3. Discourses on Public Benefit

This chapter looks at the place of 'public benefit' within Australian competition legislation, before examining each of the words 'public' and 'benefit' in the phrase and then considers the types of public benefits that the Australian Competition and Consumer Commission (ACCC) has recognised over the last four decades. Although the interpretation of both these terms has not been straightforward, the ACCC has in practice recognised a wide range of public benefits based on promoting economic efficiency as well as those concerned with social and environmental benefits. The authorisation determinations can be understood in their political and social context. Whereas the 1970s were concerned with the shape of the post-industrial economy, when economic efficiency was becoming the dominant discourse, the 1980s was a period in which concerns about market reform came to the fore. In contrast, the concerns of the 1990s revolved around becoming a competitive nation, and more recent times have brought the challenges of sustainability and climate change.

The Place of Public Benefit within the Authorisation Process

A standard introduction to the authorisation process is included at the beginning of each authorisation determination. It gives a brief outline of the test used to grant authorisation and spells out that the ACCC is able to grant businesses immunity from legal action for anti-competitive conduct where it is satisfied the public benefit from the arrangements or conduct outweighs any public detriment. The standard introduction also states that the ACCC may conduct a public consultation process, including inviting interested parties to lodge submissions outlining whether they support the application or not. After considering the submissions, the ACCC issues a draft determination proposing to either grant or deny the application. The introduction notes that, after the release of the draft determination, further written submissions on the draft determination may be lodged and the applicant or any interested party may request the ACCC hold a public conference. Following this the ACCC issues a final determination either granting or denying authorisation. In certain cases the ACCC may grant authorisation with conditions imposed, where these conditions aim either to sufficiently increase the public benefit or to reduce the public detriment.

The three main tests for granting authorisation were discussed in the last chapter and they apply to different types of conduct. All require a consideration of the public benefit that arises out of proposed conduct. There are three main tests for granting authorisation and they apply to different types of conduct. All require a consideration of the public benefit that arises out of proposed conduct. The first test in section 90(6) states the ACCC can only grant an authorisation if it is satisfied this conduct is likely to result in a public benefit that outweighs the likely public detriment. It applies to proposed or existing agreements that might substantially lessen competition and proposed exclusive dealing conduct, with the exception of third line forcing. The second test specifically relates to cartel conduct and is contained in section 90(5A) and 90(5B). This test is identical to the first and the ACCC can only grant an authorisation if it is satisfied this conduct is likely to result in a public benefit that outweighs the likely public detriment. As this was only introduced in 2009, it is of limited relevance to the study of authorisations prior to this date. The third test, contained in section 90(8), applies to proposed exclusionary provisions, secondary boycotts, third line forcing, and resale price maintenance. This test requires that the authorisation be granted only if the ACCC is satisfied in all the circumstances the proposed conduct is likely to result in such a benefit that the conduct should be permitted. The ACCC sees these tests as very similar and has stated, while applying any test it will take all public detriments likely to result from the conduct into account when assessing whether the public detriment is outweighed by the likely public benefit.[1]

Although the Australian Competition Tribunal (ACT) has stated the tests in practice are essentially the same, it has at times taken a different view.[2] In relation to the first test, the tribunal found in Re Australian Association of Pathology Practices Incorporated the test under section 90(6) limits the consideration of detriment to the public constituted by any lessening of competition resulting from the relevant conduct, whereas no such limitation is to be found in section 90(8).[3] In relation to the second test, under section 90(8), it has been suggested that because these types of conduct constitute per se offences, the test requires that public benefit be shown to exist in all the circumstances. In Re Rural Traders Cooperative (WA) Limited the tribunal stated that in this provision benefit to the public refers to a net or overall benefit after any detriment to the public resulting from the conduct has been taken into account.[4]

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1 See Australian Competition and Consumer Commission (ACCC), *Authorisations and Notifications: A Summary* (2007) 9; see also *The South Australian Oyster Growers Association* (2010) A91229, A91230, 26–28.

2 See *Re Media Council of Australia (No2)* (1987) ATPR 40-774, 48406, 48418. For an alternative view, see *Re Australian Association of Pathology Practices Incorporated* [2004] ACompT 4 (8 April 2004) paras 92, 93.

3 *Re Australian Association of Pathology Practices* [2004] ACompT 4 (8 April 2004) para 93; see also *Re EFTPOS Interchange Fee Agreement* [2004] ACompT 7, 9, in which the ACT agreed to this limitation.

4 *Rural Traders Co-operative (WA) Ltd* (1979) ATPR 40-110, 18123.

The Meaning of the Words 'Public' and 'Benefit'

The ambit of the 'public benefit' is not defined in the Act. There has been significant discussion of this term, the manner in which it can be distinguished from the term 'public interest' contained in the 1965 legislation, and how different it is from the common law concept of public interest. It has been noted that public benefit is a nebulous concept; there is also a lack of consensus over the meaning and scope of the term public interest, and this term is difficult to translate into a workable concept.[5] The term 'public interest' under the 1965 legislation was criticised as being too vague and the term 'public benefit' was to be preferred as being more specific.[6] Further, it had been stated the term was only introduced into the statute as a result of pressure from large producer associations. This allowed the interests of investors, producers, exporters and the like to be taken into account rather than a more restricted group consisting mainly of consumers.[7]

There has not been an overt acknowledgement by the ACCC within the authorisation process of the common law concept of 'public interest', nor the manner in which this term connects to the term public interest under the 1965 legislation. The ACT has stated 'public benefit' should be given its widest possible meaning. In particular, public benefit was said to include 'anything of value to the community generally, any contribution to the aims pursued by society including ... the achievements of the economic goals of efficiency and progress.'[8]

The ACCC has compiled a list of public benefits over the years. In its Authorisations and Notifications Guide of May 1999, the ACCC stated:

Public benefits recognised by the Commission and the Australian Competition Tribunal have included:

- Fostering business efficiency, especially when this results in improved international competitiveness;
- Industry rationalisation resulting in more efficient allocation of resources and in lower or contained unit production costs;
- Expansion of employment or prevention of unemployment in efficient industries or employment growth in particular regions;

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5 See Mike Feintuck, *The Public Interest in Regulation* (2004) 3, 12.

6 Maureen Brunt, 'The Trade Practices Bill: Legislation in Search of an Objective' (1965) 41 *Economic Record*, 357, 384; see also Geraldine Gentle, 'Economic Welfare, the Public Interest and the Trade Practices Tribunal', in John Nieuwenhuysen (ed), *Australian Trade Practices: Readings* (2nd ed, 1976) 59.

7 See Geoffrey de Q Walker, *Australian Monopoly Law: Issues of Law, Fact and Policy* (1967) 5; see also Commonwealth, *Parliamentary Debates*, Senate, Restrictive Trade Practices Bill 1971, 9 November 1971, 1745, (Senator Lionel Murphy, New South Wales, Leader of the Opposition in the Senate).

8 *Re Victorian Newsagency* (1994) ATPR 41-357.

- Promotion of industry cost savings resulting in contained or lower prices at all levels in the supply chain;
- Promotion of competition in industry;
- Promotion of equitable dealings in the market;
- Growth in export markets;
- Development of import replacements;
- Economic development, for example of natural resources through encouraging exploration, research and capital investment;
- Assistance to efficient small business, for example guidance on costing and pricing or marketing initiatives which promote competitiveness;
- Industry harmony;
- Improvement in the quality and safety of goods and services and expansion of consumer choice; and
- Supply of better information to consumers and business to permit informed choices in their dealings.'[9]

The ACCC has been consistent in referring to these factors in its decision-making. More recently, however, other factors have been discussed. In 2001, the then chairman, Allan Fels stated:

In addition, the Tribunal and the Commission have granted authorisations taking into account the following non-economic public benefits:

- the likely reduction in carbon, nitrous oxide and greenhouse gas emissions flowing from a joint venture's upgrading of a sodium cyanide plant in Gladstone, Queensland …
- encouraging the provision of information on formula feeding from public health professionals that is accurate and balanced and not undermining the decision of women to breastfeed …
- promoting public safety by … ensuring the safe use of farm chemicals …
- fostering fitness and recreation …
- reducing the risk of conflicts of interest …
- facilitating the transition to deregulation …
- maintaining the viability of efficient firms. For example the Commission recognised in a recent draft decision that efficient private hospitals can provide benefits to the communities in which they operate …[10]

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9 ACCC, *Authorisations and Notifications, Guidelines*, (May 1999), 7; see also Trade Practices Commission, Commonwealth of Australia, *Authorisation* [pamphlet] (March 1990).

10 Allan Fels, 'The Public Benefit Test in the *Trade Practices Act 1974*' (Paper presented at the National Competition Policy Workshop, Melbourne, 12 July 2001) 7–8.

Still other benefits have been recognised in the recent past. For example, countervailing power has been an important consideration in collective bargaining authorisations,[11] while facilitating competition in deregulated industries has been raised by the applicants,[12] and meeting Australia's international treaty obligations[13] has also been discussed as public benefits.

Other factors that may have once held sway are clearly not now regarded as public benefits. One example of this is the national champions argument that assisting a business develop in the national market will assist it perform in the international market. The contribution of Michael Porter in 1990 suggested this was a flawed argument and the ACCC has clearly endorsed these views, as illustrated in the Qantas authorisation determination, where it rejected the argument by Qantas that the authorisation would assist in making Qantas increase its global competitiveness.[14]

Causal Link—The Benefit Must Flow from the Conduct

An important step in authorisation determinations is to link the claimed benefits arising from the proposed conduct to that conduct. If the claimed benefits are likely to result irrespective of the proposed conduct, there would not be a case for authorisation. The early case of Shell illustrates this point.[15] Here the Trade Practices Commission (TPC) refused a clearance application by petrol sellers to sell only their supplier's petrol — approval for exclusive dealing contracts. Shell claimed the proposed exclusive dealing arrangement would result in single brand selling, which brought with it economies of scale in supply and transportation.[16] The commission pointed out that single brand selling or solo trading is quite distinct from exclusive dealing contracts and concluded solo trading is likely to continue even if authorisation is not provided for the exclusive dealing contracts. The TPC pointed to the market structure at the time where multi-brand trading was negligible — of a total of 3636 service stations supplied by Shell, only 34 were multi branded and the remaining 3602 were solo trading. The causal link was not established and the TPC stated:

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11 See *Australian Hotels Association* A90987, 1 March 2006; Inter-hospital agreement between *Friendly Society Private Hospital Bundaberg* A50019, 1 September 1999; *Steggles Limited and Others* A30183, 20 May 1998.

12 *National Electricity Code* A90652, A90653, A90654, 19 October 1998, and *United Energy Limited* A90665, A90666, A90670, 25 November 1998.

13 *Association of Fluorocarbon Consumers and Manufacturers Inc* A90658, 26 August 1998.

14 *Qantas and Air New Zealand* A90862, A90863, A30220, A30221, 9 September 2003, iii; *Qantas* A40107, A40108, A40109, 13 September 2006 38; Also see; Michael Porter, *The Competitive Advantage of Nations* (1990) 702; for a discussion of how Porter's work fits with Australian competition policy, see Allan Fels, Chairman, Trade Practices Commission, 'The Future of Competition Policy', (Address to the National Press Club, Canberra, 10 October 1991).

15 *Shell Company of Australia Ltd* A4540, A4543, A4544, A4665, A4666, A4668 9 December 1975, (1976) ATPR, 35.220, 16,701.

16 ibid, 16,752.

> A fundamental point in the Commission's analysis is that solo trading and exclusive dealing by contract are not the same thing. The contracts secure solo trading, but it would occur in most cases without them. To accept that solo trading is efficient is not to accept the necessity of exclusive dealing contracts, removing as they do for substantial periods even the possibility of fringe movements that could have some disciplinary effect and assist the working of the market.[17]

The commission has looked carefully in other cases for this causal link. In Australian Swimmers Association Incorporated the ACCC noted the association could establish a code of conduct and make a number of representations on behalf of its representatives without raising trade practices concerns.[18] The ACCC was of the view that many of the claimed benefits would likely occur without the authorisation and, therefore, could not be overstated. Likewise in the NSW Department of Health authorisation, the NSW Department of Health sought authorisation for its policy of requiring private in-house patients in NSW public hospitals to obtain pathology services from the pathologists of NSW Department of Health.[19] One of the benefits claimed was that the proposed exclusive agreements would result in private patients receiving a higher quality of service than they would if there were multiple pathology providers. The ACCC refused to accept this argument and stated the quality of service would be largely unaffected by the proposed policy.

