd*, [2004] ACompT 9, para 8, p 185.

It should be noted, however, that the difference between the Tribunal and ACCC decisions, and the ACCC and the High Court in New Zealand can additionally be attributed to the differing evidence presented. In particular, there was evidence before the Tribunal and the New Zealand High Court that other airlines – specifically Virgin and Emirates - would enter the market. This evidence was not provided to the ACCC.

Thus the effect in practice of the decision remains to be seen. Clearly, it is highly desirable that the issue of the appropriate test be clarified. This Report suggests that in view of the TPA's objectives, it is appropriate that the test ensures consumer benefits are both considered and passed on (at least in part). See Section 5.3 for further discussion.

### Interpretation of Scope

As noted above, 'public benefit' remains undefined in legislation. In practice it has been considered to encompass a relatively broad range of benefits, including "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".<sup>38</sup>

Despite the differing approaches of the ACCC and the Tribunal to the use of a Welfare Standard in interpreting the test, both have found room in their individual determinations to include a range of benefits of a non-economic nature.<sup>39</sup> These have included:

— **Environmental concerns**

For example the *Refrigerant Reclaim* case – which allowed a price fixing arrangement between competitors seeking to levy an industry wide fee to fund the recovery and destruction of ozone depleting and greenhouse gasses.<sup>40</sup>

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<sup>38</sup> Queensland Co-operative Milling Association Limited (1976) ATPR 40-012 at 17, 242

<sup>39</sup> Bhojani, 'Public Benefits' under the Trade Practice Act, 1997.

<sup>40</sup> Refrigerant Reclaim Australia Ltd, A90854, Final Determination, 7 May 2003. See also *DuPont (Australia) Limited and Ors* (1996) ATPR (Com) para 50-231 at 56, 531-2.

- **Public health**  
For example the *Abbott Australia and Nestle* case considered the benefits to society of increased trust and confidence in breast-feeding and associated public health benefits. Note also that compliance with a World Health Organisation code was a benefit.<sup>41</sup>
- **Public safety**  
For example the *Federation of Australian Underwater Instructors* case concluded that public safety contributes to public benefit.<sup>42</sup>
- **Fostering fitness and recreation**  
For example the *Speedo Knitting Mills* case allowed exclusive sponsorship of sport and fitness activities because it delivered a public benefit in the form of fostering fitness and recreation. (Potentially this may just be an example of a public health benefit rather than a separate category).<sup>43</sup>
- **Protection of the interests of the vulnerable**  
For example the *Australian Pensioners League of Western Australia* case authorised an arrangement to provide fixed-price discount pre-paid funerals to members of the Pensioners League, on the basis that it allowed participating funeral homes to provide basic services to a section of the community, some of which were financially disadvantaged, at a lower price.<sup>44</sup>

These cases illustrate that there is significant opportunity for the inclusion of non-economic factors in authorisations in Australia.

However, as a result of the absence of a defined scope of the public benefit test in Australia, there is no explicit requirement to consider

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<sup>41</sup> *Abbott Australia Pty Ltd and Nestlé Australia Ltd* (1992) ATPR (Com) para 50-123. See also Royal Australasian College of Surgeons, A90765, Final Determination, 30 June 2003; Royal Australian College of General Practitioners, A90795, Final Determination, 19 December 2002.

<sup>42</sup> *Federation of Australian Underwater Instructors* (1983) ATPR (Com) 50-055. See also *Agsafe Ltd and Agcare Ltd* (1994) ATPR (Com) para 50-150, *The Australian Tyre Dealers' and Retreaders' Association* (1994) ATPR (Com) para 50-162

<sup>43</sup> *Speedo Knitting Mills* (1981) ATPR (Com) 50-016.

<sup>44</sup> *The Australian Pensioners League of Western Australia*, A70012, Final Determination, 24 October 2001.  
<<http://www.accc.gov.au/content/index.phtml/itemId/744476/fromItemId/401858/display/acccDecision>>

non-economic factors, including social and environmental issues, in each determination. The instances listed above where non-economic factors have been considered are the result of individual, unique circumstances in each case, and the inclusion of non-economic factors is ad hoc, rather than coordinated. It is of course necessary to assess applications with reference to their particular subject matter. This does not obviate the need for a co-ordinated approach to non-economic factors.

### Application of test in merger authorisations

As has been noted, section 90(9) applies the same test to merger authorisation applications as that set out in section 90(8), which relates to primary boycott/exclusionary provision;<sup>45</sup> secondary boycotts;<sup>46</sup> third line forcing;<sup>47</sup> and resale price maintenance.<sup>48</sup> Importantly, however, merger authorisation is not required unless the view is formed that the merger will not pass the informal clearance process – that is the acquisition would substantially lessen competition. At this point it is open to the parties to seek authorisation of the otherwise prohibited merger on the basis of public benefits that outweigh the anti-competitive detriment. Thus, non-economic factors are not able to be considered in major merger clearance cases. For example, in major bank merger cases concerns about the impact of the merger on employment and rural and regional communities could not be considered<sup>49,50</sup>

The nature of this process is not generally well understood. This is not assisted where policy makers apparently place weight on the ACCC's capacity to consider public benefit in the context of mergers, despite the serious limitations on this capacity. For example, the Financial System Inquiry (the Wallis Inquiry) had responded to community concerns about the impact of bank mergers on employment and rural and regional communities by specifically claiming that the ACCC could deal with such issues as part of the public benefit test, and there was therefore no need for other regulation in Australia (eg Community Service Obligations for banks):

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<sup>45</sup> *Trade Practices Act 1974* (Cth), sections 45(2)(a)(ii) and 45(2)(b)(i).

<sup>46</sup> *Trade Practices Act 1974* (Cth), section 45D.

<sup>47</sup> *Trade Practices Act 1974* (Cth), section 47(6), (7).

<sup>48</sup> *Trade Practices Act 1974* (Cth), section 48.

<sup>49</sup> Australian Competition and Consumer Commission, *Westpac Banking Corporation / Bank of Melbourne Limited: Background to Decision on Merger Proposal* (ACCC, Canberra, 1997, July).

