

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

Document Lodged: Confidential Submissions

File Number: ACT 4 of 2021

File Title: APPLICATION FOR REVIEW OF AUTHORISATION
AA1000542 DETERMINATION MADE ON 21 SEPTEMBER 2021

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



A handwritten signature in blue ink, consisting of a stylized 'A' followed by a 'U'.

REGISTRAR

Dated: 1/03/2022 2:34 PM

Important information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)



IN THE AUSTRALIAN COMPETITION TRIBUNAL

Files: ACT 4 of 2021 and ACT 5 of 2021
Re: Application for Review of ACCC Authorisation AA1000542, Determination made on 21 September 2021
Applicants: National Association of Practising Psychiatrists and Rehabilitation Medicine Society of Australia and New Zealand

ACCC'S SUBMISSION CONCERNING THE TRIBUNAL'S JURISDICTION

A INTRODUCTION

1. The ACCC received 498 separate submissions before determining to grant the authorisation the subject of this proceeding (**Determination**). Regrettably, it inadvertently overlooked 51 of those submissions when it made the Determination (**unprocessed submissions**).
2. This submission responds to the Tribunal's request for a short note on whether it has jurisdiction to continue this proceeding in the circumstances. Given the nature of the request, we have sought to identify, briefly, the matters of substance that arise. Each of the points below could be amplified, and the ACCC can expeditiously do so should the Tribunal so request.
3. In summary, whether or not the Determination was, as a matter of law, validly made, does not affect this Tribunal's jurisdiction. As the Full Federal Court has observed, the validity of such determinations is to be resolved by a court, not an administrative body such as this Tribunal. For the purposes of this Tribunal, it is sufficient that the Determination purports to have been made in accordance with the ACCC's powers under the *Competition and Consumer*

Act 2010 (Cth (CCA)).¹

4. Notwithstanding this, failure to consider some submissions or invite their authors to a pre-determination conference conducted pursuant to ss 90A(6) to (10) of the CCA does not render an authorisation determination by the ACCC invalid. Further, and in any event, the ACCC was not required by s 90(6A) to consider 50 of the unprocessed submissions and, relatedly, was not required to invite the authors of those submissions to request or attend a pre-determination conference, although its usual practice in these circumstances is to do so.

B RELEVANT PROVISIONS OF THE CCA

5. Section 90(6)(a) of the CCA provides that, before making an authorisation determination, the ACCC may give any persons who appear to the ACCC to be interested a written notice inviting submissions in respect of the application for authorisation within a specified period.
6. Section 90(6A) provides that, in making a determination in respect of an authorisation application, the ACCC must take into account, *inter alia*, any submissions or information it receives under s 90(6)(a) within the period specified in the notice mentioned in that paragraph.
7. Section 90(5) provides that, before making determination in respect of an application for authorisation (other than a merger authorisation), the ACCC shall apply the requirements of s 90A.
8. Section 90A provides, *inter alia*, that, before making a determination, the ACCC shall:
 - (a) prepare a draft determination: s 90A(1);
 - (b) by notice in writing sent to the applicant and to each other interested person, invite the applicant or other interested person to notify the ACCC, within 14 days after a date fixed by the ACCC, not being earlier than the day on which the notice is sent, whether the applicant or other person wishes the ACCC to hold a conference in relation to the draft determination: s 90A(2); and

¹ *Kennedy v Administrative Appeals Tribunal* (2008) 168 FCR 566; [2008] FCAFC 124, at [22], [23] (French, Tamberlin and Mansfield JJ). See also *Kim v Minister for Immigration and Citizenship* (2008) 167 FCR 578; [2008] FCAFC 73, at [21]-[29] (Tamberlin J, with whom Bensanko J agreed); *Gashi v Federal Commissioner of Taxation* (2013) 209 FCR 301; [2013] FCAFC 30, at [43] (Bennett, Edmonds and Gordon JJ).

(c) if it receives such a notice, appoint a date, time and place for the holding of such a conference, being not later than 30 days after the expiration of the 14 day period referred to in s 90A(2): s 90A(6).

9. It is a determination made pursuant to these provisions that comes before this Tribunal for review pursuant to s 102(1) of the CCA.

C FACTS

10. On 12 January 2021, the ACCC invited persons that appeared to be interested, to make submissions to it by 5 February 2021, pursuant to s 90(6)(a) of the CCA. At the time, the ACCC was aware of the author of only one of the unprocessed submissions. That entity was invited to make a submission. The ACCC was not aware of, and so did not directly invite submissions from, the authors of any of the other unprocessed submissions. In accordance with its usual process, the ACCC also published the application on its website, together with a generic letter inviting submissions from interested parties.

11. On 21 May 2021, the ACCC published its draft determination pursuant to s 90A(1) of the CCA. On the same day, pursuant to s 90A(2), the ACCC invited interested parties to notify it, by 11 June 2021, whether they wished the ACCC to hold a conference in relation to the draft determination.