Similarly in the Australian Medical Association authorisation, although the ACCC allowed the authorisation it refused to accept some of the arguments put forth by the association for collective negotiation of fees.[20] The ACCC stated all of the public benefits claimed would result without recourse to the collective negotiation of fees: these benefits included the creation of a framework for dialogue between the Health Commission and medical practitioners that would prevent public hospitals extracting monopsony rents, as well as the facilitation of continuing medical education programs and increasing the availability of a skilled medical workforce to rural populations.

In the Showmen's Guild authorisation, the guild, which described itself as a trade association of showmen, applied for authorisation in relation to its code of conduct and rules of the guild, and also sought approval for collective negotiations with show societies. The ACCC stated it was not convinced the code, rules and collective bargaining arrangements greatly contributed to the development or maintenance of the circuit nor attendance at rural and regional

17 ibid, 16,753.

18 *Australian Swimmers Association Incorporated* A90966, 26 April 2006, 8.

19 *New South Wales Department of Health* A90754–A90755, 27 June 2003, i.

20 *Australian Medical Association Limited and South Australian Branch of the Australian Medical Association Incorporated* A90622, 31 July 1998.

shows and the circuit and current levels of attendance would be likely to exist even without these arrangements.[21] The guild successfully demonstrated such a link by making further submissions to the commission.

The BHP Billiton Iron Ore Pty Ltd[22] authorisation concerned a joint venture agreement to allow the parties to develop mining areas in the Pilbarra region with the aim of producing iron ore and delivering it to each of the parties to the joint venture. The ACCC accepted there was a necessary link between the exclusive dealing arrangement BHP had proposed and the benefits a pilot plant would bring. The ACCC asked whether there was a necessary link between the exclusive dealing agreements and the benefits BHP claimed for the pilot plant. It accepted BHP's arguments about the public benefits that the projected pilot plant might bring and accepted BHP's contention that these arrangements would be necessary before BHP could commit funds to the project. In the Qantas and Air New Zealand authorisation, however, the ACCC was not satisfied the proposed arrangements would lead to increased tourism given that the proposed arrangements were to result in higher prices and reduced capacity.[23] It had refused authorisation but its decision was later overturned by the ACT. The tribunal calculated the benefits differently, attaching different weights to benefits claimed and also on the basis that the market had altered in the time during the authorisation decision and the tribunal hearing.[24]

Benefits which accrue over the short to medium term are easier to establish than long-term benefits. The approach of the European Commission has been to discount such long-term benefits for this very reason.[25] This issue has arisen in authorisation applications dealing with deregulated industries, and the ACCC has generally accepted that industry restructuring can result in facilitation of competition in the longer term. In such cases, although benefits over the longer term are more difficult to determine, the ACCC has accepted, in numerous decisions since 1998, that deregulation of regulated industries brings longer-term public benefits, so has authorised conduct which facilitates deregulation.[26]

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21 *Showmen's Guild of Australasia* A90729, 25 February 2003, 39.

22 *BHP Billiton Minerals Pty Ltd* A70015, A70016, A70017, 5 March 2003.

23 *Qantas and Air New Zealand* A30220, A30321, A90862, A90863, 9 September 2003, para 13.215.

24 *Re Qantas Airways Limited* [2004] ACompT 9 (12 October 2004).

25 *Official Journal of the European Union*, 'Guidelines on the Application of Article 81(3) of the Treaty' (2004) OJ C 101/08; *Official Journal of the European Union*, 'Commission Notice on Agreements of Minor Importance Which do not Appreciably Restrict Competition Under Article 81(1) of the Treaty Establishing the European Community (de minimis)' (2001) OJ C 368/13 para 70.

26 *Australian Dairy Farmers Limited* A90966, 26 April 2006; *Dairy Western Farmers* A90961, 20 February 2006; *Inghams* A90825, 22 January 2003; *Steggles Limited and Other* A30183, 20 May 1998; *Australian Wool Exchange Limited* A30185, 30 December 1998; *Australian Stock Exchange Limited* A90623, 1 April 1998.

Balancing Public Benefit and Public Detriment

Central to the authorisation process is the comparison of the public benefit and anti-competitive detriment likely to result from the proposed conduct. The tribunal in Re QCMA recognised this and stated a claimed benefit may in fact be judged to be a detriment when viewed in terms of its contribution to a socially useful competitive process.[27] Similarly, in Re 7-Eleven Stores the tribunal stated the benefits and detriments are two sides of the one coin[28] — both flow from the same conduct. Thus it is not only benefits that may be passed on to the consumer, but also detriments. It was noted in Re Coalition of Major Professional Sports that one of the results of the collective negotiations would be an increase in the costs of sports betting operators and that this increase in costs may well be passed on to consumers.[29] The 'future with or without' test, discussed below, is used for this purpose and requires an examination of the detriments likely to flow from the proposed conduct, balancing those benefits against the detriments.

Further, there is clear recognition that, while in certain instances the market may fail to take into account all the costs and benefits involved in specific actions, the ACCC has a role to consider such externalities in its decision-making. In Agsafe the ACCC acknowledged its role in addressing market failure and stated arrangements that correct market failures may constitute public benefits. Here the authorisation application sought approval for the parties to enter the drumMUSTER program, which was an agreement to give effect to an industry waste reduction scheme for agricultural and veterinary chemical containers, as well as an agreement to charge a levy in order to finance the scheme. The public benefits were associated with environmental protection; the market failure being addressed was the inability of the market to deal with the environmental impact of product packaging and disposal.[30]

ACCC staff stated in interviews that any enquiry into the public benefit of proposed conduct would also take into account the likely detriments. This was seen as part and parcel of examining public benefit. These detriments were described as negative public benefits, public dis-benefits and also as dis-efficiencies.[31] In its decisions the ACCC has paid attention to four main categories of public detriment. These categories are a non-exhaustive list and examine both structural and behavioural factors. They include: consideration of whether there has been a reduction of the number of effective competitors in the market; examination of whether the conditions of entry have increased; examination of

27 *Re QCMA and Defiance Holdings* (1976) 25 FLR 169, 186.
28 *Re 7-Eleven Stores Pty Ltd* (1994) ATPR 41-357, 42645, 42683.
29 *Coalition of Major Professional Sports* A91007, 13 December 2006, i.
30 *Agsafe Limited* A90871, 18 September 2003, 16.
31 Interview 8.

whether the proposed conduct places any constraints on competition by market participants, affecting their ability to innovate effectively and conduct their affairs efficiently and independently; and any other detriments.

Similar to the list of public benefits, a list of public detriments has been compiled by the ACCC consisting of four main detriments:

- A reduction in the number of competitors
- Increased conditions of entry
- Constraints on competition by market participants affecting their ability to innovate effectively and conduct their affairs efficiently and independently
- Other.[32]

The empirical study on which this book is based examined the public detriments that the ACCC found existed or were likely to exist in the determinations studied. The public detriments, which were considered to be of minor importance, important and very important, were summed and used to plot Figure 3.1, which shows the importance attached to the different categories of public detriments has varied in the different years.

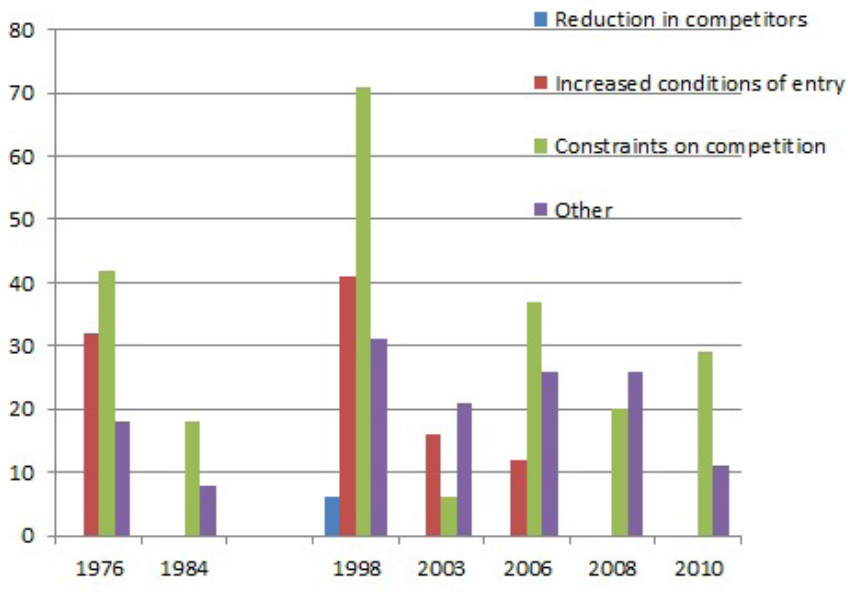

Figure 3.1: Four important categories of public detriments in ACCC authorisation determinations in the sample studied 1976–2006

Source: Author's research.

32 Although the wording of public detriments varies from one document to another, it covers substantially the same detriments. See Fels, 'The Public Benefit Test in the *Trade Practices Act 1974*' (2001) 9–11 and ACCC, *Authorisations and Notifications, Guidelines* (1991), 5.

The most commonly cited public detriment category in every year, except 2003 was the constraints placed on competition. For example, the United Energy authorisation was concerned with the proposed rules of a scheme that breached sections 45 and 47 of the Act. It involved agreements that had the effect of determining energy generation capacity, controlling the secondary trading of energy generation capacity and the basis for calculating seller's commission under the scheme.[33] The ACCC noted the scheme placed restrictions on participants' rights to trade in the market and this could be viewed as a public detriment. The ACCC also noted, however, that the underlying rationale was to enhance the level of confidence in the scheme, which would outweigh the public detriments.[34]

In Tasmanian Forest Contractors Association Limited, the association was seeking authorisation for collective bargaining between members, who carried out silviculture, harvesting and transport services, and a number of wood companies. The ACCC noted collective bargaining may lessen competition between forest contractors and reduce their incentive to innovate in respect of the services they provide; adversely affect the incentive to pursue more effective work practices; and also may reduce the incentive of forest contractors to differentiate themselves from their competitors.[35] The empirical study of decisions in 1984 and 2003 demonstrated that the ACCC referred to a number of the pubic detriments in its decision-making. In the NSW and ACT Newsagency System authorisation determination, the detriments cited by the ACCC included reduction in the number of competitors, increased conditions of entry, and constraints on competition by market participants.[36]

In certain instances, it is difficult to determine precisely the magnitude of the benefits and detriments and to decide whether the public benefit will clearly outweigh the detriment. In many such cases, conditions have been used to restrict the extent of the public detriment. For example, in Australian Hotels Association (NSW), which involved authorisation of collective bargaining arrangements, the ACCC was concerned about the constraints placed on competitors and granted authorisation subject to conditions that restricted the size of, and information sharing between, the negotiating committees.[37] Similarly, an appeal process within the code of conduct can be aimed at reducing the anti-competitive detriment. In Recruitment and Consulting, although the ACCC stated the code was unlikely to restrict competition in the employment services industry, the businesses being inappropriately penalised for breaching the code expressed concern about the process. The ACCC stated the existence

33 *United Energy Limited* A90665, A90666–A90670, 25 November 1998.
34 ibid, 13.
35 *Tasmania Forest Contractors Association Limited* A90973, A90974, 22 February 2006, 34.
36 *NSW and ACT Newsagency System* A30092, 26 April 1984.
37 *Australian Hotels Association (NSW)* A90837, 27 June 2003, i.

of a fair and transparent disciplinary process is an important means of reducing the detriment that could flow from the code of conduct.[38] It acknowledged it could not in the circumstances impose conditions because the public benefits outweighed the public detriments. The ACCC did, however, point to some ways in which the code could be improved, for example, by taking steps to bring the code to the attention of the public, including workers who might deal with its members; allowing third parties to lodge and progress complaints; and by publishing the full details of breaches of the code on the association's website. So, for example, in Agsafe, the condition imposed required information on the industry association website to be corrected in order to clearly indicate that it would be possible to procure accreditation through alternative sources.[39]

The Future With or Without Test

The 'future with or without test' is used in the process of balancing the public benefit and the public detriment. In Re John Dee (Export) Pty Ltd, the ACT discussed the place of the future with or without test and stated:

> [F]irst it is for the parties seeking authorisation to satisfy the Tribunal that benefit to the public is likely and that there will be sufficient public benefit to outweigh any likely anti-competitive detriment;
>
> secondly, since the likely benefits and detriments to be considered are those that would result from the proposed conduct, the Tribunal is required to consider the likely shape of the future both with and without the conduct in question; and
>
> thirdly, that task will generally entitle an understanding of the functioning of relevant markets with and without the conduct for which the authorisation is sought.[40]

The future with the authorisation is sometimes referred to as the factual and the future without the counterfactual.[41] Recently, the counterfactual has been used consistently in the determination of authorisations.[42] In BHP Billiton, the application was straightforward and the applicants listed the counterfactual as primarily involving economic and trade issues. They argued that if the agreement did not go ahead the result would be decreased sales, decreased trade,

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38 *Recruitment and Consulting Services Association* A90829, 24 September 2003, 26.