<sup>50</sup> ACCC, *ACCC not to oppose Commonwealth Bank/Colonial Merger*, 30 May 2000 <<http://www.accc.gov.au/content/index.phtml/itemId/323039/fromItemId/621419>>



The only issue the ACCC is legally able to consider in assessing a merger under s. 50 of the Trade Practices Act is the likely impact of the merger on competition. However, if a proposed merger was thought to be in breach of s. 50, and authorisation was applied for, it would be open to the ACCC to consider the impact of any merger proposal on employment levels when weighing the public benefit implications of the merger... Any negative consequences that a merger poses for rural communities may also be a relevant consideration in an authorisations proceeding under the Trade Practices Act.<sup>51</sup>

In fact the consideration of social issues in bank mergers is an issue that tends to fall between the regulatory cracks in Australia. In the key bank merger decisions referred to above there was a considerable degree of reliance on undertakings that only provided short term protection:

At the time [of the Westpac / Bank of Melbourne decision] the ACCC took the view that the undertakings addressed certain key criteria in the relevant markets where competition issues were substantial. However, over the years the ACCC has received a large number of complaints from consumers particularly after the time period of the undertakings lapsed. In particular, the expectation that Bank of Melbourne would have an identity and autonomy independent of Westpac has not been realised, according to complainants.<sup>52</sup>

### **Application of the Test where anti-competitive detriment is small**

Authorisation is generally considered to require only that the benefits deriving from the anti-competitive conduct outweigh any anti-competitive detriment. The weighing exercise inherent in the test can have significant 'limiting' effect on the use of the public benefit test in practice. In cases where the potential anti-competitive detriment is considered to be low, the countervailing public benefit is also only required to be low.

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<sup>51</sup> Financial System Inquiry, *Final Report*, 1997

<<http://fsi.treasury.gov.au/content/FinalReport.asp>> Page 468-469.

<sup>52</sup> Jones R, *Bank Mergers and the Trade Practices Act in the Light of the Westpac/Bank of Melbourne and Commonwealth/Colonial State Bank Mergers*, Melbourne Friday 12 April 2002. <<http://www.accc.gov.au/>>

Former ACCC Chair Professor Allan Fels has listed cases where there is only a small anti-competitive detriment as “difficult”.<sup>53</sup> This may be a significant understatement.

Much of the consumer advocacy movement’s concerns with the application of the public benefit test arise from cases where the anti-competitive detriment is considered to be low, and the applicant for authorisation or merger has therefore only had to show a minimal, often trivial, public benefit.

This has been most noticeable in the authorisation of the Australian Direct Marketing Association (ADMA) Code of Practice<sup>54,55</sup>. The ADMA Code was widely criticised as lowering consumer protection standards in key areas such as consumer disclosure, refund policies, independent dispute resolution and privacy protection. If the code had been tested against any consumer standard prevalent at the time (e.g. the Model Code<sup>56</sup>, ASIC’s standards for dispute resolution<sup>57</sup>, or State and Territory consumer protection legislation regarding direct marketing) it would have failed a basic test of equivalence.

However, because ADMA was able to argue that the anti-competitive detriment was small, they only needed to show a minimal public benefit. The ACCC considered itself unable to measure the Code against higher standards of consumer protection. This resulted in a Code with very low consumer protection standards receiving ACCC authorisation – causing confusion amongst consumers about whether the Code was ‘endorsed’ in some way by Government, and causing delay to other forms of regulation of direct marketing.<sup>58</sup>

Importantly, the recent decision by the Tribunal in *Application by Michael Jools, President of the New South Wales Taxi Drivers’*

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<sup>53</sup> Fels, A., *The Future of Canadian Competition Policy in the 21<sup>st</sup> Century. Canadian Competition Policy: Governance Issues – What are the Alternative Structures? Australia’s Experience*, 2001, p 205.

<sup>54</sup> The Code was first authorised by the ACCC in 2003. See: <<http://www.accc.gov.au/content/index.phtml/itemId/322914/fromItemId/621589>>

<sup>55</sup> A copy of the code is available at: <<http://www.adma.com.au/asp/index.asp?pgid=1985>>

<sup>56</sup> Ministerial Council on Consumer Affairs, *Direct Marketing Model Code of Practice*, (2003), <[http://www.consumer.gov.au/html/direct\\_marketing/](http://www.consumer.gov.au/html/direct_marketing/)>

<sup>57</sup> See for example ASIC Policy Statement 139 - *Approval of external complaints resolution schemes*, at <<http://www.asic.gov.au/ps>>

<sup>58</sup> The ADMA website proudly states that “ADMA was the first national marketing association to have its Code of Practice authorised under section 88(1) of the Trade Practices Act by the Australian Competition and Consumer Commission.” There is no explanation provided about the purpose, scope or limitations of the authorisation or that the authorisation is conditional. <<http://www.adma.com.au/asp/index.asp?pgid=1985>>

*Association*<sup>59</sup> requires that the public benefits to support authorisation must be more than negligible. Whilst this decision sets an important baseline, it is suggested that there may be a sufficient difference between ‘negligible’ and ‘meaningful’ that problems of the type outlined above will persist.

### Scope of “detriment”

A further limitation can occur in consideration of the second element to be assessed and measured – harm or detriment. Although the scope of the public benefit test has been interpreted to include some non-economic elements in individual cases, the scope of the ‘detriment’ has typically been constrained to economic elements only.

It is clear that non-economic factors may give rise to anti-competitive detriments. For example, this is acknowledged in discourse that recognises the pro-competitive effects of certain consumer protection provisions.<sup>60</sup>

In Australia there was limited discussion of public detriment in the *Re 7-Eleven Stores* case (1994):

Detriment to the public constituted by a lessening of competition includes 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>61</sup>

The Tribunal has also indicated an approach to these issues in the *Chicken Growers Decision*.<sup>62</sup> In that Decision the Tribunal showed a preparedness to consider detriments in the form of negative public benefits, however this approach has not necessarily been visible in other decisions where these issues are relevant.

A key consumer stakeholder concern in relation to authorisation is the potential harm and/or delay that may be caused by the authorisation to alternative regulatory options. This concern is regularly dismissed by the ACCC as an issue that is outside the scope of the test.

The concern has arisen in numerous circumstances. Examples include:

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<sup>59</sup> [2006] ACompT 5

<sup>60</sup> See for example Sylvan, L., *Consumer Regulation – how do we know it is working?* Address to the National Consumer Congress, Melbourne, March 2004.

<sup>61</sup> *Re 7-Eleven Stores Pty Ltd* (1994) ATPR 41-357, p 42,683.

FN Find citation

<sup>62</sup> *Re VFF Chicken Meat Growers’ Boycott Authorisation* [2006] ACompT 2 (21 April 2006).

