

## 4. Types of Public Benefit

This chapter builds on the discussion in the last chapter by examining in detail the types of public benefits that have been recognised in Australian Competition and Consumer Commission (ACCC) determinations. The discussion is divided into three main sections. The first part deals with economic efficiency benefits, the second examines non-economic efficiency benefits, and the third part looks at specific areas where public benefit analysis is more complex, defying easy categorisation. It is clear from this that ACCC authorisation determinations have become more myopically focused on efficiency. Although economic efficiency concerns have always focused the regulator's attention, reflecting the rise of economic rationalism by Australian governments and indeed globally, a number of varying non-economic efficiency benefits, such as environmental benefits or increasing safety of goods, have been emphasised at different times during the last 30 years. The study reveals that the ACCC has recognised these benefits in its determinations and has been able to work with the changing regulatory state by varying its use of regulatory strategies, most interestingly by being able to enlist others in the regulation game, such as professional associations, in incorporating ethical practices and appeals procedures into their codes of conduct.

### Role of Efficiency-based Public Benefits

Competition is usually linked to efficiency and it is generally acknowledged that competition is valued for what it can deliver in terms of allocative, productive and dynamic efficiency.<sup>1</sup> Interviews with ACCC staff, including members of the Australian Competition Tribunal (ACT), suggest that any authorisation decision-making process begins with economic efficiency factors before moving to non-efficiency factors.<sup>2</sup> It has been stated that the ACCC's primary emphasis is on those detriments that affect competition and economic efficiency, although other factors have been recognised.<sup>3</sup>

The public benefits used by the commission are listed in Table 1.1 and, of the 16 public benefits in this table, only 14 are classified as economic efficiency

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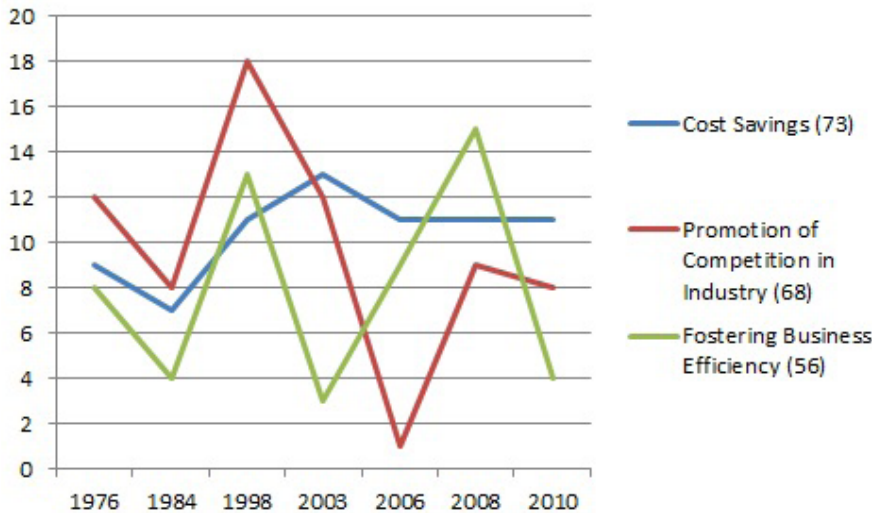
1 *Re Australian Association of Pathology Practices Incorporated* [2004] ACompT 4 (8 April 2004) 32.

2 Interview 2 and Interview 10.

3 Allan Fels and Tim Grimwade, 'Authorisation: Is it Still Relevant to Australian Competition Law?' (2003) 11 *Competition and Consumer Law Journal* 187, 2003; see also Dawson Report Committee of Inquiry, Commonwealth of Australia, *Review of the Competition Provisions of the Trade Practices Act* [Dawson Review] (2003) 32; Productivity Commission, Commonwealth of Australia, *The Growth and Revenue Implications of Hilmer and Related Reforms: A Report of the Industry Commission to the Council of Australian Governments* (1995) 385 <<http://www.pc.gov.au/ic/research/independent/hilmer/finalreport>> at 1 November 2007.

related, with PB11 (environment) and PB16 (other) not dealing with economic efficiency. Many of the factors overlap with each other and, for example, in the deregulated sector the public benefits of industry rationalisation and the promotion of competition go hand in hand. Likewise, the promotion of cost savings is usually coupled with the facilitation of business efficiency. These factors are often cited and discussed together in ACCC determinations.

The three most important public benefit factors based on economic efficiency are plotted in Figure 4.1. The public benefits that are considered to be of minor importance, important and very important were summed for the compilation of these figures. Of a total of 244 determinations studied across the 36-year span, cost savings was considered to be of importance on 73 determinations, fostering business efficiency was considered important in 56 determinations, and the promotion of competition was considered important in 68 determinations.



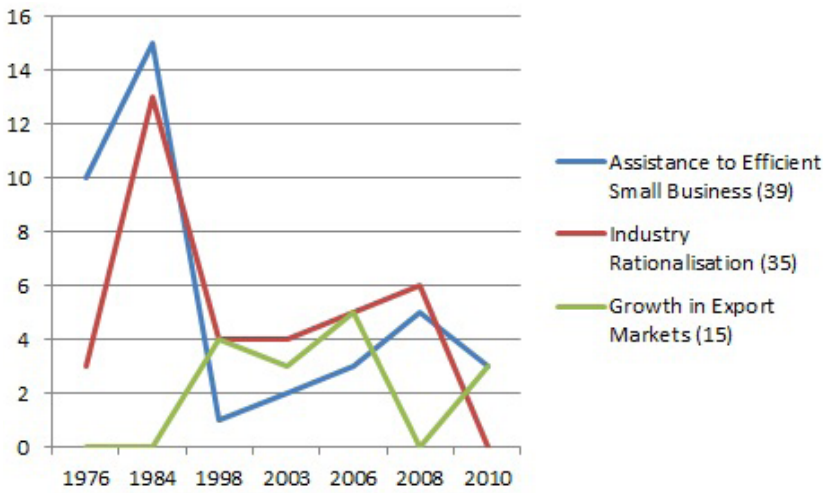
**Figure 4.1: Top three public benefits based on economic efficiency across seven years**

Source: Author's research.

The role of cost savings has been constant across all the years studied, with it becoming the most important factor in 2006 and again in 2010. The ability to increase efficiency via reduced costs has been consistently argued in applications stemming from a variety of industries, including the milk, liquor and iron ore industries.<sup>4</sup> It was the most consistently considered factor across time, despite spikes in arguments based on fostering of business efficiency and promotion

<sup>4</sup> See: *Liquor Stax Australia Pty Ltd* (2010) A91237; *Premium Milk Ltd* (2010) A91236; *Tasmanian Farmers and Graziers Association* (2010) A91197; *North West Iron Ore Alliance* (2010) A91212.

of competition in 1998, this year having been selected for the study in order to examine the effect of the implementation of the national competition policy (NCP) on authorisation determinations. This factor has levelled out, being raised consistently in 11 determinations in each of 2006, 2008 and 2010, which should be read against the increasing use of modelling and quantification being promoted among regulators in the assessment of policy.<sup>5</sup>



**Figure 4.2: Less important public benefits related to economic efficiency across seven years**

Source: Author's research.

That promotion of competition and fostering business efficiency peaked in 1998 can be understood against the backdrop of the microeconomic reform programs in the late 1980s when the Labor government under Bob Hawke and Paul Keating (1983–96) deregulated financial markets, floated the dollar, cut tariffs and privatised and corporatised government businesses, like many other European counterparts.<sup>6</sup> This is reflected in the Organisation for Economic Co-operation and Development reports that pointed to Australia having less interventionist strategies than other countries after the United States, United Kingdom and Ireland.<sup>7</sup> As discussed in Chapter 3, another obvious explanation for this spike is that it reflects the deregulation strategies that were implemented following the

<sup>5</sup> 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.

<sup>6</sup> Some of the corporatised and privatised businesses included the Commonwealth Bank, Qantas Airlines, Telecom Australia and the Commonwealth Serum Laboratories. See also Vijaya Nagarajan, 'Reform of Public Utilities: What About Consumers?' (1994) *Competition & Consumer Law Journal* 155.

<sup>7</sup> Organisation for Economic Co-operation and Development, *Economic Surveys: Australia*, (August 2001) 118.

NCP. The authorisation determinations in 1998 included the wool,<sup>8</sup> electricity<sup>9</sup> and gas<sup>10</sup> industries as well as *Stock Exchange*.<sup>11</sup> The expanded application of the Act in 1995 also meant previously unregulated conduct of professionals could now be regulated: this accounts for the *Australian Medical Association*<sup>12</sup> and the *Australian Performing Rights Association (APRA)* decisions.<sup>13</sup>

In 2003, while the promotion of competition and cost savings continued to be important, numerous other factors also rated mention, providing a more even spread across the public benefits factors dealing with economic efficiency. This can be partially explained by the determinations in 2003 covering a variety of conduct, with nine of the 35 decisions involving the aviation industry.<sup>14</sup> Further, in 2003, there was a greater reliance on non-efficiency factors, illustrated by the *CSR Limited* authorisation as well as the *Golden Casket Agents Association Ltd* determinations in which the ACCC found that one of the public benefit grounds was the promotion of equitable dealings and, in *Refrigerant Reclaim* and *Agsafe*, in which the commission found that environmental benefits would be delivered by the proposed practices.<sup>15</sup> The 2006 figures mimic the 2003 data, although the role of exports increased. Consideration of a wide range of public benefits during these years is interesting and refutes the claim of a rigid regulator, strictly adhering to the book.

In interviews, representatives of consumer groups stated that the ACCC emphasised economic efficiency considerations in its determinations: 'economic efficiency is paramount and social environmental considerations don't get an airing'.<sup>16</sup> Another representative of a consumer group stated that concerns about an association's standard contracts were dismissed by the ACCC on the grounds that such contracts were economically efficient.<sup>17</sup> These comments are consistent with the views expressed by Stephen Wilks and Ian Bartle of the English competition regulators, which they argue 'steadily developed a stronger economic input and used economic analysis, and economic doctrine, to build

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8 *Australian Wool Exchange Limited* A30185, 30 December 1998.

9 *National Electricity Code* A90652, A90653, A90654, 19 October 1998.

10 *Gas Services Business Pty Ltd* A90630, 19 August 1998.

11 *Australian Stock Exchange Limited* A90623, 1 April 1998.

12 *Australian Medical Association Limited* A90622, A90622, 31 August 1998.

13 *Australian Performing Rights Association Limited (APRA)* A30186–A30193, 14 January 1998. See also Honourable JJ Spigelman AC, 'Are Lawyers Lemons? Competition Principles and Professional Regulation' (The 2002 Lawyers Lecture, St James Ethics Centre, 29 October 2002).

14 *Air New Zealand on behalf of all members of the Star Alliance* A30209–A30213, 4 September 2003; *Qantas and Air New Zealand* A90862, A90863, A30220, A30221, 9 September 2003.

15 *Golden Casket Agents Association Ltd* A 90853, 4 September 2003; *CSR Limited* A90808, 10 June 2003; *Refrigerant Reclaim Australia Ltd* A90854, 7 May 2003; *Agsafe Ltd* A30194, 2 September 1998; see also *Medicines Australia Inc* A90880, 18 February 2004; these factors are discussed later in this chapter.

16 Interview 14.

17 Interview 13.

their credibility'<sup>18</sup> and point to the prominence of economists in the relevant agencies. They contend that this approach has 'moved the agencies towards a narrower and less critical judgment of market behavior.'<sup>19</sup>

ACCC staff expressed mixed views, with one past staff member stating the ACCC appeared to place greater emphasis on efficiency-related factors than previously in its history.<sup>20</sup> Another staff member pointed out that distributive justice issues cannot be ignored in decision-making, but should not drive the decision.<sup>21</sup> Simply recognising diverse factors, however, may not be enough. It was stated by another ACCC staff member that 'bad economic analysis can occur with both efficiency factors and non-efficiency factors'.<sup>22</sup>

By 2008, all the main NCP reforms had been implemented and the impediments to achieving productivity in certain sectors, particularly health care, were acknowledged.<sup>23</sup> In 2008 there were six authorisations dealing with the medical and dental sectors and they were all authorised.<sup>24</sup> These relied on the a combination of efficiency related and non-efficiency related benefits in their applications and, for example, in *Australian Dental Association*, the public benefits that were accepted as important were cost savings and enhancement of quality of services, with assistance to small business being seen to be of minor importance.<sup>25</sup> The importance of the environment, which had featured in the determinations since 1998, was the most important benefit in the 2010 determinations studied, with six determinations successfully raising it as an important factor. For example, in the *Agsafe*<sup>26</sup> and *Refrigerant Reclaim*<sup>27</sup> authorisations, environmental benefits were accepted as important in granting authorisation, reflecting once again the manner in which regulatory decision-making has to deal with the economic and social concerns of the day.

Of the three less-considered factors (Figure 4.2), assistance to small business spiked in 1984, rising again in 2008, which reflects the political emphasis on a micro-economic reform program which began in the 1980s and was again raised after the widening scope of the Act to include deregulated industries

18 Stephen Wilks and Ian Bartle, 'The Unanticipated Consequences of Creating Independent Competition Agencies' (2002) 25(1) *West European Politics* 148, 167.

19 *ibid.*, 170. See Bronwen Morgan, 'The Economization of Politics: Meta-Regulation as a Form of Nonjudicial Legality' (2003) 12(4) *Social & Legal Studies* 489.