39 *Agsafe* (2010) A 91234, A 91242, A91243 and A91244, 30.

40 *John Dee (Export) Pty Ltd* (1989) ATPR 40-938, 50206.

41 Stephen Corones, *Competition Law in Australia* (3rd edn, 2004) 145.

42 This is more common in the determinations after 2003. See, for example, *BHP Billiton (2003/1)*; *Association of Australian Bookmaking Companies Inc* A30243, 9 July 2006, where a standard paragraph is used to explain the counterfactual.

and decreased opportunities to expand export markets.[43] The ACCC accepted alternative arrangements to the proposed agreement in the authorisation were unlikely. In Golden Caskets Agents Association Ltd the ACCC applied the counterfactual to a collective negotiation agreement. In this case it considered whether the proposed anti-competitive agreement, which was the subject of the authorisation, is/was likely to allow the association to negotiate with the corporation and stated:

> [W]hile making no comment in relation to the extent to which the corporation engaged in a consultative process in the past, the Commission also believes that in general, parties are more likely to actively engage in effective consultation whether it is subject to a more formalised collective bargaining process rather than ad-hoc or less formal processes.[44]

Some applications are much more complex, however, raising multiple alternate counterfactuals for consideration. One example with such multi-counterfactuals was the Qantas Air New Zealand authorisation application in which five counterfactuals were considered. The counterfactual that is relied on to establish the authorisation will have a significant impact on the calculation of the net benefits.[45]

If the applicant is unable to satisfy the ACCC that the future with the authorisation is preferred, the authorisation will not be approved. In Tasmanian Forest Contractors, the ACCC denied authorisation for collective negotiations on the basis that the proposed benefits were likely to continue without authorisation approval. The ACCC asserted the likelihood of individual forest contractors continuing to engage in individual bargaining with their respective wood companies, and this would accrue the proposed benefits.[46] Similarly, in Re Australian Hotels Association, the ACCC stated that, even without the authorisation, the standard form contracts offered by service providers that allowed for limited input from the Australian Hotels Association would continue to allow for certain benefits to continue.[47] Likewise, in Re BHP Billiton the ACCC pointed out that due to other projects beginning in the area, certain benefits would occur even if the joint venture proposal was not authorised.[48]

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43 *BHP Billiton Iron Ore Pty Ltd* A90981, A90982, A90983, 1 February 2006, 9. Also see *BHP Billiton Minerals Pty Ltd* A70015, A70016, A70017, 5 March 2003 which deal with similar issues.

44 *Golden Casket Agents Association Ltd* A90853, 4 September 2003, 18 or para 8.31.

45 *Qantas, Air New Zealand* A30220–A30222, A90862, A90863, 9 September 2003, 70-88.

46 *Tasmanian Forest Contractors Association Limited* A90973, A90974, 22 February 2006, 31–32.

47 *Australian Hotels Association* A90987, 1 March 2006, 14.

48 *BHP Billiton Minerals Pty Ltd* A70015, 5 March 2003, 28.

The Ambit of 'Public' in 'Public Benefit'

The predecessor to the Trade Practices Act contained the phrase 'public interest'. This was criticised as a key weakness of the legislation and it was stated public interest is couched in terms of benefits to sectional interests as well as competition and good economic performance.[49] An alternative approach consisting of three parts was proposed by Maureen Brunt, comprising a statement that, prima facie, the public interest is served by effective competition; an affirmation of the primacy of consumers or users; and a specification of ways in which the standard of living of the community may be raised through non-competitive organisation.[50] Much of the debate surrounding the term 'public benefit' in the 1974 legislation still involves these fundamental issues.

Since the inception of the Trade Practices Act, the meaning of the word 'public' in the phrase 'public benefit' has been widely discussed.[51] Another way of framing this issue is to ask to whom does the term 'public' refer? There are two main views on this issue and both are well represented in Australia. The first is that the public can mean any group of citizens, being producers, consumers or shareholders, with no distinction made between these sectional or sectoral interests. All that has to be established is that there is a sum benefit experienced by some sector of the public. This group would advocate the use of the total welfare standard to determine public benefit. The second view defines the public as consumers and a benefit being passed on to producers or shareholders would not constitute a public benefit. This group would prefer one of a number of other standards to be used in determining whether there is a public benefit, with most references being to the consumer welfare standard.

Private/Sectional Benefit

Some economists, including Robert Officer and Philip Williams, have argued that any benefit to a sector of the public should be recognised as a public benefit for the purposes of determining whether authorisation should be granted. This interpretation focuses on efficient resource allocation rather than optimal wealth distribution, with no distinction made between public and private benefits.[52] The proponents of this view argue the Trade Practices Act should not concern itself with specifying the group that will benefit, a process that is related more to wealth distribution. They further argue assessments about the interpersonal

49 Brunt (1965) 384.

50 ibid, 384–85.

51 For a discussion of the possible difficulties the interpretations may present, see, for example, Gentle, (1976) 59, 73–75.

52 Robert Officer and Philip Williams, 'The Public Benefit Test in an Authorisation Decision', in Megan Richardson and Phillip Williams (eds), *The Law and the Market* (1995) 157–66, 160–61.

comparisons of utility that consumers or producers may derive are subjective and should not be undertaken by those administering the Act.[53] Their arguments have been summarised in Pareto improvement terms:

> The essential test … should be whether there is an improvement in the use of society's resources. If, for instance, a prospective merger would result in efficiencies, reflected in lower costs and higher profits, that is, sufficient to establish the existence of public benefit. 'Insofar as the producer is better off and the consumers are no worse off we have a Pareto improvement'.[54]

Once Pareto improvement is identified, these economists would dismiss wealth distribution or equity arguments on the basis that there would be reason to believe a benefit to a poor producer might be better than requiring the benefit to reach a rich consumer. But, because it is difficult to determine whether wealth transfers are actually taking place, it is preferable to resist using the Trade Practices Act to achieve such ends. Rather, they would suggest such ends could be met by transparently using redistributive legislation, such as tax laws, with which the Trade Practices Act does not concern itself. This school favours the use of the total welfare standard in determining authorisations, which considers the economy-wide welfare effects of an authorisation. It requires that a person may be made better off without others being made worse off. This standard is focused on efficiency.[55]

In cases where the conduct does not involve consumers, the ACCC has accepted public benefits where they accrue to a private grouping. In the Port Waratah decision, the ACCC granted authorisation to conduct that would only result in benefits to the producers of Hunter Valley coal and where the two main producers would be the recipients of the maximum savings. In this the applicants sought authorisation for a coal distribution system to be loaded onto ships with ease in order to enable export to overseas markets.[56]

Where consumers are involved, however, the ACCC has often looked for at least some of the benefits to reach consumers. In doing so the ACCC is, contrary to the view of economists discussed above, distinguishing between public and private benefits. In NSW Department of Health, authorisation was sought by NSW Health for its policy requiring private in-house patients in NSW public hospitals to obtain pathology services from the pathologists of NSW Department of Health. The ACCC concluded the transfer of five million dollars from persons with health insurance to taxpayers caused by NSW Health's pathology policy

53 ibid, 163.
54 Brunt (1965) 329.
55 Officer and Williams (1995) 160–61.
56 *Port Waratah Coal Services Ltd* A90906–A90908, 9 July 2004.

was not a public benefit for the purposes of this authorisation.[57] Authorisation was granted on other grounds, however, subject to conditions. In Re Australian Hotels Association (NSW) the ACCC considered the transfer of benefits from one group to another may not constitute a public benefit. In this case the ACCC noted that gains transferred between businesses may not in themselves constitute a public benefit and stated: 'a mere transfer between businesses (that is a transfer of money from wagering and broadcasting service providers to hotels) is not itself a public benefit'.[58] A similar decision was reached in Re Australian Association of Pathology Practices Incorporated, although the ACT did not agree, and focused its attention on the analysis of anti-competitive conduct generating financial benefits and on economic efficiency considerations.[59]

There have been a number of cases where the private benefit occurs alongside other benefits to a wider section of society. One such example is the Australian Medical Association Limited and South Australian Branch of the Australian Medical Association Incorporated authorisation, which related to a fee-for-service agreement between the association and public hospitals in South Australia.[60] Here, although the authorisation was granted, the ACCC refused to accept some of the benefits claimed on the grounds that 'the public benefits claimed would result in private benefits that would enhance the welfare or bargaining position of the applicants, but would not result in broader public benefits'.[61]

The ACCC has stated it does not consider a sectoral interest to necessarily constitute a public interest and it is looking for something more comprehensive in application. The TPC in its first annual report addressed whether a private benefit could be considered to fall within the definition of public benefit. Here it stated that the test would require benefits to the public and not merely to the applicant or some other limited group.[62] The ACCC, and the TPC before it, has been consistent in requiring that there be some benefit beyond that accruing to the members of an association.[63] In the Hardware Retailers Association of WA authorisation, the members of the association applied for authorisation to circulate price lists to its members. The TPC denied this authorisation application on the basis the 'applicant's submissions … emphasise benefits to the Association

57 *NSW Health* A90754, A90755, 27 June 2003, para 7.69, 28.

58 *Australian Hotels Association* A90837, 27 June 2003, 55.

59 *Re Australian Association of Pathology Practices Incorporated* [2004] ACompT 4 (8 April 2004).

60 *Australian Medical Association Limited and South Australian Branch of the Australian Medical Association Incorporated* A90622, 31 July 1998.

61 ibid, 50. The authorisation was granted, however, on the grounds that it would facilitate the profession's full compliance with the Act.

62 See *Re QCMA* (1976) 25 FLR 169, 182.

63 See, for example, *National Automatic Laundry and Cleaning Council* (1976) ATPR (Com) 35-200, 16533; *ACI Operations Pty Ltd* (1991) ATPR (Com) 50-108; *BMW Australia Limited* (1998) ATPR (Com) 50-001; see also *Qantas/New Zealand* A30221, 9 September 2003.

member retailers themselves rather than the public as a whole'.[64] In the Qantas and Air New Zealand authorisation the applicants sought authorisation for arrangements which coordinated activities related to scheduling and pricing for all passenger and freight services on all Air New Zealand and Qantas flights within and departing from New Zealand. The applicants argued the public benefits included increased tourism and cost efficiencies. The ACCC refused to accept the benefits as claimed on the basis that 'the benefits accrue to the Applicants and their shareholders rather than consumers in an environment where there is reduced competition'.[65]

Thus, the general rule is that the ACCC has expected evidence of a benefit to a group that is wider than a small sectoral group. In a number of instances, however, the ACCC has granted authorisation to cases where only a private benefit is evident; in Medicines Australia, the ACCC stated the code of conduct that was the subject of the authorisation generated a public benefit, but the size of the public was not clear.[66] Similarly, in the Australian Tobacco Leaf Corporation authorisation, the ACCC was sympathetic to the tobacco growers who were moving from a highly protected industry to a competitive environment and who were the main beneficiaries of the authorisation.[67] In Pareto improvement terms, as long as there is a net benefit the conduct would be authorisable. In the Qantas and Air New Zealand authorisation application, the ACCC was not willing to accept that the claimed benefit, which would go primarily to shareholders, constituted a public benefit.[68] On appeal to the tribunal, the applicants to the authorisation argued benefits flowing to every member of the community, including both final consumers and producers, should be treated alike.[69] The ACCC argued that unless benefits were shared with consumers it was inappropriate to characterise such benefits as 'public' benefits, except in exceptional circumstances. The ACCC submitted that the tribunal should treat the cost savings that would accrue to the applicants and their shareholders as deserving little or no weight.[70] In allowing the appeal, the tribunal rejected the ACCC's argument, saying the 'public verses private' dichotomy in relation to cost savings claimed by the applicants 'is of fairly limited assistance when examining public benefits' and proposed:

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64 *Hardware Retailers Association* A7102, 31 March 1976; (1976) ATPR 35-200, 16540.

65 *Qantas, Air New Zealand and Air Pacific Limited* A30220–A30222, A90862, A90863, 9 September 2003. Note this decision was overturned on appeal by the ACT [2004] ACompT 9 (12 October 2004).

66 *Medicines Australia Ltd* A90779–A90780, 14 November 2003, para 5.52.

67 *Australian Tobacco Lead Corporation Pty Ltd A90532,* (1992) ATPR 50-124.

68 *Re Qantas Airways Ltd* [2004] ACompT 9 (12 October 2004) para 8.

69 ibid, para 168.

70 ibid, para 169.

