Small Business and the Problem of Price Fixing

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There is no universally accepted definition of small business. However, many enterprises are indubitably of that character. For reasons connected with the operation of the revenue laws a high proportion of them have acquired a corporate seal. In so doing they have unwittingly or unwillingly brought themselves within the reach of s. 45 of the *Trade Practices Act* 1974. As amended by Act No. 81 of 1977 that section makes it unlawful for a corporation to make an arrangement or arrive at an understanding where a provision of the arrangement or understanding has the purpose or would have or would be likely to have the effect of substantially lessening competition.[2] The section further provides that no corporation shall do any act or thing in pursuance of or in accordance with or enforce or purport to enforce or otherwise give effect to such an anti-competitive provision, whether the arrangement or understanding in which it is contained was made or arrived at before or after the date (1st July 1977) on which the section commenced.[3] A corporation may, of course, secure itself against molestation under s. 45 by obtaining authorization under s. 88(1). Regrettably s. 88(1) is unlikely to be of benefit to small businessmen seeking to protect themselves against ruinous price competition or to bargain collectively with powerful and significant customers. Such businessmen are amongst those most in need of protection. By s. 45A price stabilizing provisions in arrangements or understandings between competitors are deemed to have the purpose, effect or likely effect of substantially lessening competition for the purposes of s. 45.

The Trade Practices Commission may not make a determination granting an authorization under s. 88(1) unless it is satisfied that in all the circumstances the provision for which authorization is sought would result, or would be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed arrangement were made or the proposed understanding were arrived at and the provision concerned were given effect to.[4] The burden of forecasting the magnitude of a foreseeable reduction in competition and weighing that diminution in competition against likely contribution to some acknowledged end of public policy or aim pursued by society is truly horrendous. The Commission has not been enthusiastic about

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1. Compare Report of the Trade Practices Consultative Committee on Small Business and the Trade Practices Act, Volume One, December 1979, Australian Government Publishing Service, Chapter One.
2. S. 45(2)(a)(ii).
3. S. 45(2)(b)(ii) read with the definition of "give effect to" at s. 4(i).
4. S. 90(6). As to pre-1st July 1977 arrangements and understandings, see s. 90(7).

adding to its burden by attempting to weigh adverse economic effects against benefits of a qualitatively different nature.[5] The Commission has been reluctant to grant authorization save where the provision makes a contribution to business efficiency which more than compensates for the derogation from the public good flowing from the restriction on competition.[6] Only in exceptional cases[7] will price stabilization schemes enhance the efficiency of small business. They are more likely to erode the incentive for small businessmen to get to know their own costs and to encourage over-investment and excess capacity.

It would strain the fictions of the law to breaking point to assume that the Australian Parliament had any real appreciation of the likely operation of the authorization test. However the Minister responsible for the introduction of the 1977 amendments must or ought to have been aware that almost the entire gamut of "public benefits" which might reasonably be argued as justification for the circulation of recommended price lists amongst small businessmen had already been rejected by the Commission in proceedings under the pre-July 1977 Act. By July of 1977 the Commission had rejected claims that the public interest was promoted by –

(a) *minimum price schemes.* The risk is real that such schemes will protect inefficient firms, encourage excessive investment and lead to over-capacity and higher costs. The Commission would not assume in the absence of evidence[8] that without the security of such a scheme efficient firms would not invest at levels required to satisfy demand.[9]

(b) *maximum price schemes.* Whatever public benefits may flow from public regulation of prices, and there is room for argument about that matter, the Commission was unable to see public benefit in private regulation,[10] and that was particularly so where a State price fixing authority had power to fix the price of the relevant goods or services if it thought fit.[11] The Commission was so wedded to the idea that competition was the appropriate way to hold down prices,[12] that it would not permit trade associations to enter into arrangements with State price fixing authorities