20 Interview 5.

21 Interview 4.

22 Interview 10.

23 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).

24 *Australian Dental Association* (2008) A91094, A91095; *Australian Medical Association* (2008) A91100, A91088; *CALMS Ltd* (2008) A91092; and *Rural Doctors Association of Australia* (2008) A91078.

25 *Australian Dental Association Inc* A91094, A91095, 10 December 2008.

26 *Agsafe* A91234, A91242–A91244, 27 October 2010.

27 *Refrigerant Reclaim Australia Ltd* A91079, 14 May 2008.

and the professions. Industry rationalisation was the fifth-most-cited economic efficiency public benefit, and it spiked up in 1984. This spike can be partly explained by the fact that a significant number of decisions dealt with industry associations, including the *Master Locksmiths Association*,<sup>28</sup> the *Real Estate Institute of Australia*<sup>29</sup> as well as those in Queensland,<sup>30</sup> Australian Capital Territory<sup>31</sup> and Victoria,<sup>32</sup> the *Stock and Station Agents Association*,<sup>33</sup> *Queensland Motor Industry Association*,<sup>34</sup> groups within the newsagency industry<sup>35</sup> and the *Society of Auctioneers and Appraisers*.<sup>36</sup> The other factor in Figure 4.2 is growth in export markets, which was at its highest in 2006 and 1998. This factor was not present in 1976 or 1984 and was only recognised in 1998 reflecting the importance of globalisation and competition among nations.

## Types of Efficiency Benefits

The following discussion examines the main types of efficiency benefits that have been recognised in the commission's authorisation decisions. Figures 4.2 to 4.6 and Figures 4.8 to 4.13 show each of the public benefits, as they were raised in the authorisation application or determination, and the weighting given to them in the discussions,<sup>37</sup> across seven years.

### Industry Cost Savings

By providing evidence about cost savings, the applicant would be in a better position to satisfy the 'future with or without test' used by the ACCC, as well as provide the necessary causal link between the proposed conduct and claimed benefit that the ACCC seeks, improving the chances of a successful authorisation application.<sup>38</sup> This factor has been consistently cited over the time studied (Figure 4.3), as is reflected by the 1976 determination in *United Permanent Building Society* in which the commission accepted there would be administrative cost savings that were 'difficult

28 *Master Locksmiths Association of Australia Ltd* A90377, A90388, 15 March 1984.

29 *Real Estate Institute of Australia* A90393, 12 January 1984.

30 *Real Estate Institute of Qld* A90393, A90397, 25 June 1984.

31 *Real Estate Institute of ACT* A97, A98, 30 November 1984.

32 *Real Estate and Stock Institute of Victoria* A4432, A4433, 10 October 1984.

33 *Stock and Station Agents Association of NSW* A90404, 11 September 1984.

34 *Queensland Motor Industry Association Ltd* A40009, 24 October 1984.

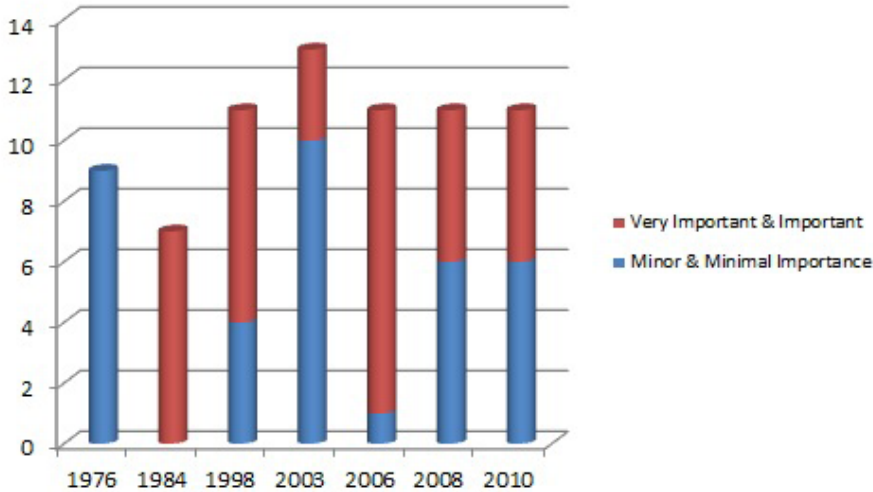
35 *NSW and ACT Newsagency System* 26 April 1984; *Mercury Newsagency System* 9 May 1984.

36 *Society of Auctioneers and Appraisers Inc* A60009, 6 September 1984.

37 A determination could raise more than one benefit and it could be given a weighting of very important (4), important (3), minor importance (2) or minimal importance (1).

38 For a discussion of the future with or without test and for discussion on the causal link see Chapter 3.

to quantify but of some magnitude' brought by the proposed authorisation.<sup>39</sup> Similarly, in the *Port Waratah* determination in 1998, the ACCC accepted that there would be significant cost savings in the form of reduced demurrage costs.<sup>40</sup>



**Figure 4.3: Promotion of industry cost savings in ACCC authorisation determinations in the sample studied across seven years**

Source: Author's research.

This factor is essentially linked to economic efficiency and has the advantage of being open to quantification. In *Qantas Airways and New Zealand*, the tribunal was satisfied the proposed alliance would result in significant cost savings that the applicants could pass on to travellers by way of lower fares, depending on the competitive pressure it faced from other airlines in the industry. Cost savings would result from integrating technology and networks, management as well as crewing and maintenance.<sup>41</sup> The tribunal was critical of the quantification methods used by certain experts to calculate tourism benefits.<sup>42</sup> One interviewee, a senior staff member of the ACCC, stated that certain groups were 'strong on quantification', requiring staff to have 'expertise in econometrics and statistical analysis' and 'it would be up to consumer groups to bring awareness of these issues that cannot be quantified, to the ACCC's attention'.<sup>43</sup> This factor was consistently referred to in 11 determinations in 2006, 2008 and 2010.

<sup>39</sup> *United Permanent Building Society* (1976) ATPR 35-220, 16789, 16877.

<sup>40</sup> *Port Waratah* A90650, 25 March 1998, 18.

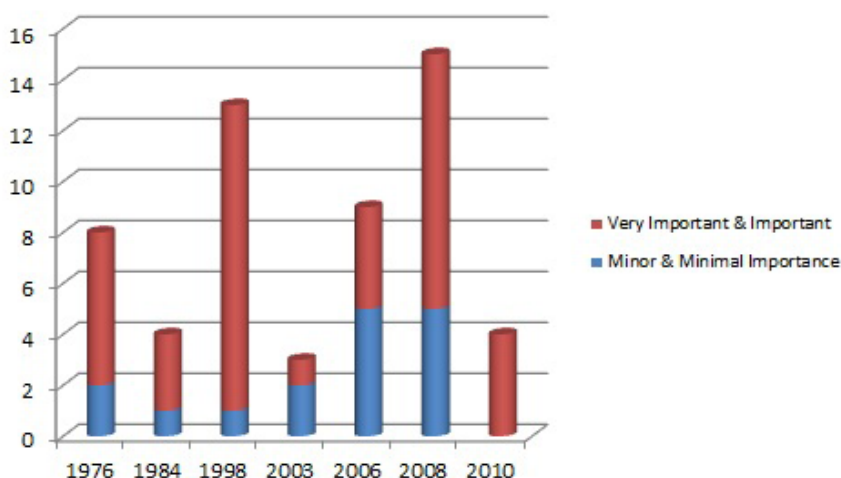
<sup>41</sup> *Qantas Airways Limited* [2004] ACompT 9 (12 October 2004), para 648.

<sup>42</sup> *ibid*, para 645.

<sup>43</sup> Interview 10.

## Fostering Business Efficiency

The ability to increase efficiency via reduced costs has been consistently argued by applicants. Although it might be reasonable to expect that the promotion of competition and fostering business efficiency apply to the same set of facts, this is not necessarily the case, as is reflected in this empirical study and plotted in Figures 4.3 and 4.4. These diverse figures reveal that both these factors have not been given the same emphasis in the determinations by the ACCC. Promotion of competition and fostering business efficiency spiked in 1998: fostering business efficiency was important or very important in 16 out of the 35 determinations for that year whereas promotion of competition was important or very important in 18 of the 35 determinations.



**Figure 4.4: Fostering business efficiency in ACCC authorisation determinations in the sample studied across seven years**

Source: Author's research.

Both featured as 'important' or 'very important', however, in only two decisions that year — *Vencorp*<sup>44</sup> and *United Energy*,<sup>45</sup> which together accounted for six of the 35 decisions. Both these factors were only considered to be of 'minor importance' in the *Australian Medical Association* authorisation.<sup>46</sup>

Fostering business efficiency was endorsed in the *United Energy* authorisation, where the applicant sought approval to enter a scheme for the provision of hedging cover to electricity retailers and generators during periods when the

<sup>44</sup> *Victorian Energy Networks Corporation (Vencorp)* A90646, A90647, A90648, 19 August 1998.

<sup>45</sup> *United Energy Limited* A90665, A90666, A90670, 25 November 1998.

<sup>46</sup> *Australian Medical Association* A90622, 31 August 1998.

spot price for electricity was very high. The ACCC was satisfied the scheme provided a risk management tool that would provide for lower risk-management costs, that may translate to a benefit to the public through increased allocative efficiency.<sup>47</sup> In the *Victorian Energy Networks Corporation* authorisation, the ACCC stated that, even without the proposed arrangement, competition would evolve over time. It was satisfied, however, that the proposed arrangement would promote economic efficiency and introduce competition in a sector of the deregulated energy market. Likewise, in the *Australian Payments Clearing Association Limited* authorisation, the commission accepted that a move from cheques to the High Value Clearing System would yield cost efficiencies.<sup>48</sup>

Fostering business efficiency through structural reform was successfully argued in cases involving the deregulated sectors in 1998.<sup>49</sup> It was the second-most important public benefit criterion among the authorisation decisions involving the deregulated sector, after the promotion of competition, across all the years studied. This is reflected in the *Australian Medical Association* authorisation, where the ACCC stated that ‘there is some public benefit in facilitating the transition to full compliance’<sup>50</sup> with the Act and the authorisation would provide a transition phase to allow industry participants to adjust to a different system of negotiation, which would presumably lead to greater efficiency.<sup>51</sup>

Figure 4.4 shows that fostering business efficiency was again an important factor in 2008 with 10 determinations considering it to be an important public benefit. These authorisations allowed corporations to reach agreement on specific types of conduct with competitors. There were several determinations dealing with the authorisation of an interim system to manage demand for coal-loading services, which were aimed at reducing the queuing of ships waiting to be loaded<sup>52</sup> and the authorisation of agreements between competitors for betting products.<sup>53</sup>

## Promotion of Competition in the Industry

There has been a gradual recognition of the necessity for Australian industry to compete internationally. This is evident from the manner in which promotion of competition increased in importance from 1976 to 1998, before dropping back again (Figure 4.4). The spike for 1998 could be explained by the emphasis

47 *United Energy* A90665, A90666, A90670, 25 November 1998, 15.

48 *Australian Payments Clearing Association Limited* A90617–A90619, 1 April 1998, 32.

49 See *Australian Communications Access Forum* A90613, 22 April 1998; *Australian Performing Rights Association Limited* A30186–A30193, 14 January 1998.

50 *Australian Medical Association* A90622, 31 July 1998, 51.

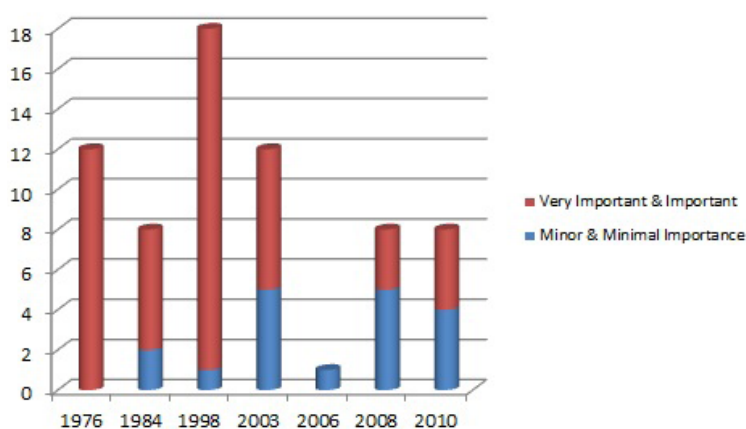
51 *ibid.*

52 These accounted for six of the 10 determinations. See: *Dalrymple Bay Coal Terminal Pty Ltd* (2008), A91060–A91062; *Donaldson Coal Pty Limited* (2008) A91075–A91077.

53 *Tabcorp Manager Pty Ltd* (2008) A91065 – A91067.

placed on deregulation, with the deputy commissioner pointing out that the 'Commission has been given a significant regulatory role in relation to communication, energy and transport'.<sup>54</sup>

In 1998, over a third of the decisions dealt with deregulatory industries, including *Vencorp*,<sup>55</sup> the *National Electricity Code*<sup>56</sup> and *United Energy*.<sup>57</sup> For example, in the *Gas Services Business* authorisation, the commission accepted that the proposed arrangements were significant in bringing about an orderly transition to a restructured gas market.<sup>58</sup> In *Vencorp* it was noted that the 'development of a truly competitive gas market on both the demand side and supply side is of vital concern to the Commission' and it was recognised that 'the achievement of a more competitive market structure in the upstream gas production sector will be a difficult task'.<sup>59</sup>



**Figure 4.5: Promotion of competition in ACCC authorisation determinations in the sample studied across seven years**

Source: Author's research.