> Does it fall in to the category of 'anything of value to the community generally'? If it does, what weight should be given to that benefit, having regard to its nature, characterisation and the identity of the beneficiaries of it?[71]

Benefit to a Wider Group

Perhaps the widest group to whom the public benefit would flow is the world at large. This issue was discussed in the Association of Fluorocarbon Consumers and Manufacturers Inc.[72] Here the commission accepted benefits would flow from the agreement between association members to limit the imports of hydrochlorofluorocarbon gases and to cease the importation and/or manufacture of disposable containers of hydrochlorofluorocarbon and hydrofluorocarbon gases. The commission stated a scheme or arrangement that contributed to limiting the risk to human health and the improvement of the environment would benefit the Australian public and may also benefit the total world population and environment. It is worth noting, however, that the Trade Practices Act deals only with conduct within Australia. This also applies to the recognition of public benefit as reflected by the ACT decision in Qantas, in which the benefits flowing to foreign shareholders were not considered to benefit the public.[73]

A narrower notion of the public was canvassed in Re Coalition of Major Professional Sports. The applicants claimed that members of the professional sports groups bargaining collectively would result in benefits to the wider community, including the development of sport at a grassroots and amateur level, increasing Australia's profile in the international community through publicity generated by the sports, as well as focusing on the ongoing promotion of sports.[74] The ACCC accepted these public benefits and granted the authorisation.

Usually economists espousing a flow through of benefits are not looking at such a wide definition of the public. Rather, they concentrate on the consumer when discussing the 'public'. They have argued that any saving of resources must be a public benefit. Brunt, however, stated that cases where the benefit is not passed on to the consumer may raise other concerns about market conduct and market structure:

> It is not the immediate distribution of benefits that is important but their durability. If a merger, for example, gives rise to rationalisation

71 ibid, para 188.

72 *Association of Fluorocarbon Consumers and Manufacturers Inc* A90658, 26 August 1998. Further, there was considerable government support for this authorisation.

73 *Re Qantas Airways Limited* [2004] T 9 (12 October 2004), paras 770.

74 *Coalition of Major Professional Sports* A91007, 13 December 2006, 10.

> economies and higher profits that are not 'passed on to the Consumer', one needs to ask why this is so. It may well reflect enhanced market power which would need to enter the benefit-cost equation; and there may well be a question of whether the lack of competitive pressure will allow productivity gains to be lost — 'benefit' to be dissipated — in slackness and rent-seeking activities.[75]

The consumer welfare standard is the most popular standard advocated by those who require that for something to constitute a public benefit the beneficiaries must be the consumer.[76] The consumer welfare standard is the sum of the individual benefits derived from the consumption of goods and services.[77] This standard looks at the effect of a proposed authorisation on the consumer. It disregards the benefits experienced by producers or shareholders and would require the benefit to be passed on to consumers.

Although a clear adherence to either the consumer welfare standard or the total welfare standard is not evident in the authorisation determinations, the ACCC has required at least some of the public benefits be passed on to the consumer in a number of determinations.[78] For example, in Re Showmen's Guild, the guild argued that the code for which it sought authorisation resulted in providing assistance to small businesses as well as providing greater bargaining power to such businesses. The ACCC stated it would be more likely to recognise the transfer of bargaining power as a public benefit if such benefits were felt by consumers, for example, in the form of lower prices to consumers or the reduced prospect of unconscionable conduct.[79]

The Role of 'Pass-through'

Strict adherence to the consumer welfare standard has been proposed as appropriate for determining public benefit. Rhonda Smith has recalled Brunt's comments, discussed above, on consideration of market structure and proposed the following rationale:

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75 Brunt (1965) 330.

76 The other standard is the balancing weights standard and further discussion of the alternative standards is contained in Chapter 6.

77 Rhonda Smith, 'Authorisation and the Trade Practices Act: More about Public Benefit' (2003) 11 *Competition and Consumer Law Journal* 21, 23. See also John Fingleton and Ali Nikpay, 'Stimulating or Chilling Competition', Office of Fair Trading (United Kingdom), (Paper presented at Competition Enforcement Conference, 25 September 2008) <http://www.oft.gov.uk/news/speeches/2008/0808> at 25 October 2008.

78 See *Qantas* A90962, A90963, A30220, A30221, 9 September 2003.

79 *Showmen's Guild* A90729, 25 February 2003, 41.

> Failure to pass-through some of the savings indicates that the firm/s concerned is/are not subject to much competitive pressure. Consequently, the efficiency gains anticipated from the conduct may not eventuate or may be dissipated subsequently.[80]

Pass through occurs when there is evidence to show that the public benefit can be passed on to a consumer or a group of consumers. The empirical work in this book indicates that both the concept and the term 'pass-through' have become more accepted in ACCC determinations since 1998. The decisions since this time deal with the extent to which the claimed benefits may flow through to the consumer. In the decisions studied, the term and concept are used in the determinations from 1998,[81] whereas they are not referred to at all in the commission decisions of 1976 and 1984.[82]

Pass-through will be easier to show in cases of economic efficiency that can result in cost savings, as illustrated in Southern Sydney Regional Organisation of Councils. The ACCC acknowledged that there were a number of public benefits that could arise from the proposed conduct although it was clear that it was easier to quantify the pass-through where there were cost savings involved. The ACCC noted: 'improvements in business efficiency and the reduction of operational and transaction costs to councils are likely to result in lower prices to ratepayers'.[83] The ACCC also noted, however, the other benefits of the proposed conduct were environmental in nature, reducing the amount of waste diverted to landfill, but this was not clearly connected to pass-through in the decision.

The reported decisions at times clearly refer to the term pass-through and at other times the reference is oblique. For example, in Australian Hotels Association, pass-through was an important factor in the commission's decision, stating it was of the view that 'any increase in PubTAB commissions or reduction in SKY Channel fees is unlikely to result in a significant pass-through to consumers'.[84] The ACCC in its determinations has not required all the benefits to reach the consumer, as illustrated in the Australian Society of Anaesthetists, where the ACCC accepted that improved efficiency represents a public benefit even where the full extent of the benefit is not passed on to the final consumer.[85]

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80 Smith (2003) 28.

81 For example see: *Job Futures Market* A90625, 8 April 1998; *Australian Medical Association Limited* A90622, 31 July 1998; *Qantas* A90962, A90963, A30220, A30221, 9 September 2003; *Inghams* A90825, 22 January 2003; *Australian Direct Marketing Association* A90876, 29 June 2006; *Coalition of Major Professional Sports* A91007, 13 December 2006; *Australian Performing Rights Association (APRA)*, A90918, A90919, A90922, A90924, A90925, A90944, A90945, 8 March 2006.

82 Some reference to the concept is made in *Real Estate Institute of Australia* A90396, 25 June 1984; *International Air Transport Association* A3485, 31 October 1984.

83 *Southern Sydney Regional Organisation of Councils* A90980, 25 January 2006.

84 *Australian Hotels Association* A90987, 1 March 2006, 58.

85 *Australian Society of Anaesthetists* (2000) ATPR 50-278, 53412.

The empirical study collates the instances where pass-through was referred to in either the authorisation application or determination. Figure 3.2 shows that the discussion of pass-through has increased over time by charting the times the concept of pass through is raised in the ACCC determinations included in the sample study. It also illustrates the number of cases where the authorisation was granted when pass-through was raised — which means that the authorisation was successful. Figure 3.2 also shows the number of cases where the concept of pass through was raised although the authorisation was not granted. This figure shows that, in 1976, the concept of pass-through was discussed in five cases although the authorisation was not granted. In 2006 and 2010 pass-through was raised in 23 and 24 decisions respectively and authorisation was granted in all these cases. This may point to an improvement in the types of guidelines being issued to the authorisation applicants as well as growing familiarity with the concept itself.

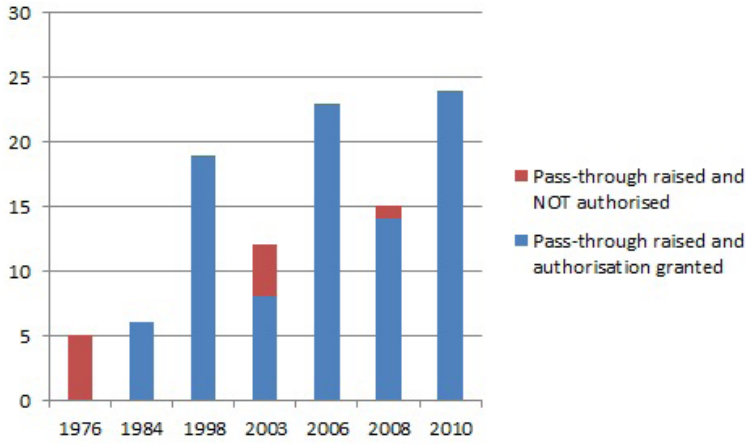

Figure 3.2: Evidence of pass-through in ACCC authorisation determinations in the sample studied 1976–2010[86]

Source: Author's research.

In the Qantas and Air New Zealand authorisation, the ACCC looked at whether the benefits were going to be passed through to the consumer and stated it was of the view that benefits to a particularly small group or segment of the community may be regarded as benefits to the public. The ACCC expressed reservations about the extent of public benefit claimed and stated any cost savings were likely to accrue to shareholders rather than consumers in an environment of reduced competition.[87] These reservations were rejected by the ACT on appeal, where it rejected the consumer welfare standard.[88] As discussed earlier, the ACT

86 Evidence of pass-through was noted by the ACCC as present in these decisions.
87 *Qantas* A90962, A90963, A30220, A30221, 9 September 2003.
88 *Re Qantas Airways Limited* [2004] ACompT 9 (12 October 2004), paras 190, 191.

clearly did not require the consumer welfare standard to be satisfied for public benefit to be established. There was no need for the benefits to directly accrue to the consumers and the tribunal stated efficiencies need not 'necessarily be passed on to consumers', although 'gains that flow through only to a limited number of members of the community will carry less weight.'[89] In the later decision the ACCC clearly stated that not all of the efficiency benefits accrued from the proposed arrangements would be benefits to Australians.[90]

Following the tribunal decision in Qantas and Air New Zealand, the ACCC demonstrated a clearer approach to the consideration of public benefit. For example, in the Australian Performing Rights Association (APRA) authorisation, the ACCC recognised that the cost savings generated by the proposed arrangements would be passed on to APRA's members who were also composers, many of whom were overseas composers. Nevertheless the ACCC, referring to the Tribunal's decision in Qantas and Air New Zealand, accepted that 'while carrying less weight than if they were passed through, significant weight should be accorded to those cost savings the benefits of which accrue primarily to APRA's members'.[91]

The need for some of the benefits to reach the consumer was acknowledged in Australian Hotels Association. Here it was argued that allowing the collective bargaining process to be authorised would mean more favourable terms of trading for members and this would result in reduced costs, which would be passed on to the consumers in the form of enhanced service standards and facilities.[92] It was pointed out that in this case the benefit that reached the consumer was likely to be low. The ACCC, however, accepted this as a public benefit, stating the revenue gains to the hoteliers, who were the association members, would likely be passed through in the form of lower prices and improved quality to consumers as a result of the collective bargaining process and that this would constitute a public benefit.[93] In Australian Brick and Blocklaying Training Foundation Limited, the ACCC recognised that authorising the implementation of a levy on the sale of bricks intended to fund a national training program to alleviate shortages of skilled bricklayers would have a number of benefits. It would result in increases in efficiency in an industry that is 'the engine room of the Australian economy' and would contribute to increases in the gross domestic product, which would provide public benefits that spread across the economy.[94] Thus the benefits would be to a wider cross-section of the public.

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89 ibid, 50.
90 *Qantas* A40107, A40108, A40109, 13 September 2006, 35.
91 *APRA* A90918, A90919, A90922, A90924, A90925, A90944, A90945, 8 March 2006, 689.
92 *Australian Hotels Association* A90987, 1 March 2006, 19.
93 *Australian Hotels Association (NSW)*, A90837, 27 June 2003, 58, para 11.63.
94 *Australian Brick and Blocklaying Training Foundation Limited* A90993, 26 April 2006, 30.

At times, pass-through may be an easy issue to resolve, as illustrated by the Myer authorisation where the ACCC stated: 'given the large number of Myer stores … this is likely to result in significant discounts across a range of retail goods being offered to consumers across Australia'.[95] Smith, however, pointed out pass-through can be difficult to determine and stated the 'problem for the ACCC in assessing the claimed efficiency gains from conduct is that it cannot know whether the benefits will be enduring'.[96] Such information can only be gained by monitoring the conduct after the authorisation has been given.