— **Acceptance of an authorisation of a voluntary code when mandatory measures are being considered by other regulators.**

This was the case in the controversial authorisation of the Australian Direct Marketing Association (ADMA) Code of Practice. This was primarily a voluntary Do Not Contact scheme proposed by the industry in order to delay / counter the development of a mandatory Do Not Contact register. Ultimately the mandatory proposal did prevail, but its development was considerably delayed (four years) by the ACCC's authorisation, which delay itself caused clear harm to consumers.<sup>63</sup>

— **Acceptance of high barriers to entry when other regulators are attempting to open up a market**

The ACCC has accepted higher barriers to entry to the Australian payment clearing system in authorisations of the Australian Payment Clearing Association rules for access to the ATM and EFTPOS networks<sup>64</sup>, than those being proposed / debated in the regulation of the payment system by the Reserve Bank of Australia and the Payments Systems Board.<sup>65</sup>

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<sup>63</sup> The 2003 authorisation is available at:

<<http://www.accc.gov.au/content/index.phtml/itemId/322914/fromItemId/621589>>

<sup>64</sup> There are multiple determinations, however the key determination related to the Consumer Electronic Clearing System (CECS) in *Australian Payments Clearing Association Authorisations A30176, A30177, A90620* (2000):

<<http://www.accc.gov.au/content/index.phtml/itemId/744928/display/acccDecision>>

<sup>65</sup> Developments in the history of payment systems regulation can be tracked at:

<[http://www.rba.gov.au/PaymentsSystem/australian\\_payments\\_system.html](http://www.rba.gov.au/PaymentsSystem/australian_payments_system.html)>

— **Acceptance of an industry standard regarding new technology facing potential regulation**

The ACCC has accepted an industry standard for the disclosure of genetic test results in life insurance in the Investments and Financial Services Association (IFSA) Authorisation<sup>66</sup>. This occurred at the same time that other organisations (a Senate Committee<sup>67</sup>, the Australian Health Ethics Committee and the Australian Law Reform Commission<sup>68</sup>) were considering stricter regulation of genetic testing and privacy.

Of course, authorisation only provides exemption from Part IV of the TPA. It does not pre-empt other forms of action by other bodies. Nevertheless it can be seen from the examples above, that whilst authorisation is theoretically no barrier to other action, it may operate as such a barrier in practical terms. There is some evidence of industry benefiting from the authorisation process at the expense of other forms of consumer regulation. Explicit acceptance of a broader scope of “detriment” may help to ease this concern.

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<sup>66</sup> Investment and Financial Services Association *Authorisation A30200 and A30201* (2000),

<<http://www.accc.gov.au/content/index.phtml/itemId/744426/display/acccDecision>>

<sup>67</sup> Australian Senate Legal and Constitutional Affairs Committee, *Report on the Provisions of the Genetic Privacy and Non-Discrimination Bill 1998*, <[http://www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/1999-02/genetic/report/contents.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/1999-02/genetic/report/contents.htm)>

<sup>68</sup> Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC 96), 2003, <<http://www.alrc.gov.au/inquiries/title/alrc96/index.htm>>

## 4. International Comparison

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This chapter briefly summarises the current international approaches that exist in relation to exemptions from competition law. It is important to recognise at the outset that the provisions discussed below are all very different and there is no real equivalent to the Australian provisions. The absence of the Australian style provisions in the jurisdictions discussed may explain what appear at times complex manoeuvres designed to enable consideration of the types of factors expressly contemplated by the Australian test.<sup>69</sup>

### 4.1 Canada

Canadian competition legislation does not allow defences for a broad range of anti-competitive conduct. Rather, defences are directed primarily at mergers. Specifically, the *Competition Act 1986* (Canada) (the Act) allows for an efficiency defence. Absent a need for authorisation, a Total Welfare Test is applied to mergers. Once however, thresholds requiring authorisation are triggered, the type of welfare standard used to measure the welfare effects of mergers in Canada is the Weighted Surplus Standard.

#### Overview

The Act has the objective of maintaining the efficiency and adaptability of the Canadian economy:

The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.<sup>70</sup>

Accordingly, under section 92 of the Act, a merger that is found by the Tribunal to prevent or lessen, or to be likely to prevent or lessen

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<sup>69</sup> For example the development of the efficiencies defence in the EU.

<sup>70</sup> Article 1.1 of the *Competition Act 1986*:

<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1141&lq=e>

competition substantially, may be forced to dissolve or be disallowed to proceed, depending on the assessment of the Tribunal. The key exemption to the merger prohibition has come to be known as the efficiency defence. This defence comes under section 96:

The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

The Act therefore recognises the fact that mergers may have both beneficial consequences from the resulting efficiencies, as well as detrimental anti-competitive consequences.<sup>71</sup> Hence section 96 prohibits the Tribunal from blocking or making an order when the efficiency gains the merger is expected to generate, offset its anti-competitive effects. The efficiencies defence requires an explicit weighing of the expected gains and benefits that are likely to derive from the merger under question. Under this Canadian provision though, only *mergers* can be considered (as compared with a broader range of anti-competitive practices such as those allowable by the TPA in Australia), and the benefits that can be weighed as against the detriments to competition here are only efficiency benefits of the economic sort, specifically allocative, productive, dynamic and transactional efficiencies.

There are some factors that must be considered which are prescribed by legislation when the efficiencies assessment is being made. Subsection 96(2) demands that in considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in:

- (a) A significant increase in the real value of exports; or
- (b) A significant substitution of domestic products for imported products.

Again, this requirement reflects the concerns deriving from Canada having a relatively small domestic market and the case where often a minimum efficient scale of production is necessitated for domestic firms to be able to compete effectively with larger firms with larger domestic

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<sup>71</sup> Trebilcock, M., *The Great Efficiencies Debate in Canadian Merger Policy: A Challenge to the Economic Foundations of Canadian Competition Law or a Storm in a Teacup?*, presented at the Fifteenth Annual Workshop of The Competition Law and Policy Institute of New Zealand, Auckland, 13-15 August 2004, p 1.

markets.<sup>72</sup> These factors were picked up in Australia in 1974 and included in the TPA authorisation provisions. The most significant part of this efficiency test is that the weighing of the net efficiency gains as against losses actually recognises an assessment of whether the gains to one group of consumers or producers requires the same weighting as similar gains to that of another group or not. This allowance of a weighted surplus standard is distinct from other approaches in that it allows the Tribunal assessing the gains and losses attributable to a proposed merger to assign a weight to affected groups according to their socio-economic status or otherwise, as the Tribunal sees fit to the case.