The spike in the 1998 determinations cannot be overestimated, as it can also be explained by the inclusion of the APRA determination in the study, which accounted for eight of the 18 decisions where this factor was rated, and a total of 35 studied in 1998. The promotion of competition in the industry was a 'very important' factor here, which means that it has been summed for eight cases leading to the spike in 1998 in Figure 4.5. As seen from this figure, this factor was

<sup>54</sup> Allan Asher, 'Regulatory Risks', (Committee for Economic Development of Australia — Infrastructure Deficiencies: The Strategic Imperatives Conference, 3 December 1998) 2.

<sup>55</sup> *Vencorp* A90646, A90647, A90648, 19 August 1998.

<sup>56</sup> *National Electricity Code* A90652, A90653, A90655, 19 October 1998.

<sup>57</sup> *United Energy* A90665, A90666, A90670, 25 November 1998.

<sup>58</sup> *Gas Services Business Pty Ltd* A90630–A90631, 19 August 1998, 16.

<sup>59</sup> *Vencorp* A90646, 19 August 1998, 35.

only raised in four decisions in 2006, but only accepted as of minor importance by the ACCC in one determination.<sup>60</sup> In 2008 it was accepted as important in one determination and, in 2010, it was accepted as important or very important in four decisions. The *Cuscal Limited & Ors* authorisation accounted for three of the four decisions in 2010, and it dealt with an agreement between network members to not directly charge each other's cardholders for ATM transactions.<sup>61</sup>

## Benefits Flowing from Import Substitution and Growth in Export Markets

These are usually listed as two separate public benefits and addressed separately in the determinations. Although these two factors are likely to be related, import substitution was only cited as a public benefit in 1998 for all the determinations examined from 1976–2010. In the *North West Shelf Project*, both these factors were considered to be 'very important' by the ACCC. The applicants sought authorisation to discuss the terms, conditions and price at which gas was to be marketed. The ACCC noted that the applicants estimated an increase in Australia's GDP by A\$1.5 billion per annum as arising from the agreement.<sup>62</sup> This could be viewed as contrary to the predominant theory of the time. By the 1980s import substitution was discredited as a doctrine of manufacturing policy left over from the conservative era under Prime Minister Robert Menzies. This was a period of economic reform that included the floating of the currency, deregulating the financial markets and systematically reducing trade barriers to produce a 'more flexible and outward looking economy'.<sup>63</sup> As one interviewee stated, this could be viewed as a 'triumph of practice over theory'.<sup>64</sup> This is supported by the release of the white paper on the manufacturing industry in 1977, which endorsed the government's commitment to reducing tariff protection and promoting competition in international markets, reinforced by the Commonwealth government's economic statement in 1988.<sup>65</sup>

Growth in export markets is more frequently cited than import replacements (Figure 4.6). It has become more important, reflecting the greater emphasis on global business and trade. In the 1998 *Ansett* authorisation, the commission accepted that an expansion of services in the longer term would result

60 It was raised in *Qantas Airways and Air New Zealand* A90862, A90863, A30220, A30221, 9 September 2003 by the applicants but not accepted by the ACCC and it was raised and accepted as a public benefit by the ACCC in *Australian Dairy Farmers Limited* A90966, 24 April 2006 as being of minor importance.

61 A91175, A91176 and A91177, 27 January 2010.

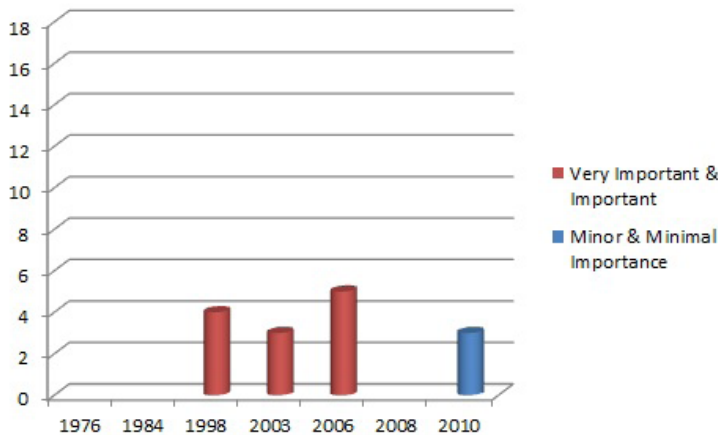
62 *North West Shelf Project* A90624, 29 July 1998, 21.

63 See National Competition Council, 'What is National Competition Policy and How Did It Come to Be?', <<http://www.ncc.gov.au/articleZone.asp?articleZoneID=16>> at 20 October 2008.

64 Interview 6.

65 See Productivity Commission, Commonwealth of Australia, *Setting the Scene: Monitoring Micro Reform*, Report 95/1 (1996) <<http://www.pc.gov.au/bie/report/96-0>> at 20 March 2008.

in increased freight capacity being available to Australian exporters and, accordingly, was a trade benefit.<sup>66</sup> In 2006, this was a ‘very important’ factor in the *BHP Billiton* authorisation, where the commission identified numerous public benefits including security of supply for Australian users, the prospect of substantial export earnings, and job opportunities, as well as the introduction of new technology and promotion of economic development.<sup>67</sup> Growth in export markets was cited as being of minor importance, for much the same reason, in the *Rio Tinto Aluminium* authorisation in 2010.<sup>68</sup>



**Figure 4.6: The summed weights of growth in export markets and the number of cases in ACCC authorisation determinations in the sample studied across five years**

Source: Author’s research.

In *Re Australian Wool Growers Association Ltd*, the applicants submitted that 95 per cent of the wool produced by association members was exported, and so they successfully sought authorisation for imposing a levy to fund an advertising campaign in the United States. The tribunal agreed with the ACCC finding and stated the provision of a properly supervised marketplace for the sale of wool in a competitive environment was a benefit to the public in the form of a significant contribution to Australia’s export earnings and a source of income for many persons in Australia.<sup>69</sup>

<sup>66</sup> *Ansett Australia, Ansett International, Air New Zealand and Singapore Airlines* A90649, A90655, 22 July 1998, 74.

<sup>67</sup> *BHP Billiton Iron Ore* A90982, A90983, 1 February 2006.

<sup>68</sup> *Rio Tinto Aluminium Limited & Ors* A91205–A91207, 2 June 2010.

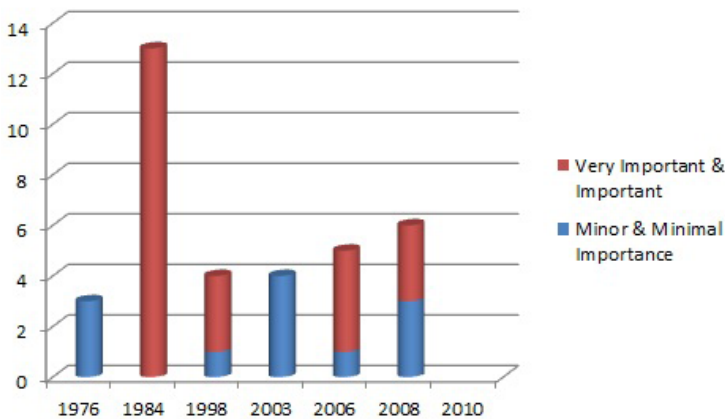
<sup>69</sup> *Australian Wool Growers Association Ltd* [1999] ACompT 4 (3 September 1999), para 71–72.

## Expansion of Employment in Efficient Industries

This issue is usually seen as a consequence of economic efficiency. It is generally linked to other issues, such as economic development, as acknowledged by the ACCC in the *Australian Wool Growers Association*<sup>70</sup> and *United Energy Limited*<sup>71</sup> authorisations discussed above. The data suggest, however, that in practice this is not an important issue, with only 1976 and 2006 having employment expansion in efficient industries as important issues. In 1976 only one decision noted this, namely *Australian Chamber of Shipping*;<sup>72</sup> in 2006 four decisions noted this factor, namely *Southern Sydney Regional Organisation of Councils*<sup>73</sup> and *BHP Billiton*,<sup>74</sup> which accounted for three of the determinations. While it was raised in *BHP Billiton*<sup>75</sup> as an important factor, alongside numerous other factors, including export earnings and promotion of competition, it has never been the single most significant criterion in the decision-making process. As discussed below, where the employment is in regional areas, it is not necessarily linked to efficiency.

## Industry Rationalisation

This factor has not been very important in authorisation determinations (Figure 4.6), and is more frequently cited in 1984 than in any other year studied.



**Figure 4.7: The summed weights of growth in industry rationalisation and the number of cases in ACCC authorisation determinations in the sample studied across five years**

Source: Author's research.

<sup>70</sup> *ibid.*

<sup>71</sup> *United Energy Limited.*

<sup>72</sup> *Australian Chamber of Shipping* A3193, 21 June 1976.

<sup>73</sup> *Southern Sydney Regional Organisation of Councils* A90980, 25 January 2006.

<sup>74</sup> *BHP Billiton* A90981, A90982, A90983, 1 February 2006.

<sup>75</sup> *BHP Billiton* A90982, A90983, 1 February 2006.

The spike in 1984 can be explained by the *Re Australian Associated Stock Exchanges* authorisation,<sup>76</sup> in which this factor was considered ‘important’ in six of the total 35 determinations examined for 1984, and one of 14 determinations in which it featured as a factor in that year.<sup>77</sup>

It was also in this year that the Button Car Plan was implemented by John Button as minister of trade in the Labor government. Prior to this plan, the local motor industry had been protected with a 57.5 per cent tariff, which left the consumer with a limited choice of 13 different models of cars from five manufacturers. Many saw this plan as the start of market reform in Australia.<sup>78</sup> The relatively high reading in 2006 was because industry rationalisation was raised in two decisions, the *Queensland Turf* and the *Federation of Australian Wool* authorisations, both of which accounted for four of the 35 authorisations studied for that year. In *Queensland Turf*, two turf clubs sought authorisation for a joint venture agreement to provide for the development of thoroughbred horse racing facilities among other activities, with the longer-term aim of developing a merger between the two clubs within five to seven years. The ACCC accepted these arrangements would allow the applicants to ‘centrally co-ordinate and finance certain of their operations, allowing them to take advantage of operational synergies and other cost savings’ and assist ‘in the efficient co-ordination and funding of capital works’.<sup>79</sup>

In *Federation of Australian Wool* three applicants sought authorisation for the imposition of a levy per bale of wool sold in order to raise approximately US\$2.8 million which was to be used to partly fund a test marketing campaign for promotion of Australian wool in the United States. The ACCC noted that the levy would assist in funding the promotion campaign resulting in increasing consumer demand for Australian wool over the long-term and consequently also increase production of wool.<sup>80</sup> Another example is in the *International Air Transport Association* decision, in which the commission accepted that the association’s tariff coordination, which provided the industry with the underlying basis for determining fares, was a public benefit.<sup>81</sup>

## Economic Development

In the *BHP Petroleum Pty Ltd* authorisation, BHP had applied for authorisation to enter into exclusive dealing arrangements with two consumers of methanol.

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76 *Re Australian Associated Stock Exchanges* A90409, A30102, A30095, A30096, A30097, A30098, 4 October 1984.

77 *ibid.*

78 Peter Robinson, ‘The Man with the Plan’, *Wheels Magazine*, 15 April 2008, <<http://www.wheelsmag.com.au/wheels/site/articleIDs/9C2C51C8E6517ACDCA25742D0018FE70>> at 20 April 2008.

79 *Queensland Turf Club Limited & Brisbane Turf Club Limited* A91000, 31 May 2006, iii.

80 *Federation of Australian Wool Organisations* A90984, A90985, 11 January 2006, 18–20.

81 *International Air Transport Association* (1984) ATPR (Com) 50-083, 55531.

This arrangement was intended to allow BHP to build a pilot plant to test the viability of new technology. The commission accepted this contention and stated that the pilot plant was likely to have a beneficial impact on the Australian economy in terms of introducing a new technology that would allow value to be added to a resource that Australia has in plentiful supply, natural gas.<sup>82</sup>

Economic development has not been cited often in the determinations studied, being referred to in one determination in 1976, three determinations in 1998 and four determinations in 2006. The slight increase in the 2006 figures is attributed to the fact that the *BHP Billiton* decision accounted for three of the four decisions in which it was raised that year. Here, the ACCC authorised the joint venture agreement and cited economic development as important because this joint venture for mining, processing and sale of iron ore was likely to prove the viability of Lower Channel Iron Deposits ore and, with the aid of the shared technology, was going to be used in the manufacturing of steel. This was likely to establish a market for Lower Channel Iron Deposits ore and consequently bring a number of other benefits in the form of investment and employment.<sup>83</sup>

## Role of Non-efficiency-based Public Benefits

There are many reasons for recognising non-efficiency-based benefits. All are examples of market failure, be it because the good is a public good or because of externalities.<sup>84</sup> Non-efficiency benefits have always featured in ACCC determinations, although the ones that have been relied on have changed. One instance of market failure is where the market may not be able to regulate certain activity, especially where it cannot be reflected in price. This is true of providing safe work practices, which is often associated with higher production costs. Another instance is where the good has the characteristics of a public good, such as security, or an improved environment. The market in such cases may not be ideally suited to rewarding individuals for producing such goods. Another example involves the undertaking of research and development in public hospitals. These benefits can be used by all parties in the industry (unless protected by intellectual property rights) and the parties carrying out the research may not be rewarded by the market.