This was discussed by both the ACCC and the ACT in the EFTPOS decision. This application concerned the use of Electronic Funds Transfer at Point of Sale (EFTPOS) transactions. Such transactions are facilitated by a debit card that is issued by the cardholder's financial institution and linked to a transaction account. The cardholder is able to use this card to purchase goods and withdraw cash at various merchants. The cardholder is able to use the merchants' electronic network to instruct the merchant's financial institution to transfer the funds and this information is communicated via the merchant's financial institution to the customer's financial institution. In 2003 there were approximately 63.8 million EFTPOS transactions processed at a value of A$4 billion. The proposed authorisation application was an agreement among card-issuing financial institutions and merchant-acquiring financial institutions to set the interchange or wholesale fees for EFTPOS transactions to zero. As such an agreement was likely to attract the price-fixing provisions under section 45A, the authorisation application was necessary. Both the ACCC and the ACT pointed out that pass-through was not easy to identify. In the draft determination, the ACCC was concerned competition between card-issuing institutions may not be sufficient to ensure a lasting pass-through of the savings by card issuers to cardholders, and that the barriers to entry erected from this agreement may inhibit potential new entrants that may also adversely affect the benefits that could be passed on to the wider community.[97] Following the draft determination, the Australian Payments Clearing Association, among other interested parties, made submissions to the ACCC. The ACCC reassured the association that access reform would be introduced and this would reduce the barriers to entry for new entrants. Further, the submissions made by the applicants on ways in the authorisation would enhance disclosure and the details of the information campaign it proposed to implement also reassured the ACCC that the benefits may be passed on to the consumers. Following these submissions the ACCC granted authorisation.

95 *Myer Stores Limited* A400082, 4 June 2003, 17. See also reauthorisation of the same conduct in 2008: *Myer* A91091, 3 September 2008, 13.

96 Smith (2003) 28.

97 *Re EFTPOS Interchange Fee Agreement* [2004] ACompT 7 30.

The ACT, however, did not agree with the ACCC's decision stating the 'Proposed Agreement is likely to have the effect of passing on to the general body of consumers an annual cost of $170 million, or a substantial part thereof'.[98] The ACT queried the evidence on pass-through from the banks, stating: 'while all economists who gave evidence agreed with the general proposition that the proposed change in interchange fees is likely to be passed on (at least to some extent) to cardholders, the evidence presented leaves us quite unable to make any worthwhile finding as to the quantification'.[99] The tribunal also pointed out there was unlikely to be any audit of the claim so pass-through to consumers would be guaranteed.[100] This again raised the issue of how all types of public benefit claims can be monitored. In the Cuscal[101] and Suncorp Metway[102] applications, authorisation was granted for an agreement not to charge cardholders for ATM transactions operated by network members, which was an attempt to reduce the competitive disadvantage that smaller financial institutions faced when competing with larger financial institutions with broad networks.

There are other reasons that make the pass-through requirement difficult to establish in all cases. This includes cases where the conduct is at an intermediate stage of production, which does not necessarily translate to consumer savings. In the Agsafe authorisation, which dealt with a code of ethics among distributors of veterinary and agricultural chemicals, the commission noted that the distributors' additional costs of compliance with the code were likely to be passed on to retailers and, in turn, consumers, as well as the benefits of having more information and safer handling processes.[103] In other cases, however, the effect on the consumer is more difficult to establish, as illustrated in the Port Waratah and Newcastle Port Corporation authorisation decisions. The applicants in Port Waratah were granted authorisation for a capacity distribution system. This system aimed to match the amount of coal that was marked for export by Hunter Valley coal producers to the capacity of the rail and port systems to transport coal onto vessels in the port of Newcastle. The commission granted authorisation on the basis of benefits that would accrue to the producers of coal in the Hunter Valley. There was no evidence, however, that these benefits would be passed on to the consumer and the ACCC stated the difficulties in requiring such evidence:

98 ibid, 41.
99 ibid, 30–31.
100 ibid, 31.
101 *Cuscal Limited & Ors* (2010) A91175–A91177.
102 *Suncorp Metway Limited & Bendigo & Adelaide Bank Limited* (2010) A91232–A91233.
103 Agsafe (2010) p 24, 28.

> It does not seem practical to attempt to measure exactly how much of the benefit and detriment flows through to the Australian community. The Commission therefore proposes to discount both the benefit and detriment equally.[104]

Furthermore there may be cases where the effect on the consumer is difficult to determine or where no consumer is affected. This occurs in deregulated markets such as primary producers of chickens or milk. These parties have sought to gain authorisation for collective bargaining to work as a group in entering contracts with wholesale purchasers of their product. In such instances, the end consumer is absent and pass-through may be difficult to gauge. In the Victorian Farmers Federation[105] the chicken-meat growers sought authorisation for collective bargaining with nominated processors of the produce. Here the effect on the consumer was not at issue. Rather it was the ability of the small growers to bargain that was important and pass-through was not directly relevant.[106]

In the Surgeons authorisation, the proposed conduct involved processes within the Royal Australasian College of Surgeons, which provides for the training of surgeons and the provision of continuing training programs. The benefits to the consumer from having qualified surgeons were recognised, although the issue of pass-through did not receive extensive attention.[107] Similarly in Refrigerant Reclaim Australia Ltd, the public benefit in the form of improvement to the environment was acknowledged, although the actual pass-through, however obvious, was not discussed.[108] And, in Central Queensland Local Government Association, the applicant argued that authorisation would benefit the ratepayers through a streamlined and consistent waste and recyclables collection service,[109] and the ACCC stated that it was reasonable to expect that the benefits would be passed on to the taxpayer,[110] although there was little discussion of how this might happen.

Many professional groups, including lawyers, accountants and architects, have submitted applications dealing with codes of conduct and the incorporation of ethical practices or fixed fees. These have been authorised in the past by the ACCC on the basis that, even though such conduct may be anti-competitive, there are overall benefits in promoting ethical practices via self-regulation

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104 *Port Waratah* A90906–A90908, 9 July 2004, 62. See also *Newcastle Port Corporation* A91072–A91073, 23 April 2008.

105 *Victorian Farmers Federation* (2010) A91214.

106 See also *Tasmania Farmers & Graziers Association* (2010) and *Premium Milk* (2010) A91236 22 in which pass-through was examined.

107 *Royal Australasian College of Surgeons* A90765, 30 June 2003.

108 *Refrigerant Reclaim Australia Ltd* A90854, 7 May 2003. See also *The South Australian Oyster Growers Association* (2010).

109 *Central Queensland Local Government Association* (2008) A91087 13 August 2008, 22.

110 See also *Council of the Municipality of Ashfield* (2008) 24.

mechanisms.[111] In the example of the Australian Medical Association Limited and South Australian Branch of the Australian Medical Association Incorporated authorisation, the ACCC accepted the main public benefit was facilitation of the application of the Act to the medical profession. Although it is clear there would be a long-term benefit from the wider application of the Act and the creation of a more competitive marketplace, a pass-through of the benefit to the consumer within a specific time frame may be difficult to achieve. Price agreements between health practitioners in one workplace has also been authorised on the basis that consistency of fees, continuity of patient care and predictability of cost is a benefit to consumers.[112] Similarly, authorising a code of conduct that gives improved information and complaints avenues to consumers is working at empowering different stakeholders in the marketplace, although it may be difficult to assess whether the information or complaints procedures will be more frequently accessed by consumers.[113]

The European Commission has recognised some of these problems and noted such qualitative efficiencies may be harder to pass-through to the consumer in the short term and, where these consumer gains may occur sometime in the future, the value of future gains must be discounted.[114] It also stated it would consider allowing agreements on research and development that may result in the creation of a safer product to proceed because the safety effects are greater than the anti-competitive effects. It acknowledged that any such assessment necessarily requires value judgment/s and it is difficult to assign precise values.[115]

The above discussion illustrates the many complexities involved in interpreting the term 'public'. Much discussion has turned on who the public is that benefits from the proposed practices. Can it mean one slice, section or part of the community or does the benefit have to flow to a wider group, requiring evidence of pass-through? Decisions of the ACCC after 1998 show a greater awareness of the concept, and reference to the concept in deliberations is common. The approach has become even more consistent in the 2006 deliberations included in the empirical study, following from the tribunal's decision in Qantas, where the ACCC indicated its acceptance of benefits accruing to both sectoral groups as well as the wider public.

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111 See Fels, 'Regulation, Competition and the Professions' (Paper presented at the Industry Economics Conference, Melbourne, 13 July 2001).

112 *Australian Dental Association* A91094, A91095, 10 December 2008, 20, 22. See also *CALMS Ltd* A91092, 30 June 2008.

113 See *Generic Medicines Industry Association Pty Ltd* A91218 & 91219, 3 November 2010; see *Vision Group Holdings Limited* (2010) A91217.

114 ACCC, *Authorisations and Notifications, Guidelines* (1991) 88.

115 ibid, 16, para 103.

The Meaning of 'Benefit' in 'Public Benefit'

The starting point for any examination of the word 'benefit' within the phrase public benefit is the seminal decision in Re QCMA, where the tribunal opted for the widest possible conception of public benefit and stated:

> This we see as anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress. If this conception is adopted, it is clear that it could be possible to argue in some cases that a benefit to the members or employees of the corporations involved served some acknowledged end of public policy even though no immediate or direct benefit to others was demonstrable.[116]

This issue was discussed in the Re 7-Eleven Stores Pty Ltd decision, where the ACT agreed that it would be a public benefit to encourage small businesses as long as they were efficient.[117] Here the applicants were seeking a review of the commission decision that refused authorisation. The facts concerned the system of distributing newspapers in Victoria: a system that granted territorial monopoly rights to newsagents. This system had been authorised previously. The tribunal's decision clearly emphasised the economic goals of efficiency and progress. The tribunal returned to the QCMA decision and the phrase 'efficiency and progress'. It stated:

> The assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources. We bear in mind that (in the language of economics today) efficiency is a concept that is usually taken to encompass 'progress': and that commonly efficiency is said to encompass allocative efficiency, productive efficiency and dynamic efficiency.[118]

The emphasis is on economic efficiency, which is viewed as the ultimate goal of competition policy.[119] The ACT was of the view that the distribution system was protecting inefficient business (the newsagent and the subagent) and preventing other small business (convenience stores) from entering this market.[120] In

116 *Re QCMA* (1976) 25 FLR 169, 182–83.

117 *Re 7-Eleven Stores Pty Ltd, Australian Association of Convenience Stores Incorporated and Queensland Newsagents Federation* (1994) ATPR 41-357, 42645, 42681.

118 ibid, 42677.

119 Allan Fels and Tim Grimwade, 'Authorisation: Is It Still Relevant to Australian Competition Law?' (2003) 11 *Competition and Consumer Law Journal* 187, 200. See also *Re Qantas Airways Limited* [2004] A Comp T 9 (12 October 2004) para 157, in which the tribunal stated that it is necessary to consider the significance of allocative, dynamic and productive efficiency.

120 *Re 7-Eleven Stores Pty Ltd* (1994) ATPR 41-357, 42645, 42681.

considering the arrangements, the tribunal stated that they had resulted in 'past losses to the community incurred through suppression of competition [that] can never be recovered'.[121] The tribunal also stated the proposed arrangements resulted in 'efficiency losses through the non-achievement of available scale economies, and lost consumer choice'.[122] It stated these losses could be lessened by hastening the advent of fully competitive market forces. The tribunal proposed different transition periods to a deregulated market for the different types of arrangements under consideration.

In the Re Australian Wool Growers Association Ltd decision, the tribunal was asked to review a decision by the ACCC granting authorisation to the Business Rules, which included rules providing for quality control procedures, market reporting, and research and development activities of the Australian Wool Exchange Limited. The tribunal was satisfied that the rules of the marketplace provided a properly supervised and controlled facility for the offering of wool for sale in a competitive environment. The tribunal pointed out:

> It is a benefit to the public that there be administered, as part of the process of offering of wool for sale, a system of quality control and quality assurance whereby quality standards can be propounded, supervised and controlled by an entity such as the Wool Exchange whose standards and controls are recognised throughout the industry.[123]

It is clear that the term benefit has been construed widely.

The Role of Economic Efficiency in Examining Public Benefit

At various times throughout history, antitrust policy has had different objectives.[124] This is no less true of Australia than elsewhere.[125] Today the primary objective of competition law and policy is the attainment of economic efficiency. The importance of economic theory is largely unquestioned. This is attributable partly to the failure of previous regulatory regimes to deliver results, partly to the soured relationship between business and the regulators, and partly because it promises a value-free, objective way to allocate resources. Dominance of economic theory in regulation is unlikely to fade.

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121 ibid.

122 ibid.

123 *Re Australian Wool Growers Association Ltd* [1999] ACompT 4 (3 September 1999), para 72.

124 See Eleanor Fox and Lawrence Sullivan, 'Antitrust — Retrospective and Prospective: Where Are We Coming From? Where Are We Going?' (1987) 62 *New York University Law Review* 936, 942–47.

125 See Vijaya Nagarajan, 'The Accommodating Act: Reflections on Competition Policy and the Trade Practices Act' (2002) 20(1) *Law in Context* 34.