## Application

In addition to the Competition Bureau, the other, and perhaps more important body in relation to the regulation of Mergers in Canada is the Competition Tribunal. The Tribunal hears matters relating to Part VIII of the Act, (that which includes mergers and the efficiency defence, as well as Part VII.1 – relating to deceptive marketing practices).

*Superior Propane*<sup>73</sup> was the first case to substantially test the interpretation of the efficiency defence and indeed the true meaning of the purpose provision of the Act.<sup>74</sup> The decision in the *Superior Propane* case, to treat wealth transfers to different constituents in the economy differently, reflects a broader approach to the efficiency calculus than it may appear on first glance.

*Superior Propane* concerned a merger between two propane companies engaged in retail sales of propane. The Canadian Commissioner for Competition applied to the Competition Tribunal for an order dissolving the merger on the basis that it would “substantially prevent or lessen competition”. The tribunal found that while the merger would lessen competition in certain local markets and eliminate it in the Atlantic region, it considered the efficiency benefits arising from the merger outweighed the anti-competitive detriments. In reaching this conclusion the Tribunal applied the Total Welfare Standard. The Commissioner for Competition appealed the Tribunal decision and the

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<sup>72</sup> Trebilcock, M., *The Great Efficiencies Debate in Canadian Merger Policy: A Challenge to the Economic Foundations of Canadian Competition Law or a Storm in a Teacup?*, presented at the Fifteenth Annual Workshop of The Competition Law and Policy Institute of New Zealand, Auckland, 13-15 August 2004, p 2.

<sup>73</sup> *The Commissioner of Competition v. Superior Propane Inc. & ICG Propane Inc.* 2003 FCA 53.

<sup>74</sup> Trebilcock, M., *The Great Efficiencies Debate in Canadian Merger Policy: A Challenge to the Economic Foundations of Canadian Competition Law or a Storm in a Teacup?*, presented at the Fifteenth Annual Workshop of The Competition Law and Policy Institute of New Zealand, Auckland, 13-15 August 2004, p 8.



choice of Welfare Standard. The court allowed the appeal and directed the Tribunal redetermine the matter within the scope of certain directions, including that effects cannot be limited to deadweight losses, that a balancing weights approach would be acceptable and that regard must be had to the objectives of the Act.

The Tribunal when assessing the relative merits of a merger will attempt to quantify, in the equivalent of monetary units, the comparative gains and losses that are likely to result from the merger in question. If it is to be judged that society may value the proportionate losses (gains) to one group more than the other group's gains (losses), then these measures may be given a weight proportionately larger to the countervailing equivalent. The resulting measure of gains and corresponding losses can then be weighed up against each other to obtain a net gain or loss – the outcome will ultimately determine whether the merger will be cleared or not.

Clearly then, the question of *how* the weight is decided is the critical issue here. The value judgment required, and the fact that an independent body is essentially the one *making* the value judgement here are the objections that are most commonly put forward by critics of the standard or its application.

In order to ensure consistency with social values, the Tribunal in Canada has suggested that the appropriate weight given to the groups affected by the merger in practice could be inferred from that already embodied in the tax system.<sup>75</sup> If this approach was taken, a calculation of how many of the affected individuals or firms were of the 'low-income type' and how many of them were pertaining to other classifications (corresponding to any meaningful distinctions relevant to the case) would need to be assessed. Their net gains or losses as separate groups would also have to be disaggregated.

The Balancing Weights approach is complex and has been described by many commentators as unworkable. Michael Trebilcock has stated "in the absence of perfect information regarding individuals' dollar gains and losses, marginal utilities of income, and interpersonal utility comparisons, it is difficult to assess a situation where some people gain at the expense of others".<sup>76</sup> It must be noted, however, that economics

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<sup>75</sup> Trebilcock, M., *The Great Efficiencies Debate in Canadian Merger Policy: A Challenge to the Economic Foundations of Canadian Competition Law or a Storm in a Teacup?*, presented at the Fifteenth Annual Workshop of The Competition Law and Policy Institute of New Zealand, Auckland, 13-15 August 2004, p 27.

<sup>76</sup> Trebilcock, M., *The Great Efficiencies Debate in Canadian Merger Policy: A Challenge to the Economic Foundations of Canadian Competition Law or a Storm in a Teacup?*, presented at the Fifteenth Annual Workshop of The Competition Law and Policy Institute of New Zealand, Auckland, 13-15 August 2004, p 27.

is a regular user of assumptions and models to attempt to overcome a lack of perfect information, which perhaps undermines the force of Trebilcock's objection.

A more practical concern is that uncertainty of outcome (and this can be exacerbated through overly complex approaches to efficiency evaluation) will deter potential users of the efficiency defence from using it in the first place, making the provision a less effective alternative for potential mergers that may in fact increase the welfare of society as a whole.

## 4.2 European Union

### Overview

Relevant competition law provisions are set out in the *Treaty of Rome 1957* at Articles 81(1) and (3).

Two broad steps are required for the determination of a merger or other conduct. The first step examines whether an agreement has an anticompetitive object or effect.

The second step, only introduced relatively recently, is to apply a form of public benefit test known as the efficiencies test. However, the test is limited to assessing whether the conduct 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. The test is also limited in that it has limited coverage in relation to authorisations other than those relating to mergers.

The law is explained in slightly more detail in the *Merger Regulation 2004*. This states that "efficiencies must be to the consumer's advantage". There is some debate about whether this is a higher standard than 'fair share', but this is a minor issue and has not had a significant impact on the interpretation of the law in practice.

The *Merger Regulation* sets out certain factors that can be taken into consideration when considering consumer benefits. These are:

- Lower prices;
- Increased product choice; or
- Improved product quality.

Generally this is considered to be an application of the Consumer Welfare Standard, although, like other jurisdictions, there is not a perfect fit between the interpretation of the test and a single Welfare Standard.

## Application

In practice, the EU applies a sliding scale test:

The more competition is restricted, the higher the efficiency gains must be in order to grant an exemption.<sup>77</sup>

European case law also indicates that in the past, efficiency arguments have been often sidelined and that cases are really determined on a pure test of ‘dominance’.<sup>78</sup> The best known example is the MSG Media Service case.<sup>79</sup> This was addressed by the Merger Regulation 2004, which made a number of changes to the 1989 Merger Regulation. In particular, the 2004 Regulation substituted a test of “significantly impede effective competition” in place of the dominance test.