A third instance where market failure can occur is in situations where there may be certain types of conduct that are considered worthwhile but which may not be facilitated by the market because it does not necessarily yield high returns. For

82 *BHP Petroleum Pty Ltd* (1992) ATPR 50-116, 56212, 56223.

83 *BHP Billiton Minerals Pty Ltd* A70015–A70017, 5 March 2003.

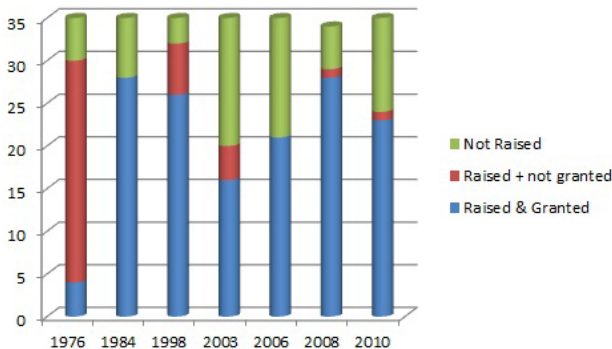
84 Economists have identified four main causes of market failure, first, the abuse of market power; second, externalities; third, where the good is a public good and fourth, where there is incomplete or asymmetric information. See <<http://www.economist.com/research/Economics>> at 31 October 2008.

example, promoting ethical practices may not be reflected by lower production costs or a higher product price. Indeed, this can also be said about deregulation of public enterprises, or the encouragement of self-regulation measures.

Allan Fels and Tim Grimwade recognised multiple situations where non-efficiency-related benefits equate to public benefits in the commission’s decision-making and stated:

Less tangible benefits than economic efficiency gains may still be regarded as public benefits, such as gains to the environment or public health, which are of course valued by the community. That is, authorisation can be granted not only where there is market failure in the technical sense, but also where there is some wider inadequacy of market functioning in the specific case to address broader social values.<sup>85</sup>

It is clear that these less tangible benefits are generally much harder to measure and quantify. Another interviewee from the ACCC stated the process of assessing public benefit begins with economic efficiency factors and then moves to the non-efficiency factors.<sup>86</sup> The *Clay Brick and Paver Association of Victoria* authorisation was used to illustrate the manner in which non-efficiency factors can have a role in the application of the public benefit test. In this decision the association lodged an application involving association members related to an arrangement to fund an industry-based training initiative for apprentice and trainee bricklayers, and to charge a common fee for the initiative. The aim of the scheme was to address the problem of the cyclical shortage of skilled bricklayers in Victoria. The commission accepted that the arrangements would have public benefits, which would result in improvements to project completion times.<sup>87</sup>



**Figure 4.8: Count of non-economic efficiency public benefits in 35 authorisation determinations from the sample studied across five years**

Source: Author’s research.

<sup>85</sup> Fels and Grimwade (2003) 201.

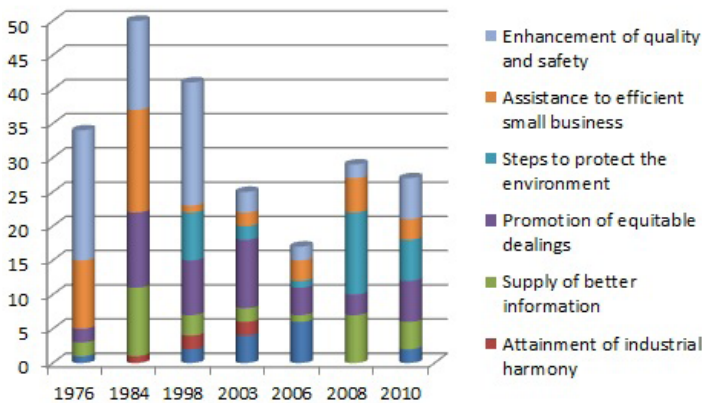
<sup>86</sup> Interview 4.

<sup>87</sup> *Clay Brick and Paver Association of Victoria* A90738, 12 December 2000, 10.

Figure 4.8 gives an overall picture of the place of non-efficiency benefits in the determinations studied. Whereas such arguments were raised in 30 determinations in 1976, of which four were granted (13 per cent success), this ratio changed rapidly. In 1984 and 2006, all the determinations in which such benefits were raised were successful (100 per cent success). In 1998, it was successful in 26 of 32 determinations (81 per cent success) rising to 28 out of 29 in 2008 (97 per cent success) and 23 out of 24 in 2010 (96 per cent success). Clearly the place for non-efficiency public benefits is increasing.

## Types of Non-efficiency-based Public Benefits

The ACCC has consistently referred to non-efficiency-based benefits in its determinations (Figure 4.8). Assistance to small business and the safety and quality of goods and services were the main non-efficiency benefits cited in 1976. These factors continued alongside the related benefit of supplying better information to consumers and businesses in 1984. A new factor also began to be commonly cited — promotion of equitable dealings; this has continued to be an important non-efficiency determinant in the subsequent years of the empirical study. It is interesting to note that this factor includes the authorisation of ethical dealings,<sup>88</sup> which is a challenge facing regulators in the post Global Financial Crisis environment — how to use light handed regulatory techniques to promote ethical governance in a market-centred economy.



**Figure 4.9: The summed weights of each of the non-economic efficiency public benefits in ACCC authorisation determinations in the sample studied across five years**

Source: Author's research.

<sup>88</sup> For example see: *Real Estate Institute of Australia* 12 January 1984, *NSW and ACT Newsagency System* 26 April 1984, *Stock and Station Agents Association of NSW* 11 September 1984 where it was weighted as very important (4) or important (3).

By 1998 safety of goods and services was again the most cited factor and the importance of climate change was finding its place, reflected in the increasing number of authorisations related to industry-driven arrangements for reducing environmental damage. In 2008, the environment was cited in one determination as an important factor and in 11 as of minor importance.

Again, industry was being co-opted effectively in the job of self-regulation, as reflected by Commissioner David Lieberman's statement that many of the codes of conduct in place in 1998 were dated, 'formulated in an environment of close government regulation of the industry in every jurisdiction'<sup>89</sup> and needed to be reviewed to bring them in line with the changing forms of regulation, including the introduction of a code of ethics that could do more than promote honest behavior by reflecting 'a greater recognition of the operating environment, a greater customer/client focus and focus on the industry's relationship with the community in general'.<sup>90</sup> The place of each of these non-efficiency benefits is discussed below.

## Safety and Improving Quality of Products and Services

At different times, the safety of employees, consumers and the wider public have been taken into account as constituting public benefits. The safety issue was important in the 1998 determinations (Figure 4.9). The *Agsafe Limited* authorisation<sup>91</sup> is one such illustration where two companies sought authorisation for an accreditation scheme for the transport, storage and handling of farm chemicals, which could have attracted the application of third line forcing provisions and exclusionary conduct provisions. Here, the commission recognised that improved safety measures would benefit employees and users of the chemicals and noted the crossover between the anti-competitive conduct and the safety issues involved:

Under ACCC authorisation Agsafe trains industry participants in the understanding of relevant safety and regulatory requirements. Agsafe also inspects premises where agvet chemicals are stored to ensure that they comply with all relevant state and federal safety regulations. Where premises are found to be in breach of these regulations Agsafe is able to, as a last resort, impose trading sanctions ... The ACCC would generally be concerned with arrangements whereby an organisation can impose trading sanctions on other businesses. However, the ACCC

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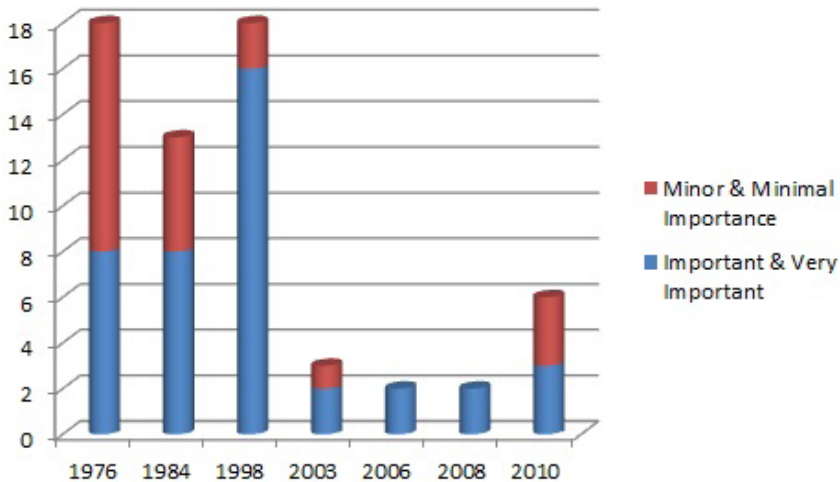
89 David Lieberman, Commissioner, ACCC, 'Aspects of National Competition Policy', (Speech presented at the Real Estate Institute of Australia, Annual Policy Conference, Hyatt Hotel, Canberra, 15 October 1998) 9.

90 *ibid*, 10.

91 *Agsafe Limited* A90680, A90681, 21 May 2003. See also *Avcare Limited* A30194, 2 September 1998.

has examined the Agsafe program and is satisfied that it is an effective means of ensuring compliance with relevant safety requirements for the transport, handling, and storage of agvet chemicals.<sup>92</sup>

Authorisation for this conduct was granted in 2010 on the basis that Agsafe clarify on its website that it is not the only body offering such an accreditation scheme.<sup>93</sup>



**Figure 4.10: The weights of enhancement of quality and safety of goods and services in ACCC authorisation determinations in the sample studied across seven years**

Source: Author's research.

International standards have been considered by the commission, as illustrated in *Association of Fluorocarbon Consumers and Manufacturers Inc.*<sup>94</sup> This application related to the industry participants reaching an agreement to reduce the production of ozone-depleting substances. The ozone layer protects human health and the environment from damaging ultraviolet B radiation and the term ozone-depletion refers to a thinning of the ozone layer in the earth's atmosphere resulting from released depleting gases. The commission noted that international standards, established under the Montreal Protocol 1987, dealt with the introduction of quota systems for the phasing out of ozone-depleting substances.<sup>95</sup> It pointed out, however, that there were no specific regulatory controls under Australian regulation.<sup>96</sup> In this instance, industry were

<sup>92</sup> See ACCC, 'ACCC Authorises Agvet Chemical Safety Program' (Press Release MR 131/02, 28 May 2002).

<sup>93</sup> *Agsafe Limited* A91234, A91242–A91244, 27 October 2010.

<sup>94</sup> *Association of Fluorocarbon Consumers and Manufacturers Inc* A90658, 26 August 1998.

<sup>95</sup> *ibid.*, 2.

<sup>96</sup> *ibid.*

cooperating with the Australian Government under the 'National Greenhouse Response Strategy' to set the cap at less than half of the level set under the Montreal Protocol for ozone-depleting substances.<sup>97</sup> The commission accepted the public benefits proposed by the applicants to the authorisation, stating the proposal would contribute to limiting risk to human health:

The Commission holds the view that a scheme or arrangement which contributes 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.<sup>98</sup>

Industry and professional groups may seek to improve the quality of the products or services supplied by engaging in improved training facilities or investing in research and development. The benefits of such investment are often classified as a public good, as other parties, who are not investing in such training or research and development expenditure, can use them. Further the benefits of such investment are often not realised over the short-term and may not be reflected in the price of the products or services. The community, however, generally benefits from such measures and the commission has recognised them as constituting public benefits. In *South Australian Oysters Growers Association* authorisation, the commission renewed the authorisation, first granted in 1999, to charge a levy which could be directed to research and development.<sup>99</sup>

Industry groups seeking to monitor the quality of their products and the skills of the persons supplying services may enter into accreditation schemes and apply for authorisation. One such example was *Quilted Products Manufacturers Association of Australia*,<sup>100</sup> where the commission granted authorisation for a self-regulation scheme intended to cover 70 per cent of the market. The self-regulation scheme aimed at improved labelling of products and monitoring of industry participants, all of which were intended to ensure the quality of the product supplied to the consumer. In the *Australian Association of Pathology Practices* decision, the tribunal examined the value provided by the larger teaching hospitals as natural locations for research, which they called a public good issue because the private sector and its customers also benefit from the research carried out in these hospitals. Although there were no exact figures, the tribunal accepted that research from the public hospitals would benefit the wider community and should be recognised in assessing public benefit.<sup>101</sup>

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97 *ibid.*

98 *ibid.*, 9.

99 *The South Australian Oyster Growers Association Inc (SAOGA)* (2010), A91229, 17 May 2010 and A91230, 20 May 2010.

100 *Quilted Products Manufacturers Association of Australia* (1993) ATPR (Com) 50-130.

101 *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4 (8 April 2004) paras 192, 193. Similar concerns were expressed by the ACCC. See *NSW Department of Health* A90754–A90755, 27 June 2003, 27.

