



Australian
Competition &
Consumer
Commission

Guide to Authorisation

Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

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Disclaimer

This publication has been updated to refer to the *Competition and Consumer Act 2010* which replaces the *Trade Practices Act 1974* on 1 January 2011. For more information on the Australian Consumer Law changes see www.consumerlaw.gov.au

The information contained in this publication is not legal advice and should not be relied on as such. All care has been taken in its preparation but readers should note that it is intended to provide a general understanding of the subject matter only. Please also note that it reflects the law and legislation as it stands at the date of publication.

Businesses should consider obtaining their own professional legal advice. Businesses intending to lodge an application for authorisation are encouraged to contact the ACCC.

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Foreword

A key objective of the *Competition and Consumer Act 2010* is to prevent anti-competitive conduct to encourage competition and efficiency in business and result in a greater choice for consumers in price, quality and service.

However, in certain circumstances the Australian Competition and Consumer Commission (ACCC) can grant immunity from legal action for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply for what is known as an 'authorisation'.

Broadly, the ACCC may grant an authorisation when it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a comprehensive public consultation process and issues a draft determination before making a decision to grant or deny authorisation.

The ACCC has prepared this guide to help people better understand the approach it takes when considering authorisation matters. The guide is designed to help applicants prepare applications for authorisation and for interested parties to better understand and participate in the authorisation process.

The ACCC is committed to assessing applications for authorisation promptly, consistently and transparently so that Australians can benefit from an effective and efficient authorisation process.

This guide replaces the 1995 *ACCC guide to authorisations and notifications* and reflects a natural evolution in the ACCC's approach, based on its experience and determinations of the Australian Competition Tribunal.

Contents

Foreword	i
1. Introduction	1
What is authorisation?	1
The Australian Competition and Consumer Commission	1
2. When to apply for authorisation	3
What can the ACCC authorise?	3
3. How to apply for authorisation	7
Before lodging an application—discussions with the ACCC	7
Lodging an application	7
Supporting submission	13
Confidential information	13
How to lodge an application for authorisation	13
Withdrawing applications	14
4. The authorisation process	15
Overview	15
Transparency of the authorisation process	16
Six-month time limit	16
Indicative timetable for authorisation consideration	17
Steps in the authorisation process	17
Public register	21
5. When will the ACCC grant authorisation?	25
The tests	25
The concepts of public benefit and public detriment	26
Assessing authorisation applications	30
The tests for authorisation	41
6. Interim authorisation	43
What is an interim authorisation?	43
When will the ACCC grant interim authorisation?	43
Applying for interim authorisation	45
Process for assessing applications for interim authorisation	45
Implications of interim authorisation decisions for the substantive authorisation application	45
What are the powers of the Australian Competition Tribunal?	46

7.	Amending, revoking and substituting authorisations	47
	Minor variation	47
	Revocation	49
	Revocation and substitution of a new authorisation	51
	Information gathering	53
8.	When authorisations expire	55
9.	Reviewing ACCC authorisation decisions	57
	Australian Competition Tribunal	57
	The role of the ACCC in tribunal proceedings	64
	The Federal Court of Australia	65
	Further information	67
	ACCC contacts	69

1. Introduction

What is authorisation?

- 1.1 Authorisation is a process under which the Australian Competition and Consumer Commission (ACCC), in response to an application, can grant immunity¹ on public benefit grounds against action under the competition provisions of the *Competition and Consumer Act 2010* (the Act).
- 1.2 Authorisation may be sought in relation to any of the competition prohibitions under Part IV of the Act except for misuse of market power. A description of the types of conduct that can be authorised is set out in chapter 2.
- 1.3 Generally, the ACCC can grant immunity from the application of the competition provisions in the Act if it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.4 The process for when and how to apply for authorisation, along with a description of the authorisation process and when the ACCC will grant authorisation, is set out in the following chapters.
- 1.5 In addition to authorisation, immunity for exclusive dealing conduct and collective bargaining arrangements can be achieved by lodging notifications with the ACCC. The ACCC has separate guides for exclusive dealing and collective bargaining notifications which are available online at www.accc.gov.au.