Since 1 May 2004 initial competition law decisions can now be made by regulators / tribunals in member states, rather than by a central EU authority. As a result, the competition laws of individual member states have become more closely aligned with the provisions in the *Treaty of Rome*. Individual member states who previously had broader public interest tests (such as the UK) now adopt the same or similar tests to the EU efficiencies test.

## 4.4 New Zealand

The statute relevant to Competition Law in New Zealand is the *Commerce Act 1986* (the Act). This Act’s underlying concern is with promoting competition in markets within New Zealand with the aim of ultimately improving “efficiency and other benefits of competition within the total economy”.<sup>80</sup>

Comparable to the Australian approach to Competition Regulation, New Zealand allows for three classes of exemptions to the restrictive trade practice prohibitions in Part 2 of the Act. The key exemption routes

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<sup>77</sup> Everett, A. & Ross, T.W., *The Treatment of Efficiencies in Merger Review: An International Comparison*, November 22 2002, p 53.

<sup>78</sup> Everett, A. & Ross, T.W., *The Treatment of Efficiencies in Merger Review: An International Comparison*, November 22 2002, p 54.

<sup>79</sup> *MSG Media Service case*, No. IV/M.469

<sup>80</sup> New Zealand Commerce Commission, *Guidelines to the Analysis of Public Benefits and Detriments in the Context of the Commerce Act*, October 1994, rev. December 1997, p 6.

<[www.comcom.govt.nz](http://www.comcom.govt.nz)>.

available are authorisations (for restrictive trade practices) and clearances (for mergers) by the Commerce Commission on a case-by-case basis.<sup>81</sup>

## Overview

Part 2 of the Act prohibits Restrictive Trade Practices – practices that substantially lessen competition.<sup>82</sup> However, in recognition that there may be cases where anticompetitive conduct results in a net benefit to the public, the Act incorporates an authorisation provision which includes a public benefit test.

Under sections 58 and 67 of Part 5 of the Act, the New Zealand Commerce Commission is empowered to authorise restrictive trade practices and business acquisitions that substantially lessen competition in the market if there is a benefit to the public that outweighs the detriment. Parties that believe potentially anticompetitive conduct may in fact result in net public benefits may apply for authorisation to be granted by the Commerce Commission.

There are constraints in the New Zealand legislation as to which types of offences can in fact be authorised. Under section 58, which deals with restrictive trade practices, only those offences such as restrictive contracts and covenants that substantially lessen competition, understandings that contain exclusionary provisions and resale price maintenance by suppliers and others can be eligible for authorisation. Section 67 deals with mergers and acquisitions and permits the Commerce Commission to authorise a merger on satisfaction of the public benefit test.

According to the Commerce Commission's *Guidelines to the Analysis of Public Benefits and Detriments*:

The term “benefit to the public” is not defined by the Act, but its meaning is in the process of being developed through case law, coupled with s 3A of the Act, which requires the ACCC to have regard to “efficiencies”. In general, a public benefit is any gain which is of benefit to the public of New Zealand, with a particular emphasis on efficiency gains.<sup>83</sup>

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<sup>81</sup> Productivity Commission, *Australia New Zealand Competition and Consumer Protection Regimes*, Draft Research Report, Canberra, 2004, pp 101-102.

<sup>82</sup> Including specific offences such as contracts (s 27) and covenants (s 28) that substantially lessen competition, contracts or understandings that contain exclusionary provisions (s 29), and resale price maintenance by suppliers (s 37) and others (s 38).

<sup>83</sup> New Zealand Commerce Commission, *Guidelines to the Analysis of Public Benefits and Detriments in the Context of the Commerce Act*, October 1994, rev.

This approach reflects the Australian position as outlined in the *QCMA Case*.<sup>84</sup> From the Commission's perspective, efficiency improvements can and should include intangibles such as environmental and social benefits. Thus less direct public benefits such as employment creation or retention and increased international competitiveness can theoretically be considered in the public benefit framework, however the Commission is "very cautious" in these respects.<sup>85</sup>

When weighing up the benefits, the Commission makes it clear that the principles apply that:

- Benefits must be *net*, not gross;
- It is necessary to understand the mechanisms through which benefits are expected to come about;
- It is crucial to avoid the problem of double counting;
- It is a "with or without test" rather than a before of after test that is used to assess whether benefits will actually accrue,<sup>86</sup> and
- The Commission believes that quantification of the benefits are likely to bring about a more focused submission that helps the Commission make better estimates of the outcomes from the conduct.<sup>87</sup>

In their *Guidelines* the Commission is also specific about the nature of the detriments in a public benefit analysis. The Commission generally considers detriments under the headings of allocative, productive and innovative inefficiencies and product quality deterioration.<sup>88</sup> It is against

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December 1997, p 12.

<[www.comcom.govt.nz](http://www.comcom.govt.nz)>.

<sup>84</sup> Queensland Co-operative Milling Association Limited (1976) ATPR 40-012 at 17, 242

<sup>85</sup> New Zealand Commerce Commission, *Guidelines to the Analysis of Public Benefits and Detriments in the Context of the Commerce Act*, October 1994, rev. December 1997, p 17.

<[www.comcom.govt.nz](http://www.comcom.govt.nz)>.

<sup>86</sup> Consequently, benefits cannot be ascribed to particular conduct if it is likely that they would have occurred even without the conduct under question.

<sup>87</sup> Clearly this approach to quantification could work against taking into account environmental and social considerations if strictly applied. Note, however, that the Commission is not absolute in its requirement that benefits be quantified.

<sup>88</sup> The type of damages to competition that indicate anticompetitive detriment are excess profits, inefficiency and the ability to cross subsidise, (Commerce Commission, 1997, p 10). The justification behind the use of these indicators is that if one of these things is occurring, then there exists scope for better allocation of resources within the economy.

these detriments that the benefits from the conduct must be weighed. It should be noted that this approach tends to exclude consideration of social and environmental detriments.