In the *Australian Tyre Dealers and Retreaders Association*,<sup>102</sup> the association applied for authorisation to enter into a voluntary program for organisations operating tyre-retreading processes. The commission recognised the public safety issue here and acknowledged there was no legislation specifically covering the retreading industry<sup>103</sup> and that the proposed program went beyond the current standards and therefore delivered public benefits:

The ability of the ... program to generate higher operational standards in participating factories goes beyond current legislation which only covers the production standard. The Commission accepts that such procedures may have the potential to contribute to efficiency gains in the factories' operations, but considers that the procedures will lean towards the delivery of personal benefit to the factories rather than benefit consumers.<sup>104</sup>

## Supply of Better Information to Consumers and Businesses

A certain degree of information is important for efficient markets. It has long been acknowledged that this may not be automatically provided by market forces. It may have to be mandated in order to enable informed choice by consumers; one example is found in the product safety provisions in the Act.<sup>105</sup>

Supply of information was an important criterion in the 1984 determinations (Figure 4.11) and in the *Royal Australian Institute of Architects* authorisation, the institute successfully sought authorisation of a professional code of conduct that included documents specifying the services provided and the bases of payment and fee guidance.<sup>106</sup> Similar arguments were successfully made in *Society of Auctioneers and Appraisers*<sup>107</sup> and *International Air Transport Association*.<sup>108</sup> Later determinations, until 2008, however, do not have supply of information as a prominent criterion (Figure 4.11), probably reflecting the fact that such information disclosure is dealt with under different regulatory regimes, such as the *Corporations Act 2001* (Cth) or *Credit Act 1984* (NSW).

102 *Australian Tyre Dealers and Retreaders Association* (1994) ATPR (Com) 50-162.

103 Note, however, that the parties were required to comply with the processing standard AS1973-1993 as well as other general occupational and safety standards.

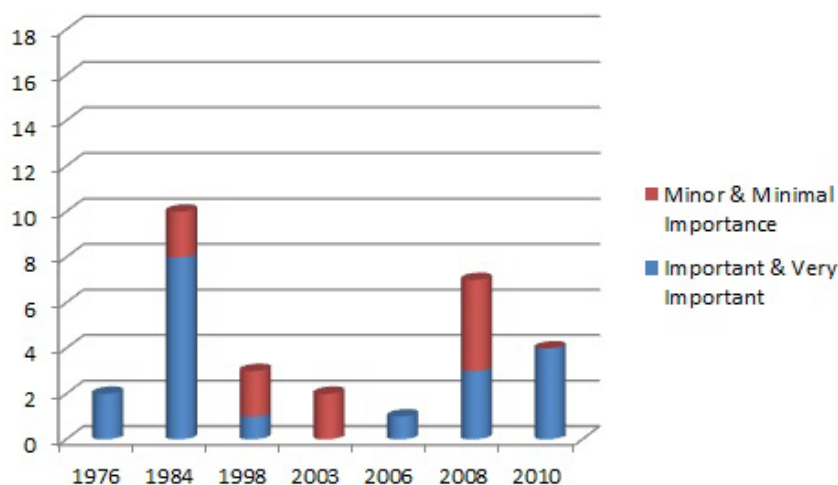
104 *ibid.* See also the earlier decision *Australian Tyre Dealers and Retreaders Association* (1991) ATPR (Com), 50115.

105 Schedule 3 of the *Trade Practices Act 1974*.

106 *Royal Australian Institute of Architects* A58, 7 September 1984.

107 *Society of Auctioneers and Appraisers* A60009, 6 September 1984.

108 *International Air Transport Association* A3485, 31 October 1984.



**Figure 4.11: The summed weights of the supply of information in ACCC authorisation determinations in the sample studied across five years**

Source: Author's research.

The increase in the number of authorisations in which supply of information was an important factor, rose in 2008 to three and, in 2010, to four. In *Generic Medicines Industry Association*, the ACCC stated that it is 'important for consumers to have information available which helps to ensure that the dispensing decisions by pharmacists, acting in their capacity as health care professionals, have not been unduly influenced'.<sup>109</sup>

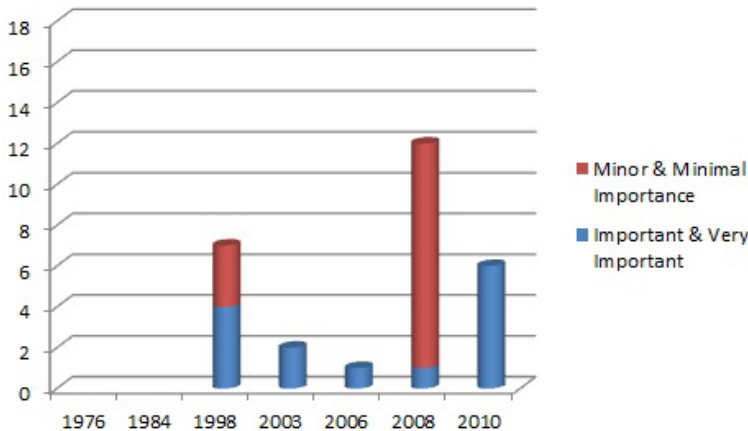
## Improved Environmental Practices

The environment can be viewed as a public good and the market may not necessarily be responsive to environmentally sound practices. This has only become an important factor for granting authorisation since 1998 (Figure 4.12), where seven of the authorisation applications raised this factor, reflecting the growing community concern and awareness of environment issues. In the *Agsafe* decision the ACCC recognised that there is a public benefit in correcting such market failure:

The Commission is of the view, that where the market fails to take into account negative externalities of industry conduct, for example, the sorts associated with environmental protection, there may exist a public benefit in correcting such failure. In this case, the Commission accepts that absent the proposed arrangements, the pricing of the relevant chemicals fails to take into account the negative externalities

<sup>109</sup> *Generic Medicines Industry Association Pty Ltd* (2010) 37; see also SAOGA (2010).

associated with the disposal or environmental impact of the packaging of those products. The Commission therefore believes arrangements which correct, or correct to a certain extent, these failures are likely to constitute public benefits.<sup>110</sup>



**Figure 4.12: The summed weights of improved environmental practices in ACCC authorisation determinations in the sample studied across five years**

Source: Author's research.

In *Association of Fluorocarbon Consumers and Manufacturers*,<sup>111</sup> the environmental benefits resulting from the proposed agreement between industry participants was acknowledged by the commission: 'a scheme which contributes to human health and the improvement of the environment would benefit the Australian public, and may also benefit the total world population and environment'.<sup>112</sup> In *Refrigerant Reclaim*,<sup>113</sup> the commission allowed authorisation of a scheme for a refrigerant-gas recovery program to cover synthetic greenhouse gases. It was also stated that the scheme would add only a negligible amount, of about \$0.20c to the price paid by the consumer.<sup>114</sup>

In the *VENCORP* decision<sup>115</sup> the commission accepted the environmental benefits of using gas and stated: 'the use of gas has environmental benefits when

<sup>110</sup> *Agsafe Ltd* A30194, 2 September 1998, 4. Also see: *Agsafe Limited* A90871, 18 September 2003, 16, para 6.5.

<sup>111</sup> *Association of Fluorocarbon Consumers and Manufacturers Inc* A90658, 26 August 1998.

<sup>112</sup> *ibid*, 9.

<sup>113</sup> *Refrigerant Reclaim Australia Ltd* A90854, 7 May 2003; for an earlier authorisation covering the same agreement see A90548, 29 July 1994. See also *Australian National Retailers Association Limited* A910939, 13 August 2008.

<sup>114</sup> ACCC, 'ACCC Draft Decision Proposes to Allow Greenhouse Gas, Ozone Recovery Program' (Press Release MR 042/03, 27 February 2003).

<sup>115</sup> *Victorian Energy Networks Corporation* A90646–A90648, 19 August 1998.

compared with other carbon based forms of energy'.<sup>116</sup> The weight attached to this public benefit was not significant, however, and the main public benefit was considered to be economic efficiency and facilitating structural reform.

It is interesting to note that this factor has been more relevant over the recent past with 11 decisions referring to it as a minor factor in 2008 and six considering it to be a major benefit in 2010. The *Refrigerant* determination in 2008 and the *Agsafe* determinations in 2010 raised this issue again, and the ACCC considered it to be of importance and the *DP World Australia Limited & Patrick Stevedores* determination prompted the ACCC to comment that the reduction of truck movement would lower carbon emissions and bring environmental benefits.<sup>117</sup>

## Equitable Dealings and Empowering Small Business

Small business protection has been one of the concerns of Part IVA of the *Trade Practices Act*.<sup>118</sup> There are a number of provisions in the Act, which directly or indirectly deal with small business interests.<sup>119</sup> The authorisation process too has been used for the purpose of protecting small business interests. In 1976, such authorisations for collective negotiations were granted on the basis that it was of assistance to efficient small businesses. Collective bargaining is defined as an arrangement whereby multiple competitors in an industry come together, either directly or through the appointment of a representative to negotiate on their behalf, to negotiate the terms and conditions of supply with another, usually larger, business.<sup>120</sup>

The authorisation applications on collective negotiations fall into two groups.<sup>121</sup> The first group of authorisations relates to the negotiation of fees for service. An example of this is the *Australian Medical Association Limited* authorisation.<sup>122</sup> Here, the South Australian and federal Australian medical associations jointly applied to the ACCC for authorisation for its members to negotiate and give effect to a common service agreement for the remuneration of visiting medical officers practicing in 65 SA rural public hospitals. The main issue in the SA medical system was the difficulties in attracting doctors to rural areas. This application

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<sup>116</sup> *ibid.*, 26.

<sup>117</sup> *DP World Australia Limited & Patrick Stevedores Operations Pty Limited* (2010), 25.

<sup>118</sup> Efforts made to provide greater protection to small businesses can be found in s 51AC in Part IVA of the *Trade Practices Act*. See Nagarajan, 'The Accommodating Act: Reflections on Competition Policy and the Trade Practices Act' (2002) 20(1) *Law in Context* 34, for a discussion of this point.

<sup>119</sup> See Graeme Samuel, 'Big Business v Small Business' (Speech delivered at the Australian Graduate Management School Dinner, Sydney, 4 November 2004). See also Business Council of Australia, 'Submission to the Committee of Inquiry: Review of the Competition Provisions of the *Trade Practices Act 1974*', 9 July 2002, 25.

<sup>120</sup> ACCC, 'Authorising and Notifying Collective Bargaining and Collective Boycott: Issues Paper' (July 2004) 2.

<sup>121</sup> Rhonda Smith, 'Authorisation and the Trade Practices Act: More about Public Benefit' (2003) 11 *Competition and Consumer Law Journal* 21, 34.

<sup>122</sup> *Australian Medical Association Limited A90622*, 31 July 1998.

was successful.<sup>123</sup> The second group is the authorisation applications by small business to jointly negotiate in order to increase their bargaining power. Such businesses are usually negotiating with large corporations to sell or buy goods and services. An example of this form of conduct is the recent authorisation of *Tasmanian Vegetable Growers*, which allowed these growers to collectively bargain with Tasmania's two vegetable processors.<sup>124</sup>

Collective bargaining increases the bargaining power of small businesses because it makes possible a credible threat of a collective boycott.<sup>125</sup> The Dawson Committee noted:

Collective bargaining at one level may lessen competition but, at another level, provided that the countervailing power is not excessive, it may be in the public interest to enable small business to negotiate more effectively with big business.<sup>126</sup>

Such conduct may bring about a wealth distribution from big business to small businesses. It does not necessarily increase efficiency or pass on the savings to the consumer. The ACCC has considered that certain public benefits may flow from collective bargaining. These include improved bargaining power, transaction cost savings, redistribution of monopoly profits and easing the transition to industry deregulation.<sup>127</sup> These benefits, however, come at certain costs and the public detriment recognised by the ACCC includes lost efficiencies resulting from collusion, effect on competitors outside the bargaining group, reduced scope for new market entry, and increased potential for collective activity beyond that authorised.<sup>128</sup> Figure 4.13 illustrates the importance of this factor in ACCC determinations from 1984 to 2003, where it has accounted for more than a quarter of the determinations in each of these years.

After considering concerns expressed to it, the Dawson Committee recommended a notification process for collective bargaining, which was introduced in 2006 (discussed in Chapter 2). Notification of collective bargaining reinforces the recognition of non-efficiency-based benefits by the ACCC, and this amendment to the Act represents a step in strengthening the power to recognise such benefits. The new streamlined process was actively promoted by the ACCC. It is

123 Other examples include: *St Vincent's Private Hospital* (2001) ATPR (Com); *St Vincent's Private Hospital and Others* A90679, 28 June 2000.

124 See *Tasmanian Farmers and Graziers Association* A90914, 17 November 2004.

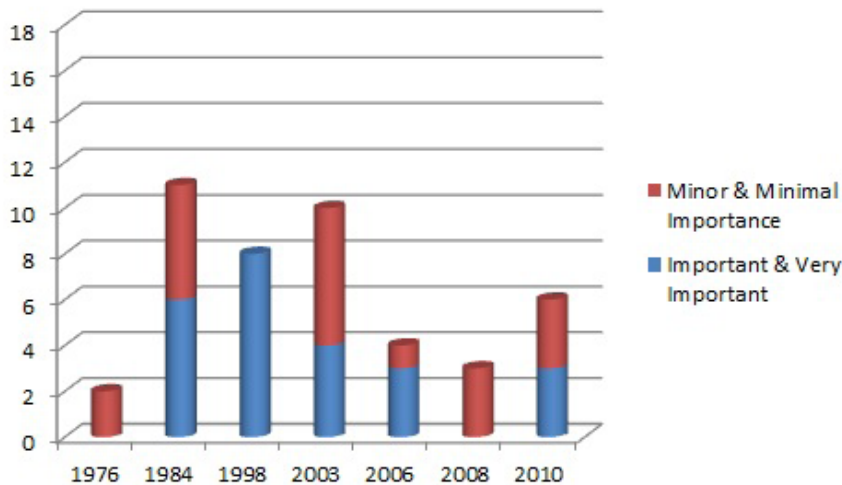
125 Smith (2003) 35. See also A Hood, 'The Confused Case of Countervailing Power in Australian Competition Law' (2000) 8(1) *Competition and Consumer Law Journal* 1.