5. A difficulty with which the Commission is strictly required to grapple, see the Tribunal's decision in *re Q.C.M.A. and Defiance Holdings* (1976) A.T.P.R. 17, 223, at 17, 242. For a case in which a qualitatively different benefit was weighed against the economic consequences of competition foregone, see *Re Application of John Fairfax and Sons Ltd.* (1980) A.T.P.R. (Com.) 16, 416, at para. 37.
6. See statement of General Principles (1978) A.T.P.R. (Com.) 16, 989-9, at para. 6.
7. See, e.g. *Re Application of Retail Confectionery and Mixed Business Association* (Vic.) (1978) A.T.P.R. (Com.) 16, 989.
8. Which for practical purposes will be unobtainable.
9. *Re Application of Australian Institute of Dry-Cleaning – Victoria* (1976) A.T.P.R. (Com.) 16,505 at para 6.4.
10. *Re Application of T.N.T. Management Ltd.* (1975) A.T.P.R. (Com.) 8,853, at para. 5.
11. *Re Application of Associated Country Sawmillers of New South Wales* (1976) A.T.P.R. (Com.) 16, 517, at para. E(a)2.
12. *Re Application of T.F. Danaher Holdings Pty. Ltd.* (1975) A.T.P.R. (Com.) 8, 855, at para. 4(c).

substituting industry self-regulation for public control.[13] Trade associations were permitted to inform members of the maximum prices set by State price fixing authorities, but no statement that the prices were recommended by the association might be added.[14] Many of the early applicants were, of course, embarrassed by Commission enquiries which showed that the recommended maximum price was "the price". In such cases the Commission could see no public benefit at all in the scheme.[15]

(c) *price stabilization schemes.* In the absence of special circumstances the Commission was unable to accept that stability of price was a substantial[16] public benefit capable of outweighing the benefits of price competition to be foregone.[17] In particular, since stabilizing prices by agreement conceals but does not solve the problem of vagaries in supply, the risk of prices being pushed up by surges in demand or under supply was held not to justify the grant of authorization.[18] Advocates who sought to argue that price stability was necessary to encourage a level of investment which would meet public demand encountered the difficulty that any alleged shortfall in investment had occurred prior to the date of operation of the Act when the price fixing arrangement had been enthusiastically adhered to.[19] The Commission's hostility to price stabilization schemes was of some significance because it was prepared to find that recommended prices which were not "the price" but which were used in setting "the price" relevantly stabilized prices.[20]

The Commission had also declined to accept that price fixing or stabilizing schemes –

(a) *were a guide to end users.* Ordinarily circulation was confined to members of the trade association whose customers became aware of current price levels only because the agreement stabilized prices.[21] In any event, the Commission was not prepared to sustain the agreement in the absence of evidence that end users wished to have the use of the "price guide" and of evidence that trade journals would not develop price guides from market surveys if price competition commenced.[22] In one post July 1977 case[23] the Commis-

13. *Re Application of South Australian Chamber of Cement Distributors* (1976) A.T.P.R. (Com.) 16, 583, at paras. 7 and 10(b).
14. *Re Application of Footwear Association of South Australia* (1976) A.T.P.R. (Com.) 16, 508, at para. 3(b).
15. See, e.g., *Re Application of Footwear Association of South Australia* (1976) A.T.P.R. (Com.) 16, 508, at para. 3(a).
16. Act No. 81 of 1977 deleted the requirement that the public benefit be "substantial".
17. *Re Application of Associated Country Sawmillers of New South Wales* (1976) A.T.P.R. (Com.) 16, 517, at para. E(b)(2).
18. *Re Application of T.F. Danaher Holdings Pty. Ltd.* (1975) A.T.P.R. (Com.) 8, 855, at para. 4(c).
19. See, e.g. *Re Application of Institute of Launderers and Linen Suppliers (N.S.W.)* (1976) A.T.P.R. (Com.) 15, 609, at para. 16.
20. See, e.g. *Re Application of T.F. Danaher Holdings Pty. Ltd.* (1975) A.T.P.R. (Com.) 8, 8955, at paras. 3 and 4(c).
21. See, e.g. *Re Application of Associated Country Sawmillers of New South Wales* (1976) A.T.P.R. (Com.) 16, 517, at para. E(c)2.
22. *Re Application of T.F. Danaher Holdings Pty. Ltd.* (1975) A.T.P.R. (Com.) 8, 855, at para. 4(b).
23. *Re Application of Service Stations Association of New South Wales Ltd.* (1978) A.T.P.R. (Com.) 17, 060, at para. 5.5.2.

sion was moved to advise members of a trade association that a businessman was perfectly free to assist potential customers by publishing lists stating his prices so customers could compare them with the prices charged by his competitors.