## Application

Although the method of application of the Public Benefit Test has not been specifically prescribed by the New Zealand legislation, the Commission explicitly uses the Total Surplus Standard in their public benefit calculations.<sup>89</sup> The justification of the adoption of the Total Surplus Standard<sup>90</sup> has been detailed in the *Guidelines* publication:

- Distributional issues are subjective and the Commission's views on them may have no greater validity than anyone else's;
- Accurately establishing just who are the ultimate beneficiaries from efficiency improvements may sometimes be almost impossible; and
- The Act contains no explicit distributional objectives.<sup>91</sup>

The implications of this choice of standard have particular importance in matters of mergers and acquisitions. These issues were highlighted most recently in the outcome of the recent Qantas-Air New Zealand merger authorisation application.<sup>92</sup> The New Zealand Commission approved the merger applying the Total Welfare Standard.<sup>93</sup>

## 4.4 USA

### Overview

The general test in US competition law is whether the conduct will result in a substantial lessening of competition – this test is contained and

<sup>89</sup> Round, D.K., *Whither Efficiencies: What is in the Public Interest*, presented at the Fifteenth Annual Workshop of The Competition Law and Policy Institute of New Zealand, Auckland, 13-15 August 2004, p 6.

<sup>90</sup> Note that this assessment no longer applies when foreign firms and issues relating to them are taken into account – only benefits accruing directly to the New Zealand public shall be registered in any Public Benefit Test, (Commerce Commission, 1997, p. 15).

<sup>91</sup> New Zealand Commerce Commission, *Guidelines to the Analysis of Public Benefits and Detriments in the Context of the Commerce Act*, October 1994, rev. December 1997, p 14, <[www.comcom.govt.nz](http://www.comcom.govt.nz)>.

<sup>92</sup> However note discussion in paragraph 3.4.1 regarding the range of views regarding the reasons for the divergent decisions in Australia and New Zealand.

<sup>93</sup> *Air New Zealand and Anor. V Commerce Commission and Ors*, HC AK CIV 2003 404 6590 [17 September 2004]

further elaborated in the *Clayton Act 1914* (section 7) and the *Federal Trade Commission Act 1914* respectively.

There is no specific statutory efficiencies defence or public benefit test, but discussion in case law and the Federal Trade Commission's *Horizontal Merger Guidelines 1997* has resulted in a de facto efficiencies defence being applied in practice. Note it is not a net effects test – efficiency benefits are only taken into account if they have pro-competitive effects.

The test in *Horizontal Merger Guidelines 1997* is “whether cognisable efficiencies likely would be sufficient to reverse the merger’s potential to harm consumers in the relevant market”.

In essence, this results in (limited) use of the Consumer Welfare Standard.

## Application

It is important to note that the US generally uses jury trials for competition cases. This has led to wide spread application of rules of thumb and consequent greater concern with false positives.

Initial US case law tended to restrict any consideration of defences. The key case is *FTC v Proctor and Gamble* (1967), where the court stated:

Possible economies cannot be used as a defence to illegality. Congress was aware that some mergers which lessen competition may result in economies, but it struck the balance in favour of protecting competition.<sup>94</sup>

Nevertheless, some broader recognition of an efficiencies defence is beginning to be considered in recent decisions. For example, *FTC v University Health* (1991) accepted that efficiencies could be raised as a defence if such efficiencies benefit both competition and consumers.<sup>95</sup>

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<sup>94</sup> *FTC v Proctor and Gamble Co.* 386 US 568 (1967)

<sup>95</sup> *FTC v University Health Inc.* 938 F.2d 1206 (11<sup>th</sup> Circuit 1991)

## 4.5 International Comparison Summary

The following table provides a brief summary of the international approaches to the public benefit test:

| <b>Jurisdiction</b> | <b>Legislation</b>              | <b>Public Benefit Test</b>  | <b>Welfare Standard</b>  | <b>Guidance</b>                   |
|---------------------|---------------------------------|---|--|-----------------------------------|
| <b>Australia</b>    | <i>Trade Practices Act 1974</i> | No explicit definition, but broad test is whether in all the circumstances of the application, authorisation will result in a benefit to the public that justifies the authorisation. | ACCC applies the Consumer Welfare Standard<br>Australian Competition Tribunal applies the Total Welfare Standard (with perhaps some elements of the Weighted Surplus Standard) | Draft Guidelines (limited scope). |
| <b>Canada</b>       | <i>Competition Act 1986</i>     | No explicit public benefit test, but an efficiencies defence allows mergers where any efficiency gains the merger is expected to generate offset its anti-competitive effects.        | Weighted Surplus Standard  | Public Guidelines                 |



| <b>Jurisdiction</b> | <b>Legislation</b>  | <b>Public Benefit Test</b>  | <b>Welfare Standard</b>            | <b>Guidance</b>  |
|---------------------|---|---|------------------------------------|--|
| <b>EU</b>           | <i>Treaty of Rome 1957 (Article 85(3))</i>                          | Specific public benefit test limited to whether the conduct 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. | Consumer Welfare Standard (approx) | EU Merger Regulation 2004  |
| <b>New Zealand</b>  | <i>Commerce Act 1986</i>  | No explicit definition but the broad test is any benefit to the public that outweighs the detriment (of the conduct in question).   | Total Welfare Standard             | Commerce Commission's <i>Guidelines to the Analysis of Public Benefits and Detriments 1997</i> |
| <b>USA</b>          | <i>Clayton Act 1914</i><br><i>Federal Trade Commission Act 1914</i> | There is no specific statutory efficiencies defence or public benefit test, but discussion in case law guidelines has resulted in a de facto efficiencies defence being applied in practice   | Consumer Welfare Standard (approx) | FTC <i>Horizontal Merger Guidelines 1997</i>   |

## 5. Issues and Recommendations

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The primary issue considered in this Report is the application and definition of the public benefit test under part VII of the TPA. This section identifies issues in the scope and application of the test, and makes recommendations aimed at improving consideration of the public benefit in authorisations (and mergers). It is clear the test as currently framed *can* encompass consideration of a broad set of non-economic factors, including social and environmental factors. However, as outlined in this Report there is cause to be concerned that in practice focus has tended to be primarily on economic effects and opportunities to consider and apply a broader set of factors are missed. Further there is a lack of consistency in application and scope even where a broader set of factors have been taken into account.

The Report also considers the potential broadening of the application of the public benefit test in authorisations (and mergers) to include consideration of a broader range of potential public harm that may be caused by the conduct.

### 5.1 Certainty of the test

There is some concern in Australia regarding the lack of certainty as to how the test will be applied and interpreted. Several factors contribute to this uncertainty:

- The public benefit is not defined in the legislation;
- The ACCC and the Tribunal referred to different Welfare Standards in applying the public benefit test<sup>96</sup>;
- The Tribunal's recent high profile decision (Qantas / Air New Zealand) leaves the door open for a weighing element to be added to their use of the Total Welfare Standard; and
- There is no current (final) public guideline on interpreting the test as there has been significant delay in producing an update to the ACCC's 1995 *Guidelines*..