Economic efficiency arguments have been important in the assessment of public benefit since the inception of the Act.[126] Both the commission and the tribunal have emphasised the importance of economic efficiency, while recognising that there is room for other matters to be considered.[127] The Hilmer Committee, which reported on Australia's national competition policy in 1993, heard a number of submissions calling for a change in the authorisation process whereby economic efficiency would become the sole objective of the Act. Although the committee saw a place for both economic efficiency and other considerations, it recommended the legislation be amended to confirm that, in determining questions of public benefit, primary emphasis should be placed on economic efficiency considerations.[128]

Table 3.1 divides the commonly claimed public benefits into three categories: economic efficiency benefits, non-economic efficiency benefits and those benefits that could fall into either category.

Table 3.1: Public benefits claimed in authorisation determinations

Clearly efficiency-based benefits	Benefits which may overlap efficiency and non-efficiency	Benefits not justified on efficiency grounds
Economic development	*Facilitating competition through deregulation*	*Promotion of equitable dealings in the market*
Industry rationalisation	Enhancement of safety and quality of goods and services	Promotion of certain types of conduct* (usually in the Other category)
Expansion of employment in efficient industries	*Steps to protect the environment*	*Professional ethics*
Promotion of cost savings resulting in lower prices at all levels in the supply chain	Attainment of industry harmony	Access to dispute resolution
Growth in export markets	*Supply of better information to customers and suppliers to permit informed choices*	*Enforcement of codes*
Benefits flowing from import substitution	Promotion of employment in particular areas	National security
Promotion of competition in the industry	*Development of import replacements* *Providing countervailing power*	*Meeting Australia's treaty obligations*

* See, for example, ACT Law Society (1977) ATPR (Com) 16615 where the then TPC considered the potential risks of conflicts of interest arising from solicitors acting for both the vendor and purchaser in land sales. See also the recognition of self-regulation schemes and codes of conduct that are recognised as public benefits: Australian Tyre Dealers and Retreaders Association (1994) ATPR (Com) 50–162.

Source: Author's research.

126 See Joseph Griffin and Leeanne Sharp, 'Efficiency Issues in Competition Analysis in Australia, the European Union and the United States' (1996) 64 *Antitrust Law Journal* 649, 649.

127 See Fels and Grimwade (2003) 200–01; see also Independent Committee of Inquiry into Competition Policy in Australia, Commonwealth of Australia, *National Competition Policy* [Hilmer Report] (1993) 97.

128 [Hilmer Report] (1993) 99.

It has been generally accepted that non-efficiency benefits have a place in the consideration of public benefit.[129] Fels commented that a broader range of social benefits are recognised by the ACCC under Australian law than under its European Union counterpart.[130] It is unclear, however, how much weight should be given to non-efficiency factors or these factors alone could become the basis of a successful authorisation application. Emphasising allocative efficiency and couching public benefits in the language of economics has made it difficult to develop a thorough approach to such non-efficiency benefits.

Furthermore, the important autonomous and active role attributed to the consumer in the market, and idea about consumer rationality have been criticised as too simplistic and not reflecting real market behaviour. Behavioural economists have queried the proposition that market failures result only from information failure and have proposed that market failures are caused by consistent biases in consumer behaviour.[131] There are numerous biases that have been recognised; the most relevant to this discussion is the 'endowment effect'. This is an attempt to explain the observed phenomenon that, irrespective of price, some consumers will be loyal to a particular supplier. Behavioural economists suggest that, rather than approaching the market with a firm shopping list, consumers' behaviour can be influenced by the environment in which the market transaction is taking place, where issues, such as stress of changing suppliers, may determine the decision.[132]

All these contributions query the underlying assumptions of neoclassical economics and the uncritical acceptance of economic efficiency as the central focus. They advocate a move away from a 'one size fits all' policy to one that allows for greater scrutiny and assessment.

Economists have also queried the viability of one competition policy for all economies. Early on, in the mid eighties, Richard Caves identified the connection between small economies and concentrated markets,[133] while Porter discussed the varieties of institutions and environments that can shape the competitiveness of a nation.[134] More recently, Michal Gal suggested that the competition policy of large economies may not necessarily suit small economies.

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129 See ACCC, 'Submission to the Commission of Inquiry: Review of the Competition Provisions of the *Trade Practices Act 1974* (Dawson Review)' (June 2002) 247; for an alternative view on the decline of non-efficiency factors, see Organisation for Economic Co-operation and Development (OECD), 'The Goal of Competition Law and Policy and the Design of Competition Law and Policy Institutions', (2004) 6 (1 and 2), *Organisation for Economic Co-operation and Development Journal of Competition Law and Policy* 78, 79.

130 Fels, 'The Public Benefit Test in the *Trade Practices Act 1974*' (2001) 3.

131 OECD (2004) 13. Also see: Department of Treasury, 'Consumer Policy in Australia: A companion to the OECD Consumer Policy Toolkit', <http://www.consumerlaw.gov.au/content/consumer_policy/downloads/Companion_to_OECD_Toolkit.pdf>

132 See OECD (2004) 14.

133 Richard Caves, 'Scale, Openness and Productivity in Manufacturing Industries', in Richard Caves and Lawrence Krause (eds), *The Australian Economy: A View from the North* (1984) 313.

134 See Porter (1990).

She identified Australia as a small economy because most of its industries are characterised by concentrated market structures.[135] Gal argued small economies have key characteristics that should be taken into account before determining the design of competition policy. Three of these key characteristics are worth noting in relation to Australia. First, unlike large economies, a firm's ability to realise economies of scale and adopt efficient technologies is limited in small economies.[136] Second, high levels of industrial concentration are likely to affect the contestability of local or regional markets in small economies. Third, high barriers to entry, such as Australia's tyranny of distance, may create supply constraints on factors of production or inhibit institutional and technological change, whereas in large economies this may result in new and better products.[137]

Gal argued that these key factors place a handicap on economic performance. Market forces alone cannot achieve efficiency in such cases, and 'competition policy in a small economy is thus a critical instrument with respect to determining domestic market structure and conduct and the intensity of competition.'[138] For Gal, it is important that competition policy in small economies has clear goals, namely economic efficiency goals that should not be sacrificed for broader policy objectives.[139] She identified small business protection for special mention and stated such protection would be to the detriment of consumers. Gal argued that, even if small business protection were a chosen goal, competition law should not be the method employed to achieve this.[140] Many economists would agree with this view. Officer and Williams argued that, whereas Part V of the Trade Practices Act addresses the wealth distribution issue, Part IV is directed at the promotion of efficient or optimal resource allocation.[141] They emphasised the need for Part IV of the Act to focus clearly on economic efficiency.

So, what does Gal propose as the appropriate design for competition policy in Australia? She argued small economies should reject per se rules and opt for 'a rule that balances possible efficiency enhancements against the anti-competitive effects of cooperative conduct and allow arrangements in which the benefits offset the restrictions on competition.'[142] On this basis it would appear that the design of Australia's authorisation process, which allows for such examination, is appropriate.

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135 Michal Gal, *Competition Policy for Small Market Economies* (2003) 55, 2. See also Fels and Grimwade (2003) 196–98, for a discussion of size and competition policy in Australia.
136 ibid, 45.
137 ibid, 20–21.
138 ibid, 21, 45.
139 See ibid 50–51. Gal examines the multiplicity of goals in the competition statutes of Israel and Canada.
140 ibid, 48.
141 Officer and Williams (1995) 157–66.
142 Gal (2003) 174.

Gal, however, would focus more on efficiency benefits than other benefits. Gal accepts that, in certain circumstances, non-economic considerations may be relevant and cited as an example for the need to produce a particular product within jurisdictional borders for security reasons. An Australian instance that falls into this category The Council of Textile and Fashion Industries Limited authorisation decision, where the parties sought an authorisation of the arrangements in the Homeworkers Code of Practice.[143] Here the ACCC accepted many non-efficiency benefits, such as social and health benefits, as public benefits. They included: lessening the risk of exploiting a less advantaged group; the provision of information to homeworkers to understand their entitlements; and the provision of improved working conditions for such workers and their families. Another, earlier authorisation decision that raised interesting issues was the Tasmanian Farmers and Graziers Association decision.[144] Here, the 600 growers of poppies used in the production of opiate alkaloids, which are in turn used in the manufacture of pharmaceutical products, sought authorisation for collectively negotiating with the purchasing companies. The growing and production of the poppies, in accordance with the Single Convention of Narcotic Drugs 1961, is required to be closely controlled and supervised and Tasmania is the only state where the growing of poppies is permitted. The TPC approved the authorisation, recognising that it was important for the international market to perceive Australia as a secure and reliable source of supply.[145]

Environmental concerns were the reasons for the authorisation of the Australian Retailers Association Code of Practice for the Management of Plastic Bags, which was a voluntary code for the managed reduction and recycling of lightweight plastic bags.[146]

There have been many who have emphasised the need for public benefits to be efficiency-based. Frances Hanks and Philip Williams discuss the different approaches of the commission and the tribunal in determining vertical restraint cases, and express similar views.[147] Their preference is for greater emphasis to be placed on current economics literature. Reviewing the decisions in the area, they point to the number of benefits that may result from vertical restraints, including the provision of cost-minimising dealership services in the case of franchises; the prevention of free riding on services of the manufacturer in the case of exclusive supply contracts; and, the existence of an optimal number of

143 *The Textile, Clothing and Footwear Union of Australia and The Council of Textile and Fashion Industries Limited* A90722–A90725, 31 July 2000; *The Textile, Clothing and Footwear Union of Australia and The Council of Textile and Fashion Industries Limited* (2000) ATPR (Com) 50-282, 53,544.

144 *Tasmanian Farmers and Graziers Association* A80001 (86) ATPR (Com) 50127, 55447.

145 ibid, 50127, 55447, 55453.

146 *Australian National Retailers Assn Limited* (2008) determination.

147 Frances Hanks and Philip Williams, 'The Treatment of Vertical Restraints Under the Australian Trade Practices Act' (1987) 147 *Australian Business Law Review* 147 165–67.

dealerships in the case of resale maintenance agreements.[148] They are critical of the commission for not giving adequate consideration to these factors and conclude that, while 'the authorities are generally well-informed when analysing anticompetitive detriment, their analysis of offsetting benefit to the public would be enhanced if arguments were presented along the lines of the contemporary economics literature.'[149] Such an approach would add transparency to decision-making. There are, however, no straightforward definitions of efficiencies as David Round stated:

> Efficiencies come in all shapes and sizes. Real ones and pecuniary ones; scale and scope economies; technical and allocative efficiencies; dynamic efficiencies and x-efficiencies; short run and long run efficiencies; and production, management, distribution, buying and retailing efficiencies. Some are harder to achieve than others … Some are easier to measure, others are not. Some are mere wealth transfers. Some are of more lasting value to society than others. Do we count them all equally? Should we? Are they all of equal value to society?[150]

Clearly, adopting a limited view of efficiencies would make recognition of non-efficiency-based benefits difficult, as quantifying benefits, such as environmental protection or the facilitation of collective bargaining, is a fraught task (discussed below). Alternatively, there is no justification for ignoring efficiency benefits without a considered coherent analysis capable of withstanding close scrutiny.

Benefits Recognised in the Commissions' Determinations

There has been a good deal of emphasis placed on economic efficiency arguments in interpreting the phrase 'public benefit'. Economic discourse, however, can only partly explain a nation's competition law. For example, Peter Hall and David Soskice emphasise the role of informal rules and understandings that lead actors to coordinate on one outcome rather than another, when both are feasible in the presence of a specific set of formal institutions.[151] The manner in which firms coordinate their activities are different in a liberal market economy

148 See ibid, 167–68.

149 ibid, 168.

150 David Round, 'W(h)ither Efficiencies: What is in the Public Interest? A Commentary on "The Great Efficiencies Debate in Canadian Merger Policy: A Challenge to Economic Foundations of Canadian Competition Law or a Storm in a Teacup?" by Michael Trebilcock' (Paper presented at the Fifteenth Annual Workshop of the Competition and Policy Institute of New Zealand, Auckland, 13–15 August 2004) 2–3.

151 Peter Hall and David Soskice, 'An Introduction to Varieties of Capitalism', in Hall and Soskice (eds), *Varieties of Capitalism: The International Foundations of Comparative Advantage* (2001), 13.

from a coordinated market economy.[152] Likewise, efficient antitrust principles in a liberal market economy will be different from those in a coordinated market economy in the context of institutions, such as intellectual property rules or industrial policy, which regulate the activities of firms. Michael Porter, Hirotaka Takeuchi and Mariko Sakakibara further illustrate this in their study of how Japan could increase its competitiveness, in which they argue that, rather than becoming a clone of American capitalism, the answer may lie with developing a distinctly Japanese conception of competition.[153] Joseph Stiglitz added that a free market cannot solve all problems and argued 'one-size-fits-all' economic policies can damage rather than help countries with unique financial, government and social institutions. He argued that the answer for public institutions may be for them to become more responsive to their constituents.[154] Thus, reliance on economic efficiency alone may not be appropriate, and the context in which the conduct is occurring needs careful attention.