126 [Dawson Review] (2003) 3.

127 ACCC, *Guide to Collective Bargaining Notifications* (March 2008) 28–32. Other public benefits include continuing viability of small business, opening up marketing opportunities, reduced risk of unconscionable conduct, improved industrial harmony and promotion of industry associations.

128 *ibid.*, 34–34.

likely that the fall in 2006 in this criterion being cited in determinations (Figure 4.13) can be explained by applicants preparing to shift from the authorisation process to the notification process.<sup>129</sup>



**Figure 4.13: The summed weights of the promotion of equitable dealings in ACCC authorisation determinations in the sample studied across five years**

Source: Author's research.

These notification determinations were conducted on similar lines to the authorisation process in 2007 and there were four such notifications.<sup>130</sup> Although it was referred to as being of minor importance in 2008, it is in 2010 that this factor was relied on again in three cases dealing with applications to collectively negotiate.<sup>131</sup>

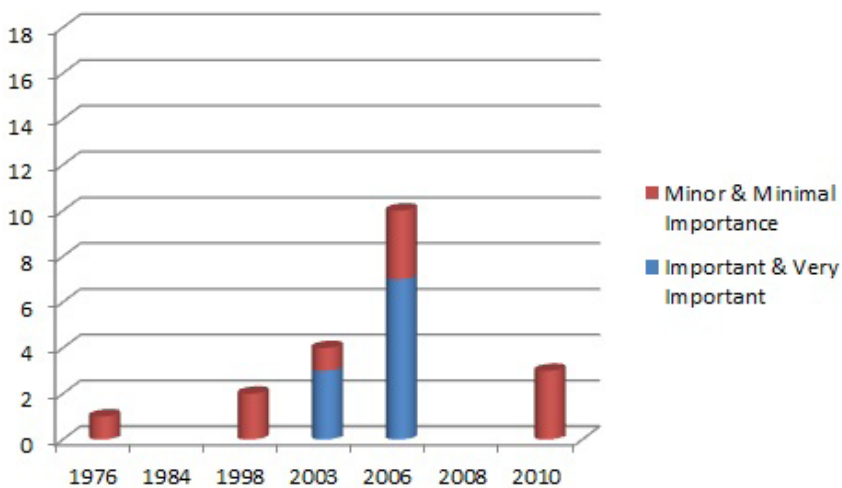
<sup>129</sup> John Martin, 'The ACCC & Small Business', (Speech delivered at the Swan Chamber of Commerce Conference, Perth, 27 October 2005) <<http://www.accc.gov.au/content/index.phtml/itemId/713033>> at 31 October 2008. See also Martin, 'Trade Practices Issues for Small and Medium Enterprises', (Speech delivered at the Law Institute of Victoria Commercial Law Conference, Melbourne, 18th November 2005) <<http://www.accc.gov.au/content/index.phtml/itemId/715317>> at 31 October 2008; Martin, 'Racing, Sports Betting and the ACCC', (Speech delivered at the Racing and Sports Betting Forum, Sydney, 12 December 2006) <<http://www.accc.gov.au/content/item.phtml?itemId=776979&nodeId=a8da0e38e9e32a4aaba7582da16ae9a&fn=Racing,%20sports%20betting%20and%20the%20ACCC.pdf>> at 31 October 2008.

<sup>130</sup> See Graeme Samuel, 'Taking a Holistic Approach to Assisting Small Business' (Speech delivered to the National Small Business Summit, 11 June 2008) 5, where it was stated that this process is still underutilised. For examples of collective boycott notifications see *Nelson Enterprises Pty Ltd & Ors* CB00001 & CB00002 (23 August 2007); *The Wangaratta Anaesthetic Group* CB00006 (17 December 2007); *Australian Newsagents' Federation Limited* CB00003 (13 September 2007).

<sup>131</sup> See: *Liquor Stax Australia Pty Ltd* (2010) A91237; *Premium Milk Ltd* (2010) A91236.

## Increased Employment in Particular Areas

Employment is sometimes addressed under two separate headings of public benefits, one referring to employment in efficient industries and the second referring to employment in particular geographic areas. Figure 4.14 deals with employment as one category. In the *Ansett* authorisation,<sup>132</sup> it was claimed that the proposed conduct would result in increased employment. The ACCC concluded that it was unable to determine whether this was likely to occur on the available evidence (even though authorisation was granted on other grounds). Employment in particular areas was a ‘very important’ criterion in 2006 with BHP Billiton, as employment was likely to increase within the Pilbara region. The commission also stated that the royalties paid to the Western Australian Government were likely to be applied towards investment projects and infrastructure across Western Australia, resulting in short- and longer-term employment and investment.<sup>133</sup> This factor was also cited as being of minor importance in the *Federation of Australian Wool Organisations* and *Southern Sydney Regional Organisation of Councils* authorisations.<sup>134</sup>



**Figure 4.14: The summed weights of the expansion of employment and employment growth in efficient industries in ACCC authorisation determinations in the sample studied across five years**

Source: Author's research.

<sup>132</sup> *Ansett Australia, Ansett International, Air New Zealand and Singapore Airlines* A90649, A90655, 22 July 1998.

<sup>133</sup> *BHP Billiton Iron Ore Pty Ltd* A90981, A90982, A90983, 1 February 2006, 22.

<sup>134</sup> *Federation of Australian Wool Organisations* A90984, A90985, 11 January 2006; *Southern Sydney Regional Organisation of Councils* A90980, 25 January 2006.

In the *Federation of Australian Wool Organisations* authorisation, submissions by numerous bodies, including the Australian Superfine Wool Growers' Association Incorporated, the New South Farmers Association and Australian Wool Exchange Ltd claimed the employment of wool classers, shearing and shed-hand contractors, as well as those employed in the brokerage and handling sectors, would increase if the proposed conduct was authorised.<sup>135</sup> It was accepted by the ACCC only as a minor benefit, the major benefits being industry rationalisation, discussed above.<sup>136</sup> Once again this benefit was considered in 2010 in two determinations, namely *Santos Queensland* and *Brisbane Marine*. In the former, the ACCC accepted that the joint marketing arrangements would assist to maintain employment in the region,<sup>137</sup> and, in the latter, the ACCC accepted that the authorisation of an exclusive agreement would guarantee, among other factors, the employment of pilots.<sup>138</sup>

## Increasing Industrial Harmony

This benefit has not been a significant feature of the determinations, only being considered 'very important' in the *Australian Rail Transport Federation* authorisation in 1984,<sup>139</sup> which accounts for its high rating as a summed weight in the graph (Figure 4.15). This authorisation was lodged by the federation, a registered organisation of employers for agreements made with the Transport Workers Union of Australia. The agreements were about the terms and conditions in long-distance road transportation and freight contracts of owners/drivers in the road transport industry. The federation had successfully submitted an earlier application and this application, which was also successful, sought to broaden the ambit of authorisation.<sup>140</sup> In all the other determinations, including the 1984 *Australian Road Transport Federation* authorisation,<sup>141</sup> the 1998 *Steggles*<sup>142</sup> and the *Australian Medical Association Limited* authorisations,<sup>143</sup> as well as the 2003 *Australian Hotels Association* authorisation<sup>144</sup> and the *CSR* authorisation,<sup>145</sup> this public benefit was only classed as being of 'minor importance'.

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135 *ibid*, 20–1.

136 See earlier discussion in this chapter.

137 *Santos QNT Pty Ltd* (2010) A91215–A91216, 2 June 2010, 12.

138 *Brisbane Marine Pilots Pty Ltd* (2010) A91235, 28.

139 A30103, 1 November 1984.

140 *Re Australian Road Transport Federation* A30103, 1 November 1984; for earlier application see *Re Australian Road Transport Federation* A90346, 4 March 1982, ATPR (Com) 50-031, 55355.

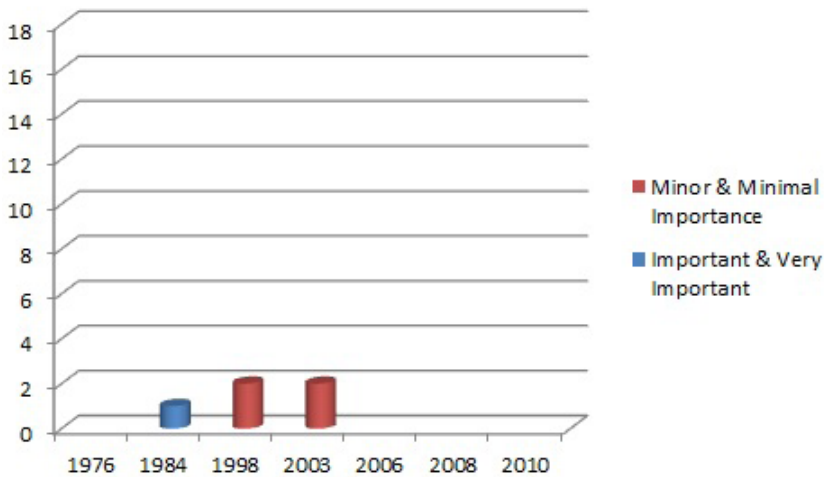
141 *Australian Road Transport Federation* A30103, 1 November 1984.

142 *Steggles Limited* A30183, 20 May 1998.

143 *Australian Medical Association Limited* A90622, 31 July 1998.

144 *Australian Hotels Association (NSW)* A90837, 27 July 2003.

145 *CSR Limited* A90808, 10 June 2003.



**Figure 4.15: The summed weights of increasing industrial harmony in ACCC authorisation determinations in the sample studied across five years**

Source: Author's research.

## Regulation of Illegal Activity

The ACCC has stated that attempts to control illegal activity would be viewed as a public benefit. Graeme Samuel acknowledged the importance of industry codes to 'address the growing problem of the backyard manufacture of speed using commonly available over the counter cold and flu decongestants'.<sup>146</sup> This was the main reason for the authorisation of a code aimed at preventing common cold and cough medicines being obtained by backyard laboratories for the manufacture of amphetamines.<sup>147</sup>

## Complex Sites of Public Benefit Analysis

Although many authorisation decisions can be straightforward, such as the *BHP Billiton* authorisation, which concentrated on efficiency benefits, other decisions are more complex and call for a detailed analysis. This section discusses six such sites, which have raised a myriad of issues that have, at times, been difficult to identify and prioritise.

<sup>146</sup> ACCC, 'ACCC Authorises Industry Code to Restrict Manufacture of Illegal Amphetamines' (Press Release MR 229/03, 27 October 2003).

<sup>147</sup> *Australian Self-Medication Industry* A30223, 22 October 2003. Also see *Tasmanian Farmers and Graziers Association* A80001 (86) ATPR (Com) 50127.

## Health of Patients, Consumers and Workers

Regulating the health industry via competition laws has been controversial. This was partly explained by the tribunal when it stated that there are several things special about the health industry that results in market failure and, in such circumstances, more competition is not necessarily a good thing for efficiency.<sup>148</sup>

One reason for the health industry needing special consideration is its delivery of a service that is considered to be an important right of persons in the community. The tribunal has termed this a 'merit good', where community values override consumer sovereignty and income is redistributed in part through the provision of merit goods on a free or subsidised basis.<sup>149</sup> In *The Royal Australian College of General Practitioners* authorisation, the College sought authorisation for general practitioners to agree on the fees they charged their patients. One of the benefits cited by the college was that such an agreement would provide continuity of patient care, as patients would be aware of the fees charged by all the general practitioners in the practice and would face no barriers to seeing another general practitioner when their preferred general practitioners was not available. The commission accepted that this benefit was likely to contribute to maintaining the quality of care provided by general practitioners.<sup>150</sup> The ACCC recognised the importance of high quality health care and stated:

The Commission recognises that the Australian community expects that high quality healthcare will be widely available. Successive Commonwealth governments have responded to this by subsidising the provision of healthcare in Australia, particularly by GPs through Medicare. This highlights the fact that GPs are a key foundation of the Australian health system. Consequently, the Commission recognised that maintaining or improving the quality of healthcare provided by GPs is an important public benefit.<sup>151</sup>

Further, the instances of market failure are common in many areas of the health industry. The tribunal examined the provision of services by pathologists for examples of market failure. Three main causes of market failure were discussed. These reasons are applicable to many services provided by the health industry. First, the provision of pathology services is characterised by the 'moral hazard' associated with the existence of insurance, since the existence of insurance cover

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148 *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4 (8 April 2004), paras 144, 158.

149 *ibid*, para 38.

150 *Royal Australian College of General Practitioners* A90795, 19 December 2002, para 5.32. The ACCC stated that this benefit was likely to be minimal because, even where general practitioners in the same practice begin by charging different fees, within a short period of time competition among general practitioners in a practice is likely to result in a common fee being charged.

151 *ibid*, para 5.24.

tends to make patients relatively insensitive to the price of medical services and hence consume too much.<sup>152</sup> Price insensitivity is likely to be valid for all types of medical services.