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<sup>96</sup> It is argued by some commentators that in practice the tests that have been applied by the ACCC and the Tribunal are in fact very similar, despite the use of different terminology. At best it is unhelpful and confusing to stakeholders in the authorisation process.

David Round has commented that there may be some benefit in including more explicit guidance on the interpretation of the test in legislation:

In making its choice of a welfare standard explicit, a government indicates its policy priorities and provides at least some certainty for merging firms as to the most likely regulatory assessment of their acquisitive activities.<sup>97</sup>

There is no doubt that the ACCC and the Australian Competition Tribunal have enjoyed a degree of flexibility in interpreting the public benefit test. However, it may be time to consider whether the benefits of such flexibility can be balanced with the interests of understanding on the part of applicants and consumers, who are the key stakeholders in the use of the test.

A key way of achieving improved understanding is through the provision of explicit guidance in relation to application of the test.

### **Recommendation 1: Certainty of the test**

**Explicit guidance on the public benefit test should be included in the legislation or formal guidelines. Such guidance should incorporate:**

- **Strong prompts to consider social and environmental criteria, including examples of the way in which such criteria arise in a range of case study scenarios, particularly scenarios where social and environmental considerations have not been taken into account.**
- **An inclusive checklist of factors to consider (of the sort presently contained in section 50(3) though obviously with significantly different focus and content).**

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<sup>97</sup> Round, D.K., *Whither Efficiencies: What is in the Public Interest*, presented at the Fifteenth Annual Workshop of The Competition Law and Policy Institute of New Zealand, Auckland, 13-15 August 2004, p 17.

## 5.2 Scope of the test

From a consumer stakeholder perspective, there are both positive and negative aspects of the current scope of the public benefit test:

| Positive   | Negative   |
|--|--|
| As a result of the absence of a defined scope, some individual determinations have considered non-economic factors, including health and the environment.  | As a result of the absence of a defined scope, there is no explicit requirement to consider non-economic factors, including social and environmental issues. Consideration of non-economic factors has therefore been ad hoc.  |
| As the Welfare Standard to be applied has not been specified, the ACCC has typically been free to apply a form of Consumer Welfare Standard. Therefore, the test, when applied by the ACCC, has required at least some benefits to be passed through to consumers.                         | As the Welfare Standard to be applied has not been specified, the Tribunal has typically been free to apply a form of Total Welfare Standard. There has therefore been no specific requirement in Tribunal determinations that consumers directly benefit from the conduct in the form of improved quality or service or lower prices, though in practice such benefits have been considered thereby modifying the Total Welfare Standard. |
| The scope of the detriment or harm to be considered (when the test requires such a balancing calculation) has not been defined, resulting in potential flexibility. There is some evidence that the ACCC and Tribunal consider there is scope to consider detriments or negative benefits. | As the scope of the detriment or harm to be considered has not been defined, both the ACCC and the Tribunal have tended to interpret it narrowly, considering primarily economic factors.  |

Overall, consumer stakeholder concerns regarding the scope of the public benefit test are likely to outweigh the benefits of the current scope of the test. Consideration of non-economic benefits has only been ad hoc, and the Welfare Standard to be applied is at best unclear and at worst sub-optimal at the Tribunal level. Although the Commission has tended to apply the Consumer Welfare Standard, Tribunal decisions trump Commission decisions, and most significant mergers and authorisations are ultimately determined by the Tribunal.

Rhonda Smith and Tim Grimwade have argued in favour of a broader scope for the public benefit test:

It is desirable that there not be a narrow interpretation of the public benefit. Indeed, there is no certainty that economic efficiency is synonymous with public benefit.<sup>98</sup>

The explicit inclusion of non-economic benefits in the test would be a useful improvement in Australia. In New Zealand intangible benefits are noted in the Guidelines. These include both health considerations (physical and mental) and environment considerations (air, water, noise, visual pollution, and the preservation of endangered species).<sup>99</sup> The Australian guideline provides some examples of the sorts of non-economic benefits that may be considered. Both guidelines, however, stop short of setting out an overarching framework within which these issues will be considered.

The lack of detailed consideration regarding public harm or detriment, either in the TPA or guidelines is also a concern.

The Australian position is in contrast to the position in New Zealand. In the New Zealand *Guidelines to the Analysis of Public Benefits and Detriments* the Commission is reasonably clear (albeit narrow) about the nature of the detriments in a public benefit analysis:

The Commission generally considers detriments under the headings of allocative, productive and innovative inefficiencies and product quality deterioration.<sup>100</sup> It is against these detriments that the benefits from the conduct must be weighed.

In practice, consumer stakeholders in Australia have had difficulty convincing competition authorities to consider the broad range of detriments that are of concern to consumers. Examples include:

— Loss of jobs and employment opportunities;<sup>101</sup>

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<sup>98</sup> Smith, R.L. & Grimwade, T.P., *Authorisation: Some Issues*, Australian Business Law Review 25, p 357.

<sup>99</sup> New Zealand Commerce Commission, *Guidelines to the Analysis of Public Benefits and Detriments in the Context of the Commerce Act*, October 1994, rev. December 1997 p 16.

<sup>100</sup> The type of damages to competition that indicate anticompetitive detriment are excess profits, inefficiency and the ability to cross subsidise, (see New Zealand Commerce Commission, *Guidelines to the Analysis of Public Benefits and Detriments in the Context of the Commerce Act*, October 1994, rev. December 1997, <<http://www.comcom.govt.nz>>, p 10). The justification behind the use of these indicators is that if one of these things is occurring, then there exists scope for better allocation of resources within the economy.

<sup>101</sup> *Smorgon v. ACI*

- Lowering of consumer protection standards (e.g. acceptance of a lower standard for consumer disclosure, refund policies, dispute resolution, privacy protection etc. following authorisation of industry association Codes of Conduct);<sup>102</sup> and
- Harm and/or delay caused by the authorisation to alternative regulatory options (e.g. acceptance of a voluntary code when mandatory measures are being considered by other regulators).<sup>103</sup>

These concerns may not in fact, be assisted by a broadening of the scope of the public benefit test, if there is no corresponding broadening of the scope of the test of detriment. This could be done either through enshrining of the approach outlined in the *7-Eleven Stores* or *Chicken Growers* decisions.