Reliance on economic discourse is also fraught for other reasons. Maher referred us to the difficulties faced by an enforcement agency in adopting one particular theoretical perspective, when alternatives are available.[155] Experts can present lucid, well-honed arguments for either side. Furthermore, although it is best for legislation to be focused towards clear goals, such as efficiency, there is always a contest between what is thought to be more manageable and what is thought to be more important. The Trade Practices Act 1974 has tried to do many things in the past and, even today, it is concerned with the protection of small business in ways that may be at odds with the goal of economic efficiency.[156] The question as to whether it should do so is, however, unresolved.

Interviews with ACCC staff indicate that, whereas staff in the past relied more on experience in determining public benefits, there had been a greater focus on efficiency benefits in the recent past. Two past staff members were critical of relying solely on economic evidence, one saying that, in many instances, economic evidence can be flawed and cited the Australian Meat Holding case as an example.[157] In this case, several economists proposed different definitions of the market, which prompted the court to state: 'economics is a study of human behaviour and to determine the boundary of a market, one has to consider what people do and what they are likely to do in the market — in fact and not merely

152 Hall and Soskice classify the United States, the United Kingdom, Australia, Canada, New Zealand and Ireland as liberal market economies, whereas Germany, Japan, Switzerland, the Netherlands, Belgium and Sweden among others are classified as coordinated market economies. See ibid, 19.

153 See Michael Porter, Hirotaka Takeuchi and Mariko Sakakibara, *Can Japan Compete?* (2000).

154 Joseph Stiglitz, *Globalization and its Discontents* (2000).

155 Imelda Maher, 'Regulating Competition' (Paper presented at the Regulating Law Conference, Canberra, 21 March 2003) 3.

156 See Nagarajan (2002) 52–56; see also Senate Economics References Committee, Parliament of Australia, *The Effectiveness of the* Trade Practices Act 1974 *in Protecting Small Business* (2004).

157 Interview 9.

in economic theory'.[158] Another current staff member stated that efficiency arguments of mainstream economists have begun to dominate the authorisation process, excluding issues of vulnerability of consumers.[159] Yet another current staff member stated that the diversity in economic thought, particularly that of behavioural economics, was not a large part of the deliberation of the ACT and rarely considered by the parties involved in the authorisation application or parties making submissions in relation to the application.[160]

Seven figures have been plotted to illustrate the changing emphasis given to the 16 public benefits considered by the ACCC in determining authorisations.[161] In each of these figures (Figure 3.3 to Figure 3.9), the public benefits are plotted in order of their importance, except for the category of 'Other', which appears below all of the named public benefits. The number in brackets on the vertical axis, next to each of the public benefits, refers to the number of determinations in which authorisation was granted out of the number where it was accepted as present by the commission. On the horizontal axis, each public benefit is coded and the summed weights are plotted. The figures in this section collate the public benefits which were weighed as important and very important in compiling the data. A number of different benefits may have been considered in the same determination.

Figure 3.3 deals with 1976, when only nine out of the 35 determinations studied were successful in gaining authorisation, which may say much about the operation of a regulatory agency in it neophyte stage than is possible to discuss in this article. This period was also a time when domestic policy was being shaped by postwar economic growth and increasing global business. The need to dismantle a protectionist regime, reconsider the cost of high tariff protection[162] and restrictive trade practices in terms of competitiveness could no longer be ignored.[163] All these factors are reflected in the shape of the Trade Practices Act, which contained far-reaching anti-competitive measures.

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158 *Australian Meat Holdings Pty Ltd v Trade Practices Commission* (1989) ATPR 40-932, 51105.

159 Interview 8.

160 Interview 10.

161 Benefits that are 'very important' in the determination are given a weighting of 4 and those that are 'important' are given a weighting of 3, 'minor importance' a weighting of 2, 'minimal importance' a weighting of 1. Where a benefit is seen as occurring twice, such as cost savings in administration and production, it is weighed twice. These weights are added together and the sum of these weights is used to plot Figures 3.3 to 3.7. Further discussion of the weighting used is discussed in Chapter 1 and the Appendix.

162 The Vernon Report of 1965 was instrumental in this shift in thinking, recommending several changes to the Tariff Board to place a greater emphasis on the broader economic consequences of the protection of particular industries.

163 John Warhurst and Jenny Stewart, 'Manufacturing Industry Policies', in Brian Head and Allan Patience (eds), *From Fraser to Hawke: Australian Public Policy in the 1980s* (1989) 160; Fred Brenchley, *Allan Fels: A Portrait of Power* (2003) 24; Margot Hone, *From Industry Assistance to Productivity: 30 Years of 'the Commission'* (2003) <www.pc.gov.au/about-us/history 2, 10–11>.

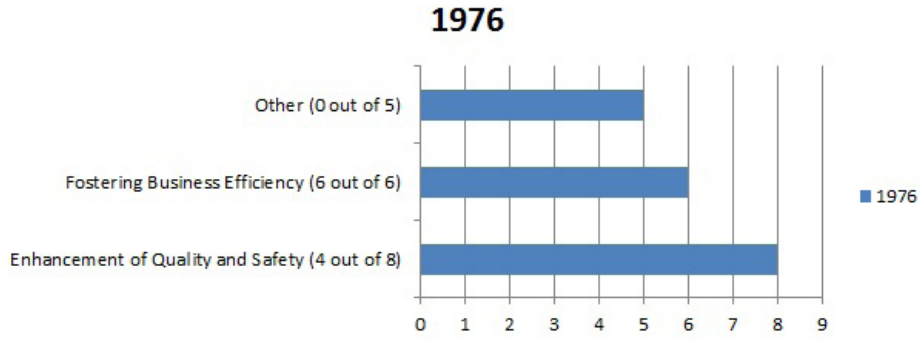

Figure 3.3: Summed weights of important public benefits and the number of cases in which authorisation was granted by the TPC in the sample studied in 1976 (9 out of 35 determinations were successful)

Source: Author's research.

Nevertheless it was, in many respects, these provisions that were incompatible with the structure and operation of the Australian national economy where protectionism was the result of the long-standing tradition of state intervention to both improve the efficiency of capitalism and temper its adverse impacts. Protection of the manufacturing sector to maintain local industry and labour-market regulation in the form of the industrial arbitration system which guaranteed a minimum wage had historically formed the basis of what is described as the 'Australian Settlement', where an accommodation between capital and labour had become the settled policy of the Australian state.[164] The Trade Practices Act was the culmination of a growing recognition of this, marking the end of bipartisan support for high levels of protection.[165] Figure 3.3 reflects the concerns with promoting efficient business as a means of increasing competition, where 'fostering business efficiency' was successfully argued in six determinations.[166]

The 1980s saw a continuing shift from interventionist policies towards a greater emphasis on market forces.[167] The Liberal government under Malcolm Fraser (1975–83) had introduced economic rationalism into policy debate, raising awareness of the need for economic reform. It began deregulation of the financial system and, in January 1983 foreign banks were permitted to apply for an

164 See: Jenny Stewart, 'Industry Policy', in Brian Galligan and Winsome Roberts (eds), *The Oxford Companion to Australian Politics* (2007) 275 and Geoffrey Stokes, 'Australian Settlement', Galligan and Roberts (2007), 56–57.

165 See: Ray Steinwall, 'The Legislative Basis of the Act', in Steinwall (co-ordinator), *Butterworths Australian Competition Law* (2000) 9. See also Brenchley (2003) 28.

166 See, *Permanent Building Societies* A5077, A21277, A21289, A21290, A21291, (1976) 17/11/1976.

167 Within the Liberal Party, the 'new right' emerged in the 1970s, and included those who subscribed to what became known in Australia as 'economic rationalism', a reworking of classical laissez-faire economics. They were the Australian equivalent to the Thatcherites in Britain and the Reaganites in the United States (www.primeministers.naa.gov.au/primeministers/fraser/in-office.aspx at 26 January 2012).

Australian license. The Hawke government was elected in 1983 and continued with deregulation of the financial system and with the floating of the Australian dollar, which saw economic reform firmly placed on the agenda.

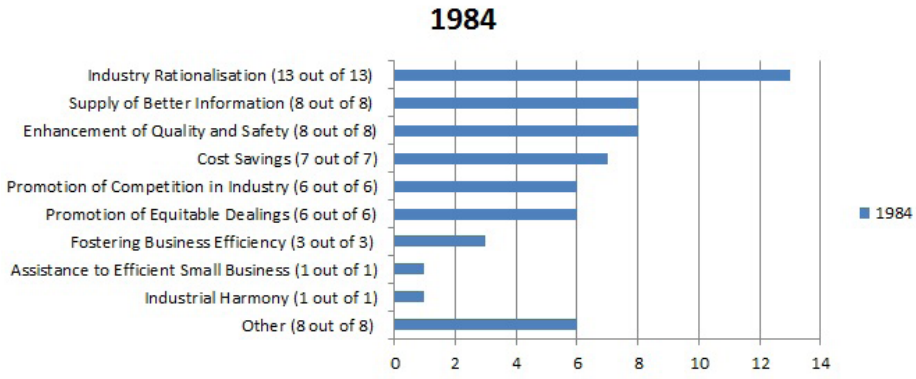

Figure 3.4: Summed weights of the important public benefits and the number of cases where authorisation was granted by the TPC in the sample studied in 1984 (33 out of 35 determinations applications were successful)

Source: Author's research.

Of the nine categories of public benefit featured as important in 1984, Figure 3.4 illustrates that 'industry rationalisation' was most prominent having been argued successfully as an important public benefit in all 13 determinations. Cost savings was accepted as an important public benefit in seven determinations while the promotion of competition in industry was accepted in six determinations, and fostering business efficiency in three determinations. This reflects the stronger focus on economic efficiency factors in the commission's decision-making. This is offset by the recognition of the promotion of equitable dealings as an important public benefit in six determinations, all of which dealt with ethical conduct within professional codes of conduct.[168] For some time, professional ethics provisions had been acknowledged as an important regulatory tool by the commission. It recognised the value of industry codes and stated that codes are an effective and market-sensitive mechanism for delivering the detail of consumer protection rules, provided they are appropriately framed, administered and monitored.[169] The importance of consumer protection was not forgotten, with eight determinations accepting supply of better information as an important public benefit and, likewise, eight accepting the enhancement of quality and safety.

168 For example, see *Real Estate Institute of Qld* (1984) A90396 and A30397, 1984; *Society of Auctioneers and Appraisers Inc* A60009; *Canberra/Queanbeyan Panel Beaters Group* A90371; *Stock and Station Agents Association of NSW* A90400.

169 ACCC, 'Submission to the Financial System Inquiry (Wallis Inquiry)', September 1986.

By the 1990s, microeconomic reform had come to dominate the economic and political agenda and the associated policies included the removal of tariff protection, corporatisation of government utilities and business enterprises, the deregulation of industries including the airline industry and the abolition of the two-airline policy and introduction of competition to the telecommunications sector, all of which fostered competition. The governments' focus was on promoting economic growth in a global market.[170] The national competition policy (NCP) of 1995, an outcome of the Hilmer Report, involved the application of the principles of competition policy to the states and territories[171] and resulted in amendments to the legislation extending the application of competition to include the professions, public utilities and government enterprises.[172] By the mid 1990s, competition policy had 'reached right into the bowels' of the Australian economy[173] and forged a cultural change in Australian business.[174] An important tool of this reform was the Productivity Commission, established in 1998 to operate as the government's principal advisory body on all aspects of microeconomic reform. Not only did this body replace the Industry Commission, but its broader charter gave greater emphasis on productivity performance of industry.[175] Its primary role was to identify obstacles to improved productivity in particular sectors, having 'due regard to the important relationships between improved use of resources in one sector and the rest of the economy'.[176]

Figure 3.5 illustrates the importance to the various public benefit factors in 1998 where 29 out of 35 determinations were authorised. The bar graphs reflect the continuing concern with the promotion of competition in industry, fostering business efficiency and cost savings. Promotion of competition and fostering business efficiency were important factors alongside the non-economic efficiency public benefit of enhancement of quality and safety. Wider application of competition laws across all sectors saw the commission faced with authorisation applications from bodies that were previously exempt. Although promotion

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170 For a discussion of the Labor party's changing economic agenda, see Kevin Davis, 'Managing the Economy', in Brian W Head and Allan Patience (eds), *From Fraser to Hawke: Australian Public Policy in the 1980s* (1989) 66–109, 68.