The Australian Competition and Consumer Commission

- 1.6 The ACCC is an independent statutory authority set up by the Australian Government in 1995 to protect the rights of consumers and business. In addition to enforcing the Competition and Consumer Act and other laws, the ACCC encourages vigorous competition in the marketplace, regulates markets where competition is less effective, and educates and informs consumers and business about the laws it administers.
- 1.7 The Act helps to create an environment of certainty for all businesses by preventing any business, large or small, from gaining an unfair advantage over its competitors by engaging in any misleading or anti-competitive behaviour.
- 1.8 The ACCC has an important role in promoting fair trade to bring about greater competition and informed markets through the administration of the Act.
- 1.9 To undertake its role, the ACCC is structured into various divisions and branches, one of which is the Adjudication Branch.

1 In this guide, the term immunity is used to describe the effect of having an authorisation in force—that is, that the relevant provisions of Part IV of the Act are not contravened by the conduct the subject of the authorisation.

Adjudication Branch

- 1.10 The Adjudication Branch considers applications for authorisation, reviews authorisations previously granted and evaluates notifications of exclusive dealing (including third line forcing conduct) and collective bargaining arrangements.
- 1.11 The work of the branch also includes assessing the rules for the use of certification trade marks under the *Trade Marks Act 1995* and the receipt of particulars of export agreements under s. 51(2)(g) of the Act.
- 1.12 The branch has an educative role, informing potential applicants, interested parties, and the general community about the ACCC's adjudication processes. It issues guidelines, holds seminars, gives speeches, and meets various groups to increase understanding of the ACCC's adjudication processes for authorisations and notifications.
- 1.13 The branch has extensive experience in conducting public benefit analysis. It has developed considerable expertise in specific industries like finance and banking, insurance, aviation, the professions, the health sector, resources and the rural sector.

Mergers and energy matters

- 1.14 Authorisation applications for mergers are considered by the Australian Competition Tribunal (the tribunal).
- 1.15 Applications for authorisation relating to the electricity and gas industries will often be considered by the Australian Energy Regulator. The AER is an independent national body responsible for economic regulation in Australian energy markets and compliance with the electricity and gas rules at a national level. It has been established under the Act as a constituent part of the ACCC. For energy-related (gas and electricity) authorisations, the AER provides advice to the ACCC, which is the decision-making body. As such, applicants and interested parties may deal with ACCC staff from the AER. Further information about the AER is available from its website (www.aer.gov.au).

The commission

- 1.16 Decisions by the ACCC (e.g. to grant authorisations) are made by the commission. The commission comprises a chairperson, two deputy chairpersons and other full-time members (usually referred to as commissioners) appointed by the Governor-General.

2. When to apply for authorisation

- 2.1 Generally, persons may apply for authorisation when the conduct they propose to engage in might constitute conduct prohibited by the competition provisions of the *Competition and Consumer Act 2010*. They may also apply for authorisation for conduct they are already engaging in. However, an authorisation can only provide protection from court action from the date it commences—the Australian Competition and Consumer Commission (ACCC) cannot authorise conduct retrospectively (see paragraph 3.28).

What can the ACCC authorise?

- 2.2 The ACCC may, if the relevant test is met (see chapter 5), authorise conduct that might constitute the making and/or giving effect to:
- a cartel provision² (including agreement as to price³)
 - an anti-competitive agreement⁴
 - a secondary boycott⁵
 - exclusive dealing⁶
 - resale price maintenance⁷
 - an acquisition that occurs outside Australia.⁸
- 2.3 The ACCC is not able to authorise conduct that might constitute a misuse of market power.⁹ However, in some cases, obtaining an authorisation for conduct that might breach one of the prohibitions listed above also protects the parties from court action for misusing market power.¹⁰
- 2.4 Applying a public benefit test similar to the one applied by the ACCC, the Australian Competition Tribunal may authorise a merger that might substantially lessen competition.

2 Section 88 (1A). Relevantly, a cartel provision relates to price fixing, restricting outputs in the production and supply chain, allocating customers, suppliers or territories, or bid rigging.

3 In this guide, the term price agreement is used to describe a contract, arrangement or understanding between competitors that contains a provision that, directly or indirectly, has the purpose or effect of fixing, controlling or maintaining prices.