A second reason for market failure is classified as the principal-agent problem. The tribunal pointed out that the patient goes to the doctor and the doctor orders pathology tests. It is not the doctor who pays for these services and hence will not generally consider the marginal costs and benefits of them. Such a problem is likely to be common to all medical specialist services, as well as to general practitioners who may prescribe drugs, but usually do not inform the patient of the costs and alternative drugs available.

Third, the tribunal pointed out that pathology services also have some characteristics of a public good, which is defined from an economic perspective as one in which there is no rivalry in consumption and everyone can consume the total output.<sup>153</sup> The tribunal pointed out that there are a number of benefits derived from such a service, including the improved health of the population and productivity of the workforce. Further, the training of pathology registrars is a costly exercise that is usually borne by the public hospital system, involving the payments to registrars and their supervisors and the provision of materials and equipment. Once trained, the pathologists leave the hospitals where they have received their training and work for another laboratory, which receives the benefit of their training without paying for it.<sup>154</sup> All these benefits were recognised as public benefits by the tribunal and the ACCC for the purposes of the authorisation decision.

The commission considered the health of the general public, consumers as well as employees, in its decisions.<sup>155</sup> In 1998 Deputy Commissioner Allan Asher stated that the authorisation of collective bargaining agreements between doctors in rural South Australia and the SA Health Commission would benefit the consumer through access to professional health services at a lower cost than would otherwise have been available.<sup>156</sup> In *Tasmanian Oyster Research Council*,<sup>157</sup> the authorisation application related to the imposition of a levy to fund scientific research aimed at producing disease-free oysters. The commission granted the authorisation stating that the maintenance of health and safety measures was a public benefit.<sup>158</sup>

152 *Australian Association of Pathology Practices* [2004] ACompT 4 (8 April 2004) para 33.

153 *ibid*, para 35.

154 *ibid*, para 39.

155 See, for example, *Australian Meat and Livestock Corporation* (1987) ATPR (Com) 50-061; *Commonwealth Serum Laboratories Commission Novo Industries A/S and Novo Laboratories Pty Ltd* (1985) ATPR 50-088.

156 Allan Asher, 'Sustainable Economic Growth for Regional Australia', (Speech delivered at the Competition Issues and the Regions, National Conference, Beaudesert, 3 November 1998) <<http://www.accc.gov.au/content/index.phtml/itemId/96907>> at 1 November 2004.

157 *Tasmanian Oyster Research Council* (1991) ATPR (Com) 50-106.

158 *ibid*, 56-054.

In the *Abbott Australasia Pty Ltd and Nestle Australia* authorisation,<sup>159</sup> the application related to an arrangement to adopt a code of marketing between manufacturers and importers of infant formula, which could have breached the exclusionary provisions of the Act. Here the commission noted that the main benefits included the availability of information to health care professionals and consumers, particularly women who were determining whether or not to breastfeed.

In the *Homeworkers*<sup>160</sup> authorisation, a code of practice was authorised by the ACCC on the basis that it would bring a number of societal and health benefits to the workers involved. The code regulated the employment entitlements of homeworkers and sought to assist them by promoting improved working conditions for workers and their families. These included lessening the risk of exploiting a less advantaged group, provision of information to homeworkers to assist them to understand their entitlements, and the provision of improved working conditions for homeworkers and their families.

The application of the competition law to the medical profession and related health industries has caused confusion among the profession,<sup>161</sup> as illustrated by the *Australian Medical Association* determination<sup>162</sup> 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.<sup>163</sup> Similarly, in *Australian Dental Association*,<sup>164</sup> the commission agreed that the accepted norm of having consistency of fees within a medical or dental surgery, although constituting exclusionary conduct, would ensure a shared responsibility for the continuity and quality of patient care to be maintained within a shared practice.<sup>165</sup> In 2008 there were six applications dealing with the medical and dental sectors, all of which were authorised.<sup>166</sup> In 2010 there were three such determinations authorised.<sup>167</sup>

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159 *Abbott Australasia Pty Ltd and Nestle Australia Limited* (1992) ATPR (Com) 50-123.

160 *The Textile, Clothing and Footwear Union of Australia and the Council of Textile and Fashion Industries Limited* (2000) ATPR (Com) 50-282.

161 See: Stephen G Corones (2005) 'The uncertain application of competition law in health care markets' 33(6) *Australian Business Law Review*, 407-28.

162 *Australian Medical Association Limited & Ors* (2008) A91100.

163 *ibid*, 14, 33.

164 *Australian Dental Association* (2008) A91094 & A91095.

165 *ibid*, 20, see also *Vision Group Holdings Limited* (2010) A91217, 8.

166 *Australian Dental Association* (2008) A91094 & A91095; *Australian Medical Association* (2008) A91100, A91088; *CALMS Ltd* (2008) A91092 and *Rural Doctors Association of Australia Limited* (2008) A91078.

167 *Generic Medicines Industry Association* (2010), *Vision Group Holdings* (2010).

## Right to Due Process/Right to Justice

The right to access appeal mechanisms and have a fair hearing has been considered a public benefit. This issue has not presented itself to the commission in a direct manner, as access to due process is not the main point of authorisation applications. They are repeatedly encountered indirectly, however, in those applications dealing with the adoption of a code of conduct. The commission has often sought to strengthen governance processes, such as the access to appeal mechanisms, by using its conditions power under section 90(3).

One reason for the imposition of such conditions is to curb any misuse of market power and increased market concentration, conditions that are addressing long-term efficiency in the market. Another equally important reason is that the ACCC is facilitating the decentring of regulation. Doing so allows private enforcement by the participants in the scheme. When dealing with authorisations involving deregulated industries, the commission has imposed conditions primarily dealing with governance issues, such as incorporating the right to appeal against decisions made by associations. In 1998, out of the 36 decisions studied, the ACCC granted authorisation on the basis of conditions in 16 instances.

In the *Steggles* application,<sup>168</sup> the ACCC reviewed a proposed arrangement between Steggles Limited, a purchaser of chickens, and a number of small chicken farmers, who were the sellers of the chickens. The arrangement would allow Steggles Limited to negotiate with the growers collectively concerning the rates and conditions for the raising of broiler chickens. The commission was satisfied that the proposed arrangements would assist in a smooth transition to deregulation for the SA chicken-meat industry.<sup>169</sup> Other public benefits that the commission considered were likely to result from the arrangement included: addressing the inequality in the negotiating process for growers who would benefit from being able to negotiate collectively and a reduction in costs for both Steggles and the growers. The commission, however, expressed concern about a dispute resolution provision in the proposed agreement and granted authorisation subject to a condition that required this provision to be amended. The proposed dispute resolution provision allowed for the SA Steggles Consultative Committee to bind parties in dispute to a decision made unanimously by that committee. The commission considered the proposed dispute resolution to be insufficiently independent or fair and stated:

The Commission considers that the constitution of the committee would not always be sufficiently independent such that fairness of a decision made by the committee could be guaranteed. Consequently,

<sup>168</sup> *Steggles*, A30183, 20 May 1998.

<sup>169</sup> *ibid*, para 8.32; see also para 8.15.

the Commission considers that in order for Rule 13 not to contain a provision for conduct that may be likely to contravene provisions of the Act. Rule 13(b) should be amended to include provision for appeal to independent arbitration by a party mutually agreed to by the parties in dispute.<sup>170</sup>

The ACCC asked for the rule to be amended to include provision for appeal to independent arbitration by a party mutually agreed to by the parties in the dispute. Similarly, in *Real Estate Institute of Australia Limited*, the ACCC was asked to authorise a code of conduct. The ACCC agreed to the authorisation only if adequate provision was made for consumer access to the complaint-handling mechanism and for appeals to be made to an independent arbitrator. The ACCC stated:

The establishment of a complaint handling mechanism that provides for an avenue of appeal to an independent arbitrator and the making of decisions in accordance with the principles of procedural fairness as well as public reporting is important, therefore, not only to ensure that the Code is likely to result in a benefit to the public but also to act as a check against any attempt to use the complaint handling procedures in an anticompetitive manner.<sup>171</sup>

Again, in the *Agsafe* determination, the commission asked for the code to be varied to ensure 'independence and allow for natural justice and procedural fairness'.<sup>172</sup> In *Victorian Energy Networks Corporation*,<sup>173</sup> the application was made by a statutory gas company established by legislation and it sought approval for the terms and conditions on which access to transmission pipeline services would be made available to third parties. Here, the commission granted authorisation on the basis that the corporation report to the market on a prompt basis in order to make information available in a timely and transparent manner.

Another example can be found in *Australasian Performing Rights Association (APRA)*, in which authorisation was granted on the basis of a number of conditions, one of which required APRA to set up a new dispute-resolution mechanism to handle complaints between it and its users. The conditions required that disputes be heard before a panel of three adjudicators to determine the outcome and also required APRA to bear the cost of the dispute-resolution process. APRA contested this on the basis of the cost involved and proposed another model that saw APRA paying the cost of the mediator in the dispute-

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170 *ibid*, para 8.14.

171 *Real Estate Institute of Australia Limited* (2000) ATPR (Com) 50-279, 53453.

172 *Agsafe* (1994) ATPR (Com) 50-150, 55261; see also *Australian Communications Access Forum Inc* (1998) ATPR (Com) 50-262, 55246; *Australian Hotels Association (NSW)* A90837, 27 June 2003, where the applicants agreed to develop a dispute resolution mechanism as a condition of the authorisation being granted.

173 *Victorian Energy Networks Corporation* A90646–A90648, 19 August 1998.

resolution process, but proposing that the remaining administrative costs, such as the costs of the stenographers and room hire, should be shared between the parties. The ACT in its decision found a middle ground and commented that such a process was an essential avenue for dissatisfied members to air their grievances against APRA, which retained a monopoly position in the market.<sup>174</sup> The decision recognises that adequate dispute resolution mechanisms may be one way of monitoring the activities of monopolies.

At times, these dispute-resolution processes are in addition to those available under the law. They offer, however, cheaper, quicker and less formal alternatives with more flexible remedies. In the *Australian Amalgamated Terminals Pty Ltd* (AAT) authorisation the ACCC required the incorporation of a dispute-resolution process, with provision for mediation and, ultimately, expert determination accessible by end users of AAT's terminals.<sup>175</sup> This was in addition to other dispute-resolution process in operation and was not intended to compromise the operation of these existing processes.<sup>176</sup> Likewise, in the *Victorian Egg Industry Cooperative* authorisation, the conditions provided an independent appeal mechanism for producers in addition to the procedures provided under the *Commercial Arbitration Act 1984* (Vic).<sup>177</sup> Similarly, in the *Australian College of Cosmetic Surgery* authorisation, the ACCC required the inclusion of a condition in the college's code requiring that the member of the external appeals committee not be a member of the college.<sup>178</sup> In the *College of Surgeons* authorisation, the conditions imposed required that a number of the members of the appeals committee had to be nominated by the Australian health ministers, reflecting the public interest issues involved in the determination.<sup>179</sup>

## Facilitation of Deregulated Industries

The commission dealt with an increasing number of authorisation applications from the deregulated sectors of the economy that came within the ambit of the Act after the amendments made to it in 1995. Accordingly, only the authorisation decisions studied in 1998 include applications from deregulated industries. Of the decisions studied, the largest number of applications were from previously state-owned enterprises, including electricity, water and gas industries. Others included industries that had received protection from statute, such as the Wool Board or the Egg Marketing Board, as well as the professions, including the medical profession, which has been subject to competition law since 1995.

174 *Australian Performing Rights Association Ltd* A30186–A30193, 14 January 1998, para 330.

175 *Australian Amalgamated Terminals Pty Limited* (2009) A91141, A91142, A91181, A91181.

176 *ibid.*, 36–37.

177 *The Victorian Egg Industry Co-operative* (1995) A40072 29. This authorisation determination is not part of the empirical study.

178 *Australasian College of Cosmetic Surgery* (2009) A91106, 56.

179 *Royal Australasian College of Surgeons* (2003) A91106, 217.

Both efficiency and non-efficiency arguments were advanced and accepted by the commission in many of these cases. The most commonly accepted efficiency criteria were fostering business efficiency and the promotion of competition in the industry. Equally important were the non-economic benefits. The two most important were the promotion of equitable dealings in the market and the enhancement of the quality and safety of goods and services. Evidence of these benefits being passed on to the public is not always present. The need to allow time for deregulated industries to operate within a competitive market was acknowledged by the commission:

The Commission is of the opinion that there is some public benefit in facilitating the transition to full compliance with the *Trade Practices Act* in certain circumstances. This will help minimise the adjustment costs that could result from too precipitous a change from the previous exemption. A public benefit arises because a transition phase may help to allow industry participants to adjust to new negotiation systems.<sup>180</sup>

This flexible approach is necessary in a time of transition and it would be difficult to bring about structural change and allow such industries to function in a competitive market with hard and fast rules. Further, the ACCC intends that, by adopting such an approach, it is building commitment to long-term compliance to the Act, which would be viewed as a public benefit. The most important non-efficiency benefits that featured prominently in 12 out of the 19 decisions examined was the enhancement of quality and safety of goods and services.