(b) *ensured an acceptable standard of service and compliance with warranties.* The Commission's view was that competition for customers would compel businessmen to maintain and improve the quality of their product or service and build a reputation for commercial integrity.[24]

(c) *provided the financial base for safe industrial practices.* The Commission's view was that the vigilance of government bodies and unions of employees guaranteed observance of satisfactory standards.[25]

(d) *promoted public health.* The Commission was not to be persuaded that the various government instrumentalities carrying primary responsibility for public health were less well equipped than trade associations to set and monitor acceptable standards.[26]

(e) *avoided the complexities of costing.* Of course price fixing arrangements do avoid the complexities of costing. They go straight to the bottom line. But there is no public benefit in that. Costing is a basic exercise for any businessman working at a reasonable level of efficiency. The Commission could see only public detriment in schemes which reduced the incentive to perform the task.[27]

(f) *avoided price leadership.* There can be no objection to price leadership which does not contravene the Act and the Commission was not prepared to find any.[28]

The Swanson Committee[29] recommended that authorization should not be available for agreements between competitors, having the purpose or effect or likely to have the effect, of fixing or controlling the price of goods or services supplied by the parties or any of them, in competition with each other to persons not being parties to the agreement.[30] The recommendation arose in part from the Committee's conviction that price agreements between competitors were at the very heart of anti-competitive behaviour.[31] It was attributable also to the Committee's opinion that such agreements will so rarely be in the public interest that the costs in time and money, both for industry and government, involved in allowing attempts to justify such agreements would far outweigh the social benefits which might flow from an occasional successful

24. *Re Application of Australian Institute of Dry-Cleaning — Victoria* (1976) A.T.P.R. (Com.) 16, 505, at para 6.1.
25. Ibid, at para. 6.4.
26. Op. cit., at para. 6.2.
27. *Re Application of T.F. Danaher Holdings Pty. Ltd.* (1975) A.T.P.R. (Com.) 8, 855, at para. 4(d); *Re Application of Associated Country Sawmillers of New South Wales* (1976) A.T.P.R. (Com.) 16, 517, at paras. E(d) and E(g).
28. *Re Application of T.F. Danaher Holdings Pty. Ltd.* (1975) A.T.P.R. (Com.) 8, 855, at para. 4(e).
29. The Trade Practices Act Review Committee of 1976, Chaired by Mr. T.B. Swanson.
30. Report of the Trade Practices Act Review Committee to The Minister for Business and Consumer Affairs, 1976, Australian Government Publishing Service, at para. 4.59.
31. Ibid., at para. 4.59.

application.[32] Exceptions to cover "true" recommended price agreements[33] and agreements between competitive sellers and competitive buyers[34] were recommended. It is now part of the history of Australian competition law that the Australian Parliament rejected the Committee's recommendation that authorization should not be available to competitors who sought to fix the prices at which they supplied services but otherwise accepted its advice.[35] The distinction between goods and services is commonly attributed to a desire to assist small business.[36] It does not. The small businessman's problem is merit not jurisdiction. A small businessman who operates in the service area is less likely to satisfy the authorization test than a small retailer.[37] The rivalry between department and chain stores is such that small retailers have little influence on price competition. But for the risk that two of the parties to a price fixing arrangement will be found to be competitors, in which case the arrangement is deemed to substantially lessen competition though in fact it does not, small retailers would not require authorization to be free from molestation under s. 45. Small businessmen in the service area tend to compete only with one another. Their price fixing arrangements cannot be shown to improve their competitive position vis a vis larger and dominant suppliers. Their arrangements foreclose a much more significant area of competition to weigh against any public benefit flowing from the scheme. The Legislature's distinction between goods and services serves only to foster false expectations.