### **Recommendation 2: Scope of the test**

**The scope of the public benefit test should be expanded to explicitly include non-economic factors in consideration of both the public benefit and any counter-balancing detriment.**

### **5.3 Welfare Standard in the test**

The ACCC and the Tribunal have expressed different views on which Welfare Standard should be applied when considering the public benefit test. Alternative Welfare Standards are applied in other jurisdictions.

Consumer stakeholders will be interested in the use of a Welfare Standard that ensures consumer benefits are both considered and passed on. This limits the choice of Welfare Standard to the Consumer Welfare Standard or the Weighted Surplus Standard.

However, in Australia, the Tribunal applies a modified Total Welfare Standard. While this does not always exclude consideration of whether benefits will be passed on to consumers, it is potentially a weaker test than the Consumer Welfare Standard, as some mergers and authorisations will result in benefits to producers and their shareholders

<sup>102</sup> See Section 3.4.4 in this Report.

<sup>103</sup> See Section 3.4.5 in this Report.

that will result in an overall surplus, without any benefit to end consumers.

Clearly the Consumer Welfare Standard is the preferred option for consumer stakeholders, and its use can easily be justified in Australia where the objective of the *Trade Practices Act 1974* includes consumer welfare as an objective of the legislation.

The Consumer Welfare Standard is used to an extent in two key jurisdictions - the EU and the United States- although as noted above its impact is very limited as it is only used as a secondary or subsidiary test in those jurisdictions and in limited circumstances. It has only had a limited impact in individual determinations in both jurisdictions.

A further consideration in Australia is whether some consideration should be given to the Weighted Surplus Standard (or weighting approaches in general), acknowledging the difficulties that can be involved in assigning weightings, particularly given the lack of data that may assist in this task. However, a lack of data ought not be the reason for abandoning an otherwise preferable policy position.

As Rhonda Smith & Tim Grimwade note, even when the ACCC or the Tribunal takes into account a range of factors other than efficiency gains when considering authorisation applications, “there is little guidance as to how they will be weighted”<sup>104</sup>. It is important to examine not only what factors constitute the public benefit, but also whether those factors should be weighted, and if so, how.

Consumer stakeholders will, of course, be interested in an interpretation of the test that provides a reasonable weight to consumer benefits. However, there may be an even greater degree of interest in a test that provides a higher weighting to the interests of low income and vulnerable consumers.

David Round cautions that these types of weightings are in fact political issues, rather than purely economic or legal concerns:

The ‘correct’ welfare standard with which to evaluate efficiency gains is an inherently controversial issue. It is as much a political and social choice, keeping distributional consequences in mind, as it is an economic one. If the standard is not laid down in legislation, regulators will be free to put their own interpretation on

the standard until such time as a judicial determination is made to resolve the issue.<sup>105</sup>

Although ‘weighting’ is not explicitly accepted in Australia (in contrast to Canada where the Weighted Surplus Standard is formally recognised), elements of weighting do appear in individual Commission and Tribunal determinations – including the Qantas/Air New Zealand case.

### **Recommendation 3: Welfare Standard in the test**

**In applying the public benefit test, a Welfare Standard should be selected that ensures consumer benefits are both considered and passed on.**

#### **5.4 Public guidance on the test**

An element of the public benefit test that is present in all other jurisdictions is the use of formal guidelines to assist in interpretation of the test.

In Australia there is an ACCC Draft Guide to authorisations (2006).<sup>106</sup>

However, this document has several limitations:

- **The Guidelines are not formal**  
The Guidelines make it clear that they carry no formal legal weight and there is no reference to the Guidelines in the TPA.
- **The Guidelines are draft**  
The guide to authorisations are draft and therefore not a reliable source of guidance.
- **The Guidelines only address applicant concerns**  
The guidelines are specifically directed to applicants and therefore written to address applicant concerns, and are not suitable for use by other stakeholders (e.g. consumers with concerns about an authorisation).

<sup>105</sup> Round, D.K., *Whither Efficiencies: What is in the Public Interest*, presented at the Fifteenth Annual Workshop of The Competition Law and Policy Institute of New Zealand, Auckland, 13-15 August 2004, p 16.

<sup>106</sup> ACCC, *Guide to authorisation (Draft for comment)*, February 2006, <<http://www.accc.gov.au/content/index.phtml/itemId/723455/fromItemId/776251>>



As there is not any formal guideline as to how the Public Benefit Test should be applied in Australian circumstances, predictions on the application of the public benefit test in individual cases is difficult.

#### **Recommendation 4: Public Guidance on the test**

**Formal guidelines should be published by the ACCC and used to assist in interpretation of the public benefit test. Such guidelines should be suitable for use by consumer stakeholders as well as applicants.**

### **5.5 Consumer participation**

The other critical issue to be addressed is empowering consumers and consumer representatives to participate effectively in authorisation processes. The ACCC has increasingly recognised in recent years that issues raised in authorisation applications impact on consumer interests. It has also recognised that consumer organisations may have information that is valuable in weighing benefits and detriments that may arise from authorised conduct.

Efforts made by the ACCC to assist consumer organisations to participate in its authorisation processes are therefore welcomed.<sup>107</sup> More however can and needs to be done to ensure relevant information regarding public benefits and detriments is obtained. This will be particularly important as the scope and ability to take these issues into account is expanded.

Examples of initiatives that should be considered (in addition to the public guidance referred to in recommendation 4) include:

- Guidance on presenting public benefits or detriments in a form that will be useful to the ACCC in its consideration;
- Recognition by the Tribunal of consumer interest in these issues and the standing of consumer organisations to present these issues to the Tribunal;
- Consideration of means by which to obtain information in relation to public benefits or detriments where such information is not provided by parties to the authorisation process.

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<sup>107</sup> For example the ACCC has made efforts to identify consumer organisations that may be interested in particular issue and also has taken oral submissions.

**Recommendation 5: Stakeholder participation**

**That consideration be given to the following initiatives to improve stakeholder participation:**

- **Guidance on presenting public benefits or detriments in a form that will be useful to the ACCC in its consideration;**
- **Recognition by the Tribunal of consumer interest in these issues and the standing of consumer organisations to present these issues to the Tribunal;**
- **Consideration of means by which to obtain information in relation to public benefits or detriments where such information is not provided by parties to the authorisation process.**

## 6. Appendix 1 – Resources

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ACCC, *Merger Guidelines*, June 1999. The Guidelines are available at: <<http://www.accc.gov.au/content/index.phtml/itemId/776536/fromItemId/6204>>

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