## Encouraging Compliance and Self-regulation

Often, self-regulation, compliance and the encouragement of ethical practices are interrelated. For example, in the *Medicines Australia Limited* authorisation<sup>181</sup> the applicant was a national association representing the prescription medicines industry in Australia. It was seeking authorisation for its code of conduct, which had the likely effect of breaching section 45 of the Act. The applicant successfully argued that the code would encourage compliance and self-regulation via, among other things, the inclusion of ethical practices.<sup>182</sup>

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180 *Australian Medical Association and South Australian Branch of the Australian Medical Association Incorporated* A90622, 31 July 1998, 51.

181 *Medicines Australia Limited* A90779, A90780, 14 November 2003.

182 In other cases, facilitating compliance with legislation has been considered to be a minor benefit. See *ibid*, para 5.32.

John Braithwaite and Christine Parker discussed the new regulatory state's move from command and control toward indirect governance.<sup>183</sup> One way in which such governance can occur is by facilitating self-regulation, and the commission has played an active role in doing just that. Since the mid 1980s, self-regulation in the form of codes of conduct has been viewed as an efficient regulatory tool by the commission.<sup>184</sup> The then Commissioner, Ron Bannerman, identified three broad influences which affect the pursuit of efficiency: market forces; rationalisation, meaning the efficient reorganisation of resources and the methods of using them so as to reduce the cost of production and distribution; and, self-regulation, which can be a lower-cost method than government regulation and can thus contribute to efficiency.<sup>185</sup> Bannerman, however, voiced the main concerns expressed about self-regulation by saying: 'a point sometimes overlooked is that particular sorts of self-regulation prevent the operation of market forces and may thereby actually reduce efficiency'.<sup>186</sup>

Clearly, proposed self-regulation schemes can bring both benefits and detriments, and consideration of such proposals is usually complex. The importance of self-regulation has been recently reinforced by Samuel, when he announced that the ACCC would introduce a system of endorsement for high quality industry codes of conduct because it 'has the potential to provide effective industry codes that deliver real benefits to businesses and consumers with the least possible compliance costs placed on either'.<sup>187</sup> This statement demonstrates the recognition that self-regulation can be more efficient and less costly than regulation, which relies on command and control strategies.

In *Media Council of Australia (No. 2)*, the tribunal considered an appeal by the Australian Consumers Association about a commission decision to authorise four applications relating to a number of codes of conduct and asked the council to consider a number of variations. The tribunal acknowledged that such self-regulatory strategies were achieving government policy. It recognised that there were some efficiencies of both a procedural and enforcement kind that would result from the proposed conduct. In refusing to grant the authorisation, however, the tribunal found, among other things, that the proposed codes were not reflective of community standards and values, and that the rights of appeal under the codes were inadequate. The tribunal went beyond economic

183 John Braithwaite and Christine Parker, 'Conclusion', in Christine Parker, Colin Scott, Nicola Lacey and John Braithwaite (eds), *Regulating Law* (2004).

184 See, for example, *Royal Australian Institute of Architects* A58, 7 September 1984; *NSW and ACT Newsagency System* A30093, A30093, 26 April 1984; *Mercury Newsagency System* A4782, A4937, 9 May 1984; *Master Locksmiths Association of Australia Ltd* A90387, A90388, 15 March 1984. See also *Homeworkers* (2000) ATPR (Com) 50-282.

185 Ron Bannerman, 'Points from Experience 1967-84', in Trade Practices Commission, Commonwealth of Australia, *Annual Report 1983-84* (1984) 157, 191.

186 *ibid*, 192.

187 See ACCC, 'ACCC to Endorse High Standard Voluntary Industry Codes of Conduct' (Press Release MR 168/03, 11 August 2003). As far as the author is aware, this has not been fully implemented.

efficiency matters to examine the best way to give effect to community values and stated the current proposals had inbuilt design faults that allowed biased conduct against the new entrant, the small advertiser and the novel product.<sup>188</sup>

In *Australian Communications Access Forum Inc*, the forum's primary role was the generation of recommendations on declared services and submitting such draft access codes for approval by the ACCC. This application dealt with the constitution and rules of governance of the forum. One of the primary benefits recognised by the commission was the facilitation of self-regulation, and authorisation was granted.<sup>189</sup>

Chief concerns about self-regulation schemes are that they may encourage anti-competitive conduct, or that they may allow members to be unfairly treated without any avenue to obtain relief. The ACCC has used conditions to address such concerns. Once again, the importance of an appeals process and the costs implementing one have also been explored in the determinations. In the *Australian Institute of Mining and Metallurgy* authorisation the ACCC recommended that 'the introduction of an appeals process for applicants denied admission to the Institute and the enhancement of procedural fairness through the introduction of a requirement for the Board to give reasons for its decisions'.<sup>190</sup> While the first of these two issues were dealt with by the institute following the draft determination, the second was dealt with by the ACCC through the imposition of a condition to the grant of the authorisation. Another concern has been the need to have external oversight of compliance and, in the *North West Shelf* authorisation, the condition required an ACCC approved independent compliance auditor to review compliance with the terms of the authorisation and the agreed protocol. The conditions also required the applicants to implement all of the auditor's recommendations. The auditor was required to report annually on the finding of the review as well as reporting on any non compliance with recommendations of the review.<sup>191</sup>

In *Medicines Australia Inc*, the ACCC considered that the Medicines code of conduct may not have the deterrent impact it promised and granted authorisation on the basis of a number of conditions.<sup>192</sup> These included increased reporting and monitoring of specific activities and that any amendments to the guidelines in the code were supplied to the ACCC. In the *College of Surgeons* authorisation the ACCC was concerned with the exclusive role of the college in setting the standards for accrediting hospitals and training positions within hospitals. The

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188 *Media Council of Australia* (No 2) (1987) ATPR 40-774, 48451. See also John Duns, 'Competition Law and Public Benefits' (1994) 16 *Adelaide Law Review* 245, 265.

189 *Australian Communications Access Forum Inc* A90613, 22 April 1998, 15.

190 *Australian Institute of Mining and Metallurgy* (2004) A90824, 20.

191 *North West Shelf* (1998) A90220, A91221, A91222 & A91223, 90.

192 *Medicines Australia* A90779-A90780, 14 November 2003, 37, para 5.58.

conditions imposed included a requirement that the college establish a public, independent review of the criteria for accrediting hospitals for the provision of various surgical training positions.<sup>193</sup> This condition was supplemented by others involving the participation of the state health ministers in the nomination of hospitals for accreditation<sup>194</sup> and another condition required the college to establish an independent chaired committee to publicly review the tests that medical colleges use to assess overseas-trained surgeons.<sup>195</sup> In *Agsafe* the condition required the independent monitor to report on the progress that the company is making in complying with the conditions imposed by the ACCC in the authorisation annually.<sup>196</sup>

## Promoting Ethical Conduct

For some time, professional ethics provisions have been acknowledged as an important regulatory tool by the commission. It has recognised the value of industry codes and has stated that it considers codes to be an extremely effective and market-sensitive mechanism for delivering the detail of consumer protection rules, provided they are appropriately framed, administered and monitored.<sup>197</sup> The commission examines codes to ensure that they contain rules encouraging appropriate conduct and internal and external dispute resolution procedures to monitor such conduct.

Professional ethics arise in authorisations as a subsidiary issue where a code of conduct is being considered for authorisation. In *The Mortgage Industry Association of Australia* authorisation, concerns about unethical conduct in the form of fraudulent conduct engaged in by some brokers in the mortgage industry had been commented on in a number of reports, including those undertaken by the Australian Prudential Regulation Authority and the Consumer Credit Legal Centre.<sup>198</sup>

Ethical conduct has at times arisen in the context of conditions subject to which authorisation has been granted. In *Real Estate Institute of Australia Limited*,<sup>199</sup> the ACCC granted authorisation to a real estate agents' code of conduct on a number of conditions. One of these conditions required changing a clause in the code that required a member not to engage in conduct that was detrimental

<sup>193</sup> *College of Surgeons* (2003) A90765, 166.

<sup>194</sup> *ibid*, 167–68.

<sup>195</sup> *ibid*, 172.

<sup>196</sup> *Agsafe* (2002) A90680 and A9068, 61.

<sup>197</sup> ACCC, 'Submission to the Financial System Inquiry (Wallis Inquiry)', September 1986.

<sup>198</sup> *Mortgage Industry Association of Australia* A90880, 18 February 2004, 10–1, paras 2.16, 2.18.

<sup>199</sup> *Real Estate Institute of Australia Ltd* (2000) ATPR (Com) 50–279. See also *Real Estate Institute of Australia* (1981) ATPR (Com) 50–013 for an earlier decision on the code of ethics.

to the reputation or interests of the profession, the institute or its members. The ACCC saw such a clause as being at odds with the promotion of ethical standards and stated:

In the Commission's view, clause 1.3(b) may lead to the Code being interpreted in a manner that is focussed on the interests of the REIA [Real Estate Institute of Australia], its affiliated institutes and the real estate profession rather than being interpreted in a manner that is primarily focussed on promoting ethical standards or real estate practice in the public interest.<sup>200</sup>

In the *Mortgage Industry Association of Australia* decision the ACCC did not impose any conditions on the basis that the proposed arrangements met the authorisation test. It did, however, suggest that the association consider adopting proposals made by interested parties, including Consumer Affairs of Victoria, on how the code could be improved and thereby enhance the standing of mortgage brokers.<sup>201</sup> In *Australasian College of Cosmetic Surgery* a condition required the code to be amended so as to provide for an independent auditor to be appointed to report findings of checks on the manner in which the complaints panel of the college dealt with complaints made to it. The results of these audits are to be reported to the ACCC, as well as the college's code administration committee.<sup>202</sup>

## Protecting Certain Sectors of the Community

At different times the commission has viewed protection of specific sectors of the community as a public benefit. In the *Homeworkers* authorisation, lessening the risk of exploitation of a less advantaged group was seen as a public benefit.<sup>203</sup> In the *Agsafe* authorisation the benefits flowing to the rural sector were considered important and the chairman stated in a press release:

The ACCC considers that the Agsafe program is of particular benefit to rural and regional Australia where agvet chemicals are predominantly used. Through its accreditation and training scheme, the Agsafe program has significantly increased knowledge and understanding of existing regulatory requirements for the safe transport, handling, and storage of agvet chemicals.<sup>204</sup>

In *Job Futures*, the ACCC recognised that a public benefit resulted from assisting people with physical or intellectual impairment to gain employment. The ACCC

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200 *ibid*, 50-279, 53455.

201 *Mortgage Industry Association* A90880, 18 February 2004, 27, para 6.32.

202 *Australasian College of Cosmetic Surgery* (2009) A91106, 57, 79.

203 *The Textile, Clothing and Footwear Union of Australia and the Council of Textile and Fashion Industries* (2000) ATPR (Com) 50-282, 53550.

204 ACCC, 'ACCC authorises Agvet chemical safety program' (2002).

stated that the statement of values adopted by Job Futures reflected a focus upon the delivery of services to people who are most disadvantaged in relation to employment as a consequence of long-term unemployment or physical and intellectual disabilities.<sup>205</sup> The commissioner stated:

The ACCC also recognises the public benefit in having smaller community based organisations participating in the Job Network, particularly as a result of their diversity in approach and local focus in delivering these services. These smaller non-profit organisations often provide employment services to disadvantaged people in places where larger for-profit organisations do not operate.<sup>206</sup>

In the Distilled Spirits Industry Council of Australia authorisation, conditions imposed required an independent review to be conducted of the effectiveness of the Retailer Alert Scheme, which was a system for regulating inappropriately named or packaged alcohol products from the market. The ACCC noted that this scheme was weak as it did not contain a mechanism to enforce compliance and required the association to report to it on the findings of the review.<sup>207</sup>

## In Summary ...

This chapter has categorised public benefits from ACCC determinations across four decades. The determinations themselves have become more detailed, longer and transparent with the public benefits being much more clearly emphasised. The commonly held view that the ACCC's decisions have become focused on economic efficiency is not supported by the empirical study, which shows that both efficiency and non-efficiency benefits have always had a place in the determinations. It also shows that non-efficiency benefits are more often and more successfully argued today than in 1976 or 1984. The study also shows that varying benefits have been emphasised at different times.

The place of non-efficiency benefits is even more intriguing. Although some of these benefits, such as safety and quality, had long been acknowledged, others have become more important over time, and environmental benefits is one such example of this. The advantages of self-regulation had been recognised since

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205 *Job Futures* A90625, 8 April 1998, 12. This was again authorised in 2008. See *Job Futures Limited* A91084, A91085 (18 September 2008). See also *Australian Medical Association Limited and South Australian Branch of the Australian Medical Association* A90622, 31 July 1998, where the ACCC recognised the importance of attracting doctors to rural sectors. It should be noted that this reason came within Industry Rationalisation because it resulted in a more efficient allocation of resources.

206 ACCC, 'ACCC proposes to authorise employment services collective tendering arrangements', (Press Release MR 183/08, 26 June 2008) <<http://www.accc.gov.au/content/index.phtml/itemId/833255>> at 30 September 2008.

207 A91054 & A91055, 31 October 2007, 34–35, 48.

the 1980s, with the commission encouraging it by approving codes of conduct that were, in effect, self-governance systems. Promotion of equitable dealings has become more important and has often been used as a way of monitoring powerful players in the deregulated market. This was also the explanation for the increasing incorporation of dispute-resolution mechanisms and appeal processes, which the commission sought to incorporate using the conditions power in granting authorisations. We might conceive this as a meta-regulatory shift towards procedural regulation of self-regulation by the ACCC.<sup>208</sup>

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208 Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (2002).