If the portents were poor the post July 1977 experience has been even worse. Over the period 1976 to 1979 numerous associations of motor body repairers sought authorization to formulate and distribute to members a recommended hourly rate for motor body repair work. All applications were denied.[38] Applications by associations of tow truck operators to issue recommended charges for storage, salvage and towing[39] and by associations of service

32. Op. cit., at para. 4.59.
33. Op. cit., at paras. 4.61, 4.69 and 4.70.
34. Op. cit., at paras. 4.64 and 4.65.
35. *Trade Practices Act* 1974 as amended by Act No. 81 of 1977, sub-sections (1), (2), and 3(b) of s. 88.
36. See, e.g. Donald, B.G. and Heydon, J.D., *Trade Practices Law,* 1976 Law Book Co., at p. 161.
37. See, e.g. *Re Application of The Mower Specialists Association of Australia Co-operative Ltd.,* (1979) A.T.P.R. (Com.) 15, 576 where authorization for a price recommending arrangement relating to mower repairs was denied and authorization for joint advertising of individually acquired mowers was granted.
38. *Re Application of Victorian Automobile Chamber of Commerce and Australian Automobile Chamber of Commerce* (1976) A.T.P.R. (Com.) 16, 579; *Re Application of Motor Trades Association of New South Wales* (1978) A.T.P.R. (Com.) 17, 070; *Re Application of Motor Body Repairers and Builders Association of New South Wales Ltd.* (1978) A.T.P.R. (Com.) 17, 083; *Re Application of South Australian Automobile Chamber of Commerce* (1979) A.T.P.R. (Com.) 15,600. The changes effected by Act No. 81 of 1977 made no relevant impact. See also *Re Application of Victorian Automobile Chamber of Commerce and Australian Automobile Chamber of Commerce* (1976) A.T.P.R. (Com.) 15, 695 (Clearance denied).
39. *Re Application of Victorian Automobile Chamber of Commerce* (1979) A.T.P.R. 15, 660; *Re Application of Western Australian Chamber of Commerce Inc.* (1979) A.T.P.R. (Com.) 15, 669.

station proprietors to circulate recommended charges for particular services[40] were similarly treated. The Commission was prepared to accept that by maintaining prices at level higher than would otherwise be the case the arrangements would assist the viability of the industry. The Commission was not prepared to regard that as a public benefit, howsoever great the benefit might have been to individual members who were able to retain their businesses. Schemes calculated to promote efficiency either by providing members with market information to which they would not otherwise have access or by pointing out ways of correctly ascertaining and reducing costs are encouraged. The Commission has granted authorization for the circulation of hourly labour rates based on actual award costs if unaccompanied by comment on overhead, profit or bottom line price.[41] It has been disposed to grant authorization for the circulation of standard times to remove and replace specified panels and parts of identified makes and models of motor vehicles undergoing body repair,[42] notwithstanding that circulation could have such a significant effect on competition that clearance was not available.[43] But the Commission has not been prepared to accept that recommended prices are, in fact, costing advice and has been unable to see how such recommendations could assist cost assessment by members with diverse wage and cost structure.

That body of case law is internally coherent. However other small businessmen in similar situations have been quite differently treated. Owner-drivers have been granted authorization[44] to enter into an agreement upon the rates and conditions they propose to put to "contractors" in the course of negotiations[45] for a collective