4 Section 88(1). The ACCC may also authorise covenants which substantially lessen competition—see s. 88(5). Anti-competitive covenants are prohibited by ss. 45B and 45C. In this guide, the term agreement is used to describe a contract, arrangement or understanding consistent with the meanings given to them under the Act.

5 Sections 88(7) and 88(7A).

6 Section 88(8).

7 Section 88(8A).

8 Section 88(9). Not discussed further in this guide.

9 Section 46.

10 Section 46(6). In particular, if conduct that might constitute an anti-competitive agreement, exclusive dealing, a merger that substantially lessens competition or a covenant affecting competition is authorised, that conduct is also protected from court action for misusing market power.

- 2.5 The ACCC advises parties to obtain private legal advice on whether conduct they propose to engage in might breach the Act (and therefore whether they should consider applying for authorisation). The ACCC cannot provide legal advice, although it is able to provide general guidance on the issues.
- 2.6 The short descriptions below are intended to provide readers with a brief outline of the various types of conduct prohibited by the competition provisions of the Competition and Consumer Act. If readers need more than a general understanding, they should consult the Act.

Anti-competitive agreements

- 2.7 The Act prohibits businesses¹¹ from making or giving effect to contracts, arrangements and understandings that:
- contain cartel provisions¹²—including agreements between competitors that have the purpose or effect of fixing, controlling or maintaining the price of goods or services
 - substantially lessen competition¹³
 - contain exclusionary provisions¹⁴—sometimes referred to as ‘primary boycotts’, exclusionary provisions are agreements between competitors which have the purpose of excluding or limiting dealings with particular suppliers or customers.
- 2.8 The ACCC is often asked to authorise collective bargaining arrangements. Collective bargaining refers to an arrangement under which two or more competitors in an industry come together to negotiate terms and conditions (which can include price) with a supplier or a customer.
- 2.9 An ACCC guide, *Streamlined collective bargaining*, describes an expedited process for consideration of collective bargaining authorisations. Another ACCC publication, *Guide to collective bargaining notifications*, describes the notification process by which immunity from legal action for collective bargaining arrangements may be granted on the grounds of public benefit. Both publications are available on the ACCC website (www.accc.gov.au).

Secondary boycotts

- 2.10 A secondary boycott involves action by one person in concert with a second person that hinders or prevents a third person from engaging in certain conduct, including:
- supplying goods or services to, or acquiring goods and services from, a fourth person, where the purpose and likely effect of the action is to cause substantial damage to the business of the fourth person¹⁵
 - engaging in trade and commerce involving the movement of goods between Australia and places outside Australia.¹⁶

11 The Act generally applies to corporations. However, as discussed at paragraph 3.13, under the Competition Code all unincorporated entities and individuals are subject to the prohibitions on anti-competitive conduct in the Act.

12 Section 44ZZRD.

13 Sections 45(2)(a)(ii) and 45(2)(b)(ii).

14 Sections 45(2)(a)(i) and 45(2)(b)(i).

15 Section 45D.

16 Section 45DB.

Exclusive dealing

- 2.11 Exclusive dealing occurs when a person trading with another imposes restrictions on the other's freedom to choose with whom, or in what or where they deal.
- 2.12 There are several forms of exclusive dealing. For example, the Act prohibits:
- supplying goods or services on condition that the purchaser will not acquire goods or services from a competitor of the supplier¹⁷
 - supplying goods or services on condition that the purchaser acquire goods or services from a third party—this is often known as 'third line forcing'.¹⁸
- 2.13 Other examples of exclusive dealing conduct are described in detail in the ACCC's *Guide to exclusive dealing notifications* publication.
- 2.14 Other than third line forcing, exclusive dealing is prohibited only when it substantially lessens competition.¹⁹

Resale price maintenance

- 2.15 Resale price maintenance occurs when suppliers (e.g. manufacturers or wholesalers) specify a minimum price below which goods or services may not be resold or advertised for resale. This practice is prohibited regardless of its effect on competition.²⁰

Who decides if conduct might breach the Act?