171 Against the backdrop of major microeconomic reforms, in October 1992, Prime Minister Paul Keating commissioned an independent inquiry into national competition policy, chaired by Professor Frederick Hilmer, which reviewed the structural inefficiencies that limited the effectiveness of competition law and prevented development of a competition regime across all sectors.

172 Among the reasons identified in favour of developing a national competition policy was that Australia was now 'for all practical purposes a single integrated market as the economic significance of state and territory boundaries diminished', Hilmer Report (1993) xvii–xviii.

173 Brenchley (2003) 18.

174 ibid, 8.

175 Hone (2003) 87, 94.

176 Commonwealth, *Parliamentary Debates*, 7720, cited in Hone (2003) 93.

of competition was advocated as a public benefit in many applications, it was not always accepted, as demonstrated by the Australian Performing Rights Association determination.[177]

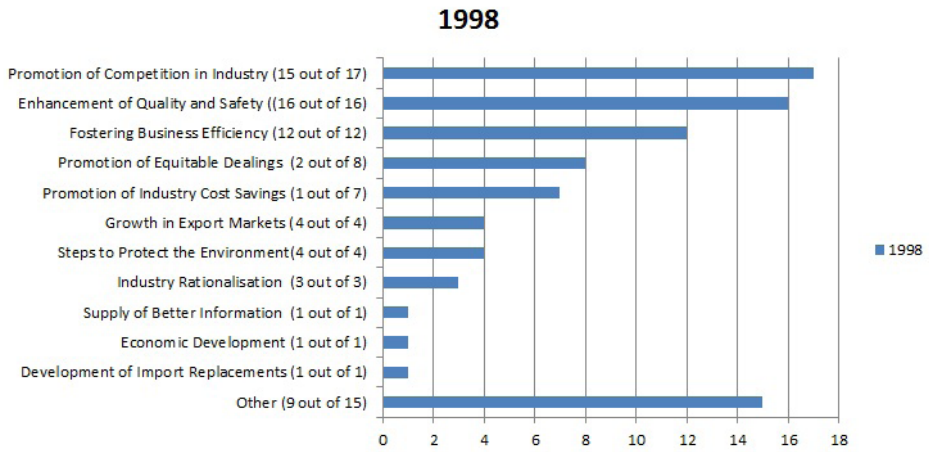

Figure 3.5: Summed weights of the important public benefits and the number of cases where authorisation was granted by the ACCC in the sample studied in 1998 (29 out of 35 were successful in 1998)

Source: Author's research.

The focused efforts described in the last section to build a competitive market economy remained a priority in the first half of the last decade. The Productivity Commission had been asked to assess the impact of the NCP reforms and, in 2005, it reported that productivity and price changes would be likely to raise Australia's GDP by around 2.5 per cent.[178] The increasing use of modelling and quantification in order to enable assessment of policy was being promoted by government and used by regulators.[179]

177 *Australian Performing Rights Association* (1998), A30192 and A30193.

178 See Productivity Commission, *Review of National Competition Policy Reforms*, Inquiry Report No 33, Canberra, February 2005.

179 Interview 2; see also Department of Finance and Deregulation, Commonwealth of Australia, Office of Best Practice Regulation (OBPR), 'Cost Benefit Analysis', which emphasises cost benefit analysis. <http://www.finance.gov.au/obpr/cost-benefit-analysis.html> at 15 October 2008.

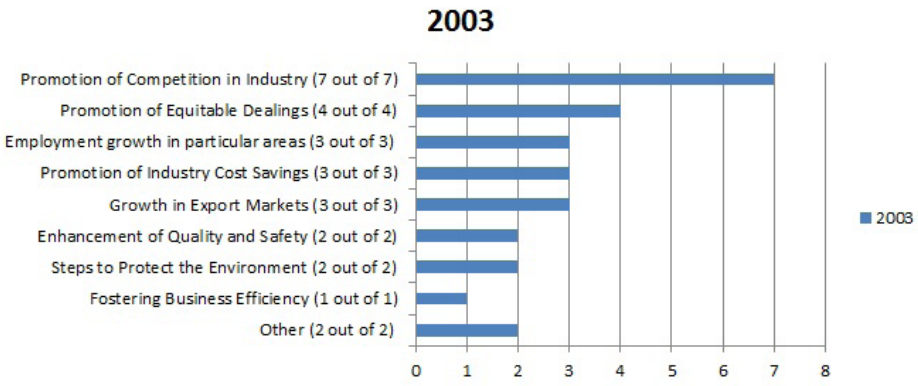

Figure 3.6: Summed weights of the important public benefits and the number of cases where authorisation was granted by the ACCC in the sample studied in 2003 (31 out of 35 were successful in 2003)

Source: Author's research.

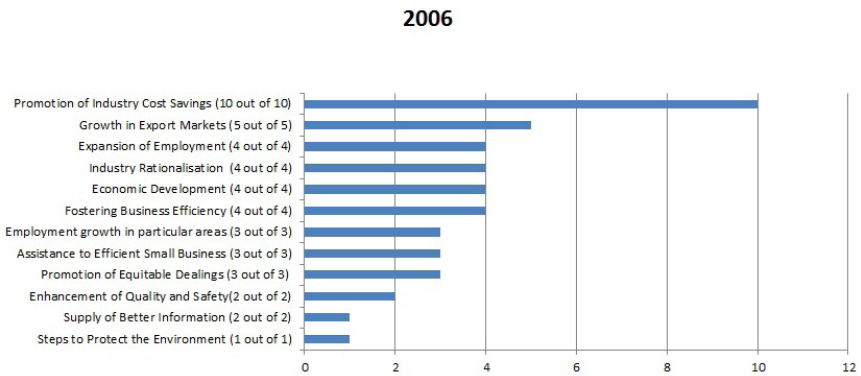

Figure 3.7: Summed weights of the important public benefits and the number of cases where authorisation was granted by the ACCC in the sample studied in 2006 (32 out of 35 applications were successful in 2006)

Source: Author's research.

This is reflected in the 2006 determinations in Figure 6 where the promotion of industry costs savings was more commonly cited in these ACCC determinations, featuring in 10 out of 35 determinations in that year. This factor is linked to economic efficiency and has the advantage of being open to quantification, which was steadily increasing in Australia following the necessity for government departments and regulators to improve transparency of decision-making. Unlike all the years studied previously, the category of 'Other' was not referred to, perhaps indicating a preference for identifying specific public benefits. Fostering business efficiency and growth in export markets were often cited and

this year also saw the return of expansion of employment as a criterion, which had not had a showing since 1976. Steps to protect the environment appeared in one determination, which was lower than in 1998 and 2003.

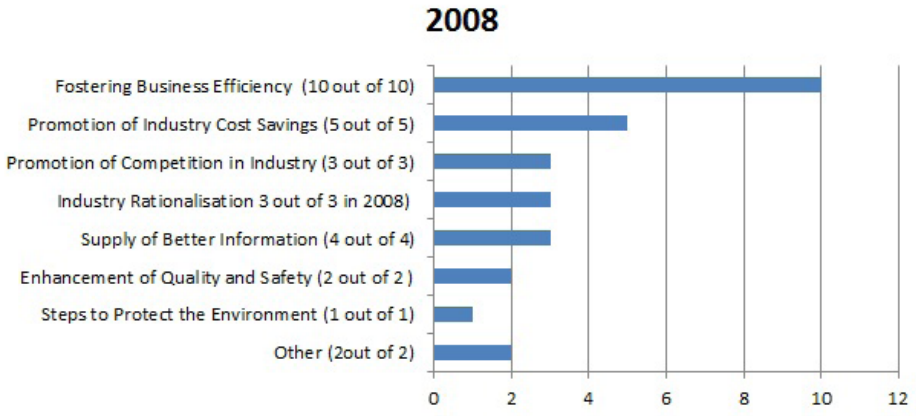

Figure 3.8: Summed weights of the important public benefits and the number of cases where authorisation was granted by the ACCC in the sample studied in 2008 (33 out of 34 were successful in 2008)

Source: Author's research.

The focus on competition and economic growth was shaken by the recognition that the rollout of competition policy into all sectors may not be straightforward. This focus was also shaken, perhaps more indirectly, by the challenges posed by the global financial crisis and climate change. These factors have impacted on competition policy in two main ways that are relevant to the discussion on authorisation determinations: first the complexities inherent in introducing competition to infrastructure and technology industries such as the health care sector and deregulated sector was recognised and a number of authorisations dealing with these industries came before the commission; second the need to promote business-driven initiatives aimed at market stability and environmental sustainability also played out in the determinations made in 2008 and 2010.

By 2006, all the main NCP reforms had been implemented and the impediments to achieving productivity in certain sectors, particularly health care, were acknowledged.[180] Regulating the health industry via competition laws has been controversial. This was partly explained by the tribunal when it stated that the health industry is unique in way that result in market failure and, in such circumstances, more competition is not necessarily a good thing for efficiency.[181] The application of the competition law to the medical profession

180 See Paul Gretton, 'Assessing the importance of national economic reform — Australian Productivity Commission experience' in Conference on the Micro Foundations of Economic Policy Performance in Asia, (New Delhi, 2008).
181 *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4 (8 April 2004), paras 144, 158.

and related health industries has caused confusion among the profession,[182] as illustrated by the Australian Medical Association determination[183] in which the association stated that the reason for making the application was to provide it with certainty and legal protection in its dealings with state and territory health departments.[184] Similarly, in Australian Dental Association,[185] the commission agreed that the accepted norm of having consistency of fees within a medical or dental practice, although constituting exclusionary conduct, would ensure a shared responsibility for the continuity and quality of patient care within a shared practice.[186] In 2008 there were six authorisations dealing with the medical and dental sectors and they were all authorised.[187]

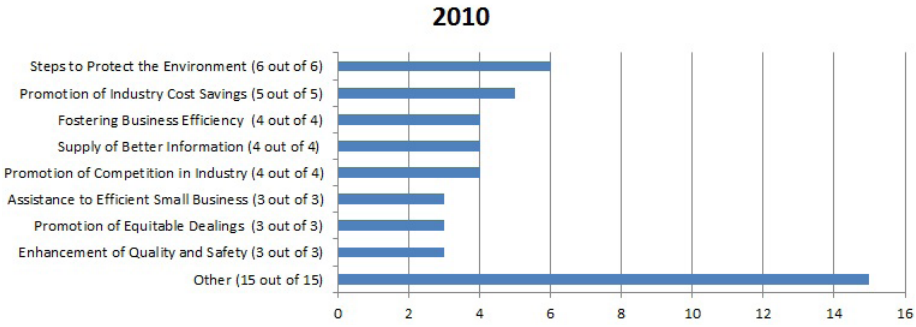

Figure 3.9: Summed weights of the important public benefits and the number of cases where authorisation was granted by the ACCC in the sample studied in 2010 (34 out of 35 were successful in 2010)

Source: Author's research.

The position was similar in 2010. Environmental concerns were raised in 6 determinations successfully in 2010, including the Agsafe and Refrigerant Reclaim authorisations. Cost savings and fostering business efficiency still remained as important public benefits, although the number of determinations where other public benefits (outside those in the list in Table 1.1) was increasing.

182 See Stephen G Corones (2005), 'The uncertain application of competition law in health care markets' (2005) 33(6) *Australian Business Law Review* 407–28.
183 *Australian Medical Association Limited & Ors* (2008) A91100.
184 ibid, 14, 33.
185 *Australian Dental Association Inc* (2008) A91094 & A91095.
186 *Australian Dental Association Inc* A91094 and A91095, 20; see also *Vision Group Holdings Limited* (2010) A91217, 8.
187 *Australian Dental Association* (2008) A91094 and A91095; *Australian Medical Association* (2008) A91100, A91088; *CALMS Ltd* (2008) A91092; and *Rural Doctors Association of Australia Limited* (2008) A91078.

In Summary …

It is clear from this survey of benefits recognised in the seven years under scrutiny that the ACCC's determinations reveal a continuing acceptance of both economic efficiency benefits and other benefits, such as the enhancement of safety and the promotion of professional ethics. The manner in which the term public should be interpreted has, however, been less clear. Earlier authorisation deliberations do not make reference to the concepts of pass-through, or the consumer welfare standard, and often deal with authorisation applications from which there was little likely impact on consumers, such as approval for agreements between professional groups or associations. As the economic discourse has gained widespread acceptance in government policy, there have been attempts by the ACCC to give effect to these discourses by seeking evidence of some benefits finding their way to consumers. Following the tribunal's decision in Qantas and Air New Zealand, however, the ACCC's deliberations have been more circumspect. More recent deliberations are specifically located within the principles expressed by the ACT and plainly refer to the decision, demonstrating the importance of the economics discourse in shaping the meaning of this phrase.