40. *Re Application of Tasmanian Automobile Chamber of Commerce* (1978) A.T.P.R. (Com.) 16, 995; *Re Application of Service Stations Association of New South Wales Ltd* (1978) A.T.P.R. (Com.) 17, 060; *Re Application of Motor Traders Association of New South Wales* (1978) A.T.P.R. (Com.) 17, 070.
41. See *Re Application of Master Painters, Decorators and Signwriters' Association of South Australia Inc.* (1979) A.T.P.R. (Com.) 15, 565.
42. See *Re Application of Victorian Automobile Chamber of Commerce and Australian Automobile Chamber of Commerce* (1976) A.T.P.R. (Com.) 16, 579. See also *Re Application of Australian Automobile Chamber of Commerce* (1978) A.T.P.R. (Com.) 17, 058 and *Re Application of Service Stations Association of New South Wales Ltd* (1978) A.T.P.R. (Com.) 17, 060. Quaere whether it was appropriate for the Commission to grant authorization in *Re Application of Motor Body Repairers and Builders Association of New South Wales Ltd.* (1978) A.T.P.R. (Com.) 17, 083 without first satisfying itself that the recommended times were fair and accurate (see para. 5 of the Final Determination).
43. See *Re Application of Victorian Automobile Chamber of Commerce and Australian Automobile Chamber of Commerce* (1976) A.T.P.R. (Com.) 15, 695.
44. See *Re G. & M. Stephens Cartage Contractors Pty. Ltd.* (1977) 1 A.T.P.R. 17, 445; *Re Application of Queensland Pre-Mixed Concrete Carriers* (1979) A.T.P.R. (Com.) 15, 560 and *Re Application of Quarry Carters Association* (1981) A.T.P.R. (Com.) 91, 50-014, at para. 29.
45. In *Re Application of Quarry Carters Association* (1981) A.T.P.R. (Com.) para. 50-014 the Commission indicated that it would be prepared to authorize "contractors" to discuss and agree on the terms which they should put in negotiations initiated by owner-drivers.

industry-wide agreement, and to enter[46] into contracts, arrangements and understandings with "contractors" pursuant to which the "contractors" agree to offer standard rates and conditions and the owner-drivers agree to carry for those rates and conditions; provided that any such contract, arrangement or understanding is not in the nature of a primary boycott and does not forbid negotiated variations from the norm to meet special circumstances or for special jobs. The Trade Practices Tribunal found that there was public benefit in maintaining the independence of owner-drivers (who were at risk of being swallowed up by the Transport Workers' Union of Australia) because (a) the calling constituted an occupational opportunity where remuneration was related to efficiency and effort, (b) the potential for competition was greater than if employee drivers were substituted, and (c) the costs associated with owner-drivers were lower than those associated with employee drivers.[47]

It is not put that the motor vehicle repairer cases are on all fours with the owner-driver cases. The evidence was that if the owner-drivers were denied authorization the Transport Workers' Union of Australia would invade the field and negotiate collective agreements calculated to diminish competition even further. In those circumstances the Tribunal (rightly) held that authorization of the conduct would not dampen competition to any greater extent than denial of authorization. But in the motor vehicle repairer cases the Commission did not come to the task of balancing public benefit against anti-competitive effect. The applicants failed on the thresh-hold question. The Commission found that the conduct sought to be authorized was not likely to result in a benefit to the public. Yet one suspects that insurance companies find it cheaper to engage independent panel beaters to reinstate motor vehicles than to staff their own workshops. One is inclined to think that as panel beaters do not derive the whole of their income from insurance repairs the calling is likely to offer greater opportunities for competition that the vocation of owner-driver. One may readily appreciate that there is no public benefit in the circulation of recommended prices for use in both insurance and non-insurance repairs. It is a good deal more difficult to understand why associations of motor vehicle repairers should be denied the opportunity to negotiate collective agreements with insurers and should be restricted to acting on behalf of a particular member in a dispute with an insurance company.[48] It may be that if the matter were pro-

46. Such an authorization protects the "contractors" also, see s. 88(6). The Commission will authorize contractors to initiate negotiations for the variation but not the extension of existing collective agreements; provided there is no flow over into common cartage rates. See *Re Application of New South Wales Road Transport Association* (1979) A.T.P.R. (Com.) 15, 553.
47. *Re G. & M. Stephens Cartage Contractors Pty. Ltd.* (1977) 1 A.T.P.R. 17, 445, at 17, 475 to 17, 479.
48. *Re Application of South Australian Automobile Chamber of Commerce* (1979) A.T.P.R. (Com.) 15, 600, at para. 14 (Draft Determination) and para. 6 (Final Determination). That approach assimilates associations of motor vehicle repairers to associations of "contractors" rather than associations of owner-drivers, see *Re Application of New South Wales Road Transport Association* (1979) A.T.P.R. (Com.) 15, 553.