12. At that time, the ACCC was still only aware of the author of one of the unprocessed submissions. That entity was invited to indicate if it wished the ACCC to hold a pre-determination conference, and was subsequently invited to attend the pre-determination conference which was requested by other parties. The authors of the other unprocessed submissions were not invited to the conference (although one of the authors attended the pre-determination conference on behalf of another invited organisation). In accordance with its usual process, the ACCC also published the invitation to attend the pre-determination conference on its website.

13. The pre-determination conference was held on 8 July 2021.

14. The ACCC received 50 of the unprocessed submissions in the period between 28 May 2021 and 28 July 2021. All of those submissions were received after the ACCC issued its invitations to attend the pre-determination conference. Two were received after the pre-determination

conference was held. The ACCC was not aware that the authors of the submissions were interested persons until it received their submissions.

15. Of the 51 unprocessed submissions, 48 are one or two pages long. Fifty address only matters that were addressed in other submissions which the ACCC received and considered prior to making the Determination, namely: (a) concerns about the introduction of US-style managed care; and (b) restricting patients' choice of healthcare provider and/or a potential lessening of competition. **Annexed** to these submissions is a spreadsheet in which the ACCC has identified the matters the subject of the unprocessed submissions, and other submissions the ACCC received which identify and address the same matters.
16. The remaining unprocessed submission raised various matters which were dealt with by other submissions, and two that were not otherwise raised in submissions before the ACCC, being submissions that:
 - (a) "It [the conduct proposed to be authorised] interferes with the course of Justice in the Workers Compensation / Motor Accidents Schemes"; and
 - (b) "[Honeysuckle Health] proposes to manage a baby's or child's or adult's or disabled person's or vulnerable person's health care (treatment and surgeon) without any accountability to Health Care Complaints processes or recourse to a course of action in Medical negligence".

D VALIDITY OF THE DETERMINATION

17. In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, McHugh, Gummow, Kirby and Hayne JJ, said this at [91]:

An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.

18. There are, in the ACCC's submission, four matters which indicate that the legislature did not intend that a failure fully to comply with ss 90(6A), 90(5) and 90A(2) would invalidate an authorisation determination.

19. *First*, the manifest purpose of ss 90(6A), 90(5) and 90A(2) of the CCA is to ensure that relevant information is taken into account by the ACCC, and interested parties have the opportunity to be heard before determinations are made. That purpose can be achieved without treating failure to comply with those provisions as invalidating a determination. It can be achieved because this Tribunal conducts a re-hearing of the matter: s 101(2). The Tribunal can take into account all of the information that was provided to the ACCC: s 102(7). And it can permit interested parties to make submissions (s 102(1)), or to intervene: s 109(2). Any point that was sought to be made by any interested party to the ACCC can be made to, and considered by, this Tribunal.
20. That is significant, because failure to comply with a condition regulating a statutory requirement will not ordinarily result in invalidity of an act unless there is no other way to achieve the purpose of that condition.²
21. *Secondly*, if any failure to comply with ss 90(6A), 90(5) and 90A(2) were to invalidate a grant of authorisation, that could result in harm to competition and the Australian economy.
22. When the ACCC authorises conduct, it is, in an appropriate case, authorised to attach conditions to the authorisation: s 88(3). Those conditions can ensure that the conduct does not cause harm to competition and the Australian economy, and/or that it results in a net public benefit. If failure to comply fully with ss 90(6A), 90(5) and/or 90A(2) were to invalidate a grant of authorisation, the conduct could become automatically authorised, absent any of those conditions. That follows from the fact that, if the ACCC does not determine an application for authorisation within a prescribed period, it is taken to have granted the application (s 90(10)) and that period could have (and in this case has) expired by the time any failure fully to comply with ss 90(6A), 90(5) and/or 90A(2) is identified.³
23. As a result, if the determination is invalid, the present application would be deemed to have been granted, authorising the conduct for a period of 10 years without the conditions imposed by the ACCC. As this demonstrates, if a failure to comply fully with ss 90(6A), 90(5) and/or 90A(2) were to invalidate a determination, it would have the potential to harm competition, and decrease the welfare of Australians, contrary to the object of the CCA: s 2.

² See *Smith v Wyong Shire Council* (2003) 132 LGERA 148; [2003] NSWCA 322, at [40]-[42] (Spigelman CJ).

³ The period is six months beginning on the day the ACCC receives the application, subject to some exceptions: s 90(10A).