perly investigated[49] such exercises would be found to sap competition to an extent that outweighed any public benefit otherwise accruing.[50] Prima facie, simply because such agreements can reflect the exercise of countervailing power, they do not necessarily have the same undesirable effects on competition as agreements purely between competitors.[51] They certainly provide greater scope for the operation of market forces than the governmental price fixing systems in the direction of which the denial of authorization is likely to propel small businessmen in the motor trade.

Small retailers too received relatively unsympathetic treatment in the initial post-July 1977 cases. The Commission was not minded to object in competition terms to the circulation of a set of retail prices based on different mark-ups; provided no recommendation was made as to the appropriate price, and costing information was included.[52] But the matter of competitive effect does not arise until the Commission is satisfied that there is public benefit in the proposed conduct. The Commission was prepared to find "public benefit" in bottom line pricing guidance only where it could be demonstrated that the viability of the members' businesses depended on the arrangements[53] and that the viability of all existing members was required in the public interest.[54]

Re Application of Rental Confectionery and Mixed Business Association (Vic.)[55] was something of a watershed. The trade association's members operated mixed businesses and milk bars (typically with the assistance of their family and one employee), which by opening fifteen hours a day seven days a week struggled[56] to compete on non-price grounds[57] (i.e. convenience and service) with chain and supermarket stores. They could fairly be described as at the bottom end of small within the meaning of the Commission's guidelines.[58] Authorization was sought to circulate members with a recommended price for each of a multitude of different

49. The denial of clearance in *Re Application of Victorian Automobile Chamber of Commerce and Australian Automobile Chamber of Commerce* (1976) A.T.P.R. (Com.) 15,695 indicates clearly enough that the Commission would find some lessening of competition.
50. It is, with respect, quite inappropriate to assume without evidence that any restriction on price competition in the repairer-insurer market will have a flow over effect on premium competition between insurers, compare *Re Application of Victorian Automobile Chamber of Commerce and Australian Automobile Chamber of Commerce* (1976) A.T.P.R. (Com.) 16, 579, at para. 2(ii).
51. Compare the Swanson Committee's reasons for permitting authorization of price fixing agreements between a number of competitive buyers and a number of competitive sellers. Report of the Trade Practices Review Committee, 1976, Australian Government Publishing Service, at para. 4.65.
52. *Re Application of Pharmacy Guild of Australia* (1977) A.T.P.R. (Com.) 16, 910, at para. 25.
53. *Re Application of Betta Stores Ltd.* (1977) A.T.P.R. (Com.) 16, 927, at paras. 16 and 17.
54. *Re Application of Pharmacy Guild of Australia* (1977) A.T.P.R. (Com.) 16, 910, at para. 16.
55. (1978) A.T.P.R. (Com.) 16, 989.
56. The Association had an annual membership turnover of 40%.
57. The maximum price that members could get was fettered by the availability of their range at the chains and supermarkets during business hours.
58. *Statement of General Principles* (1978) A.T.P.R. (Com.) 16, 989-9, at para. 2.

items.[59] The price guide gave no costing information. It went straight to the bottom line price.[60] That no doubt explains the association's omission to call evidence to show that the circulation of standardized costing information would, or could, contribute to the efficiency of individual members with actual costs (e.g. rent) which were, presumably for no evidence was led, quite different. It does not explain the Association's omission to lead evidence of the use which members made of the guide, for the essence of the Association's case was the claim that the price guide contributed to the viability and efficiency of members' businesses by sparing hundreds of (often inexperienced) small shopkeepers the task of making similar costing calculations for a multitude of different lines.[61] The Commission's staff made independent enquiries which satisfied the Commission that the price guide was used as a check on price information available from other sources, mainly manufacturers and wholesalers recommended prices.[62] That finding took the Association's application beyond the reach of earlier decisions confining authorization to the circulation of price guides which were used[63] but which did not fix[64] or stabilize[65] prices. It fell far short of a finding of dependency.[66]