24. *Thirdly*, there could be considerable public inconvenience if any failure fully to comply with ss 90(6A), 90(5) and/or 90A(2) were to invalidate an ACCC authorisation determination. There would be uncertainty and inconvenience for the parties that sought the authorisation. They may have begun conducting themselves, at significant expense, on the basis of the determination (and any conditions attached to it). Further, a proceeding to review the determination (such as this proceeding) may have been commenced. The Tribunal's and parties' time and cost spent on that proceeding would be wasted. And, as noted in paragraph 23, an authorisation on different terms may be deemed pursuant to s 90(10), such as one not including conditions and other protections within the ACCC's original determination dated 21 September 2021.
25. As McHugh, Gummow, Kirby and Hayne JJ said in *Project Blue Sky*, at [97], "[c]ourts have always accepted that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act."
26. *Fourthly*, for a determination to be invalidated by failure to comply with a relevant condition, the failure must be material.⁴ A failure is material only if compliance with the condition could, realistically, have caused the determination to be different.⁵ The burden of proving materiality is on the party alleging invalidity.⁶
27. At present at least, it appears unlikely that this burden could be discharged in this respect in relation to s 90(6A). As noted above, almost all of the unprocessed submissions are one or two pages long; 50 were in substance the same as submissions which the ACCC received and considered; and the remaining one submission only raised two new matters, neither of which was explained, or supported by evidence or any of the other 447 submissions the ACCC received. There is, at present, no reason to conclude that either matter could have led the outcome of the Determination to be different and therefore that any failure by the ACCC fully to comply with ss 90(6A) was material.

⁴ *Hossain v Minister for Immigration and Border Protection & Anor* (2018) 264 CLR 123, at [29] (Kiefel CJ, Gageler and Keane JJ).

⁵ *Minister for Immigration v SZMTA* (2019) 264 CLR 421, at [45] (Bell, Gageler and Keane JJ).

⁶ *Minister for Immigration v SZMTA* (2019) 264 CLR 421, at [46] (Bell, Gageler and Keane JJ).

28. Nor was any failure to comply with ss 90(5) and/or 90A(2) material. That is because, on its website, the ACCC provided details of the pre-determination conference and stated that persons who wish to attend them are able to do so. Authors of the unprocessed submissions were therefore able to learn of and attend the pre-determination conference held by the ACCC in relation to this matter.

E COMPLIANCE WITH SS 90(6A), 90(5) AND 90A(2)

29. Subject to the context of its use, where “shall” or “must” entrusts a function on a person, each *prima facie* imposes an obligation to exercise that function.⁷ While that proposition admits of exceptions,⁸ properly construed, each of ss 90(6A), 90(5) and 90A(2) imposes an obligation, as opposed to a power coupled with a discretion, on the ACCC. Nevertheless, save in respect of one matter, the ACCC complied with those obligations.

Sections 90(6) and 90(6A)

30. As noted above, s 90(6) provides that the ACCC may invite persons, who appear to be interested, to provide submissions within a specified period, and s 90(6A) provides that, in making a determination, the ACCC must take into account submissions or information it “received under” s 90(6)(a). For a submission to be “received under” s 90(6)(a), the ACCC must have invited the submission. The ACCC did not invite 50 of the 51 unprocessed submissions. Accordingly, failure to consider those submissions does not constitute a failure to comply with s 90(6A), having regard to its terms. The only potential failure to comply with s 90(6A) is in respect of the one unprocessed submission that the ACCC did invite, being the submission referred to at [10] above.

Sections 90(5) and 90A(2)

31. As already noted, s 90A(2) of the CCA requires the ACCC to invite the applicant and interested persons to notify it whether they wish to hold a conference in relation to the ACCC’s draft determination.
32. The ACCC invited the author of one of the unprocessed submissions to indicate if it wished the ACCC to hold a pre-determination conference, and subsequently to attend the pre-

⁷ *Grunwick Processing Laboratories Ltd v Advisory, Conciliation and Arbitration Service* [1978] AC 655, at 690 (Lord Diplock) and 698 (Lord Salmon).

⁸ D C Pearce, *Statutory Interpretation in Australian* (9th edition, 2019) at [11.16], pp. 398-399.

determination conference pursuant to s 90A(2). It did not directly invite the authors of the remaining 50 unprocessed submissions: see also [12] above. However, it was not required to do so. Section 90A(2) provides for the ACCC to: (a) “fix a date” for the purpose of its invitations, and then (b) invite interested parties to advise the ACCC whether they wish it to hold a conference in relation to the draft determination within 14 days of that date. The pre-determination conference must then be held within a further 30 days: s 90(6). The statutory scheme accordingly proceeds on the premise that the ACCC will issue all invitations to attend a pre-determination conference at or around the same time, to persons it understands to be interested parties at that time. It is not required by s 90A(2) to invite to the conference persons that it later learns may be interested parties.

33. Of course, as part of its usual process, the ACCC:
- a. actively seeks submissions from the public via its website, and reviews and considers all submissions received;
 - b. invites to the pre-determination conference all of the authors of submissions submitted before the conference is held, and after invitations are issued; and
 - c. publishes details of the pre-determination conference on its website and invites anyone who is interested to attend.
34. The fact that these authors and submissions were overlooked in this instance is highly regrettable and exceptional. But it does not constitute a failure to comply with the relevant statutory provisions (ss 90(5), 90(6), s 90(6A) and 90(A)).

Date: 16 February 2022

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