Authorization was granted. The dissenting opinion of Dr. Pengilley is persuasive but it is the final two sentences which are crucial: "I accept that my views do not form those of the majority of the Commission. The views which I will apply in future cases are those of the majority of the Commission where I feel the criteria in the present case reasonably apply."[67] *Re Application of Retail Confectionery and Mixed Business Association (Vic.)*[68] has not become a distinguished case in the less favourable sense. It has been treated as a basis for the grant of authorization to issue recommended price lists to trade associations whose membership includes larger in-

59. The items accounted for 60% of the average member's turnover. If, as was not the case, the material circulated had been genuine costing information used as such, one might have distinguished *Re Hardware Retailers of Western Australia* (1976) A.T.P.R. (Com.) 16, 536 (authorization denied) where, because the price list covered less than 10% of the member retailer's turnover, less time would have been saved by using the guide.
60. And was aimed at providing a mixed business with a weekly turnover of $2500 with a 21% to 22% gross margin.
61. (1978) A.T.P.R. (Com.) 16, 989, at para. 6.
62. Ibid., at para. 8.
63. *Re Application of Printing and Allied Trades Employers Federation of Australia* (1978) A.T.P.R. (Com.) 16, 991, at paras. 11 to 13.
64. If the members were competitors, s. 88(3)(b) would have been inapplicable and s. 88(2) would have barred authorization. If the members were not competitors, it would have been impossible to find public benefit in the scheme; *Re Application of Footwear Association of South Australia* (1976) A.T.P.R. (Com.) 16, 508, at para. 3(a).
65. A barrier to a finding of public benefit, see *Re Application of Associated Country Sawmillers of New South Wales* (1976) A.T.P.R. (Com.) 16, 517, at para. E(b).
66. See text to which footnotes 53 and 54 refer.
67. (1978) A.T.P.R. (Com.) 16, 989, at para. 8.
68. (1978) A.T.P.R. (Com.) 16, 989.

dependent supermarkets[69] and even Woolworths and Coles.[70] The argument that those shopkeepers who used the guide were in all material respects in the same position as the Victorian mixed business and milk bar proprietors has prevailed[71] over the previously accepted principle that price recommending schemes could not be justified on the basis of public benefit arguments attaching to only some recipients of the list.[72] Indeed, authorization has been granted to trade associations whose members were engaged in aggressive price competition with the chains[73] and were not, therefore, in the same position as the Victorian shopkeepers.

The most cursory perusal of the submissions gathered together at Volume 2[74] of the Trade Practices Consultative Committee's report to the Minister for Business and Consumer Affairs on the question of Small Business and the Trade Practices Act indicates clearly enough the hostility which associations of small businessmen now direct towards the Trade Practices Commission. The solution to the deterioration in the relationship is more difficult to find. If indeed misconception is a contributing factor,[75] adoption of the Trade Practices Consultative Committee's information and advice recommendations[76] will ameliorate the difficulties. If, however, as the Committee reported to the Minister " . . . the basic problem is one of small business uncertainty as to the effect of the provisions of the Act and particularly as to what will substantially lessen competition in a market . . . ,[77] the appropriate course is to reintroduce

69. *Re Application of Queensland Retail Traders and Shopkeepers Association* (1978) A.T.P.R. (Com.) 17, 100. Only 58% of the members were small shops as defined by the *Factories and Shops Act* 1960-1975 (Qld.), i.e. two proprietors and one full-time employee or less, ibid., at para. 4.
70. *Re Application of Retail Grocers and Shopkeepers' Association of Western Australia Inc.* (1979) A.T.P.R. (Com.) 15, 592, at para. 2.
71. *Re Application of Queensland Retail Traders and Shopkeepers Association* (1978) A.T.P.R. (Com.) 17, 100, at para. 7; *Re Application of Retail Grocers and Shopkeepers' Association of Western Australia Inc.* (1979) A.T.P.R. (Com.) 15, 592.
72. *Re Application of T.F. Danaher Holdings Pty. Ltd.* (1975) A.T.P.R. (Com.) 8, 855, at para. 5; *Re Application of Associated Country Sawmillers of New South Wales* (1976) A.T.P.R. (Com.) 16, 517, at para. E(g)(2).
73. *Re Application of Queensland Grocery Groups* (1978) A.T.P.R. (Com.) 17, 089. See the description of the Cut Price Stores Group at para. 18.
74. December 1979, Australian Government Publishing Service, Canberra. At p. 225, para. 2.7, the Council of Small Business Organizations is recorded as saying "[t]here appears to be a lack of deep understanding of the problems and needs of small business within the Commission . . .". The Australian Automobile Chamber of Commerce asserted (at p. 15, para. 1.4.2) ". . . the Trade Practices Commission does not as yet appear to give sufficient weight to aspects of public interest other than short term price competition". The Victorian Automobile Chamber of Commerce was more truculent observing (p. 667, paras. 4.20 to 4.22) that the Commission's administration and interpretation of the Act had thwarted the 1977 amendments relating to price recommendations. The Pharmacy Guild of Australia described the Commission's attitude to price cuts as demonstrating "how certain interpretations of the Act can cause direct harm to small business in the market place, simply because they happen to be small" (p. 412, para. 2.5).
75. Compare Report of the Trade Practices Consultative Committee on Small Business and the Trade Practices Act, Volume One, December, 1979, Australian Government Publishing Service, at paras. 12.6 to 12.7.
76. Ibid., at paras. 12.25 to 12.29.
77. Op. cit., at para. 12.11.

a clearance procedure. The Committee, of course, recommended against that solution.[78] The Committee's reasoning[79] is not compelling. The definitional difficulties in limiting clearance to small business agreements are real. There are problems in denying the benefit of the clearance to businesses which are not parties to the agreement. But if the agreement is found not to be relevantly anti-competitive, of what consequence is any flow-on benefit to large businesses!

It is not put that clearance is a panacea. Clearly it is not. Many price guidance schemes, particularly those relating to services, do have an anti-competitive effect and may be saved only if public benefits are weighed against the diminution in competition. The problem which most clearly emerges from the cases is the difficulty of persuading the Commission to recognize an alleged public benefit. The Consultative Committee recommended against particularizing matters to which the Commission should have regard in assessing public benefit in small business adjudication matters because such a list would either be too narrow or so long as to add nothing to the matters embraced in the present test of "public benefit".[80] Why should not the present test be retained but defined to include particular matters? Why should there not be power to add to a narrow list by regulation? The Commonwealth has already intervened in one case to persuade the Commission that there was a countervailing public benefit where the Commission could see no public benefit at all![81] Another option, canvassed in the submission of the Council of Small Business Organizations of Australia in its submission to the Consultative Committee,[82] is to entrust competitive assessment to the Trade Practices Commission and public benefit assessment to some other tribunal. If the Committee's conclusion[83] that in many cases small business activity will not have or be likely to have the effect of substantially lessening competition be correct, the exercise of pooling the results of the two assessments should not be unduly arduous. A further option is for the Trade Practices Commission to display the breadth of vision called for by the concept of "public benefit" and meet the challenge of weighing qualitatively different factors.

78. Op. cit., at paras. 12.17 to 12.24.
79. Op. cit., at paras. 12.17 to 12.24.
80. Op. cit., at paras. 12.13 to 12.16.
81. *Re Application of John Fairfax and Sons Ltd.* (1980) A.T.P.R. (Com.) 16, 416, at paras. 8, 10, 11, and 28 to 37.
82. Volume Two, op. cit., at p. 225, para. 7.4.
83. Volume One, op. cit., at paras. 12.4 and 12.8.