- 2.16 The Act provides that the ACCC may authorise conduct that **might** breach a prohibition on anti-competitive conduct. The ACCC applies the approach of the Australian Competition Tribunal, which is that:
- ... where an applicant believes on what appeared to him to be good grounds, that his conduct (if not authorised) may be in breach of the Act and he applies for authorisation accordingly, the Tribunal's duty, on an application for review, is to decide the application on the public benefit grounds spelt out in the Act and that it is not one of those grounds that the application might appear to be unnecessary.²¹
- 2.17 However, the Federal Court of Australia has added that the test:
- ... is not purely subjective, but has an objective element. As a matter of basic principle, the power conferred on the ACCC to grant an authorisation could not have been intended to be used in circumstances where that body concluded that there was clearly no risk of any contravention.²²
- 2.18 Therefore, unless it is clear that there is no risk that conduct will breach the Act, the ACCC will consider the application for authorisation.

17 Section 47(2)(d).

18 Sections 47(6), 47(7), 47(8)(c) and 47(9)(d).

19 Section 47.

20 Section 48. See also ss. 96 to 100.

21 *G and M Stephens Cartage Contractors Pty Ltd* (1977), ATPR 40-042 at 17,478. See also *Australasian Performing Right Association* (1999), ATPR 41-701 at 42,937; and *Queensland Co-operative Milling Association Ltd* (1976), ATPR 40-012 at 17,241.

22 *Jones v Australian Competition and Consumer Commission* (2002), FCA 1054 at paragraph 50. The Full Court of the Federal Court of Australia in *Jones* reproduced this passage without suggesting it was wrong (2003), ATPR 41-950 at 47,430-31.

the 'information' and 'communication' fields. The 'information' field is defined as:

...the study of the processes of information production, distribution, access, use and evaluation, and the study of the social, cultural, economic and political contexts in which these processes take place. (p. 10)

The 'communication' field is defined as:

...the study of the processes of communication production, distribution, access, use and evaluation, and the study of the social, cultural, economic and political contexts in which these processes take place. (p. 10)

The 'information science' field is defined as:

...the study of the processes of information production, distribution, access, use and evaluation, and the study of the social, cultural, economic and political contexts in which these processes take place. (p. 10)

The 'information studies' field is defined as:

...the study of the processes of information production, distribution, access, use and evaluation, and the study of the social, cultural, economic and political contexts in which these processes take place. (p. 10)

The 'information technology' field is defined as:

...the study of the processes of information production, distribution, access, use and evaluation, and the study of the social, cultural, economic and political contexts in which these processes take place. (p. 10)

The 'information systems' field is defined as:

...the study of the processes of information production, distribution, access, use and evaluation, and the study of the social, cultural, economic and political contexts in which these processes take place. (p. 10)

The 'information management' field is defined as:

...the study of the processes of information production, distribution, access, use and evaluation, and the study of the social, cultural, economic and political contexts in which these processes take place. (p. 10)

The 'information policy' field is defined as:

...the study of the processes of information production, distribution, access, use and evaluation, and the study of the social, cultural, economic and political contexts in which these processes take place. (p. 10)

The 'information law' field is defined as:

...the study of the processes of information production, distribution, access, use and evaluation, and the study of the social, cultural, economic and political contexts in which these processes take place. (p. 10)

The 'information ethics' field is defined as:

...the study of the processes of information production, distribution, access, use and evaluation, and the study of the social, cultural, economic and political contexts in which these processes take place. (p. 10)

The 'information education' field is defined as:

3. How to apply for authorisation

3.1 Four key steps in applying for authorisation are:

- discussing the proposed application with the ACCC before lodging it
- lodging a valid application
- paying the required fee
- providing a comprehensive submission in support of the application.

Before lodging an application—discussions with the ACCC

- 3.2 The ACCC encourages applicants to discuss their applications with it before lodgment. In particular, applicants are encouraged to contact the Adjudication Branch or, where relevant, the Australian Energy Regulator (see ACCC contacts).
- 3.3 These discussions enable applicants to outline their proposals to the ACCC and to obtain further information about the authorisation process. Applicants can seek advice from ACCC staff if they are uncertain about aspects of the application form, what their supporting submissions should cover, or about the various steps in the ACCC process of assessing the application.
- 3.4 ACCC staff are not able to suggest arguments in support of an application. What they can do is explain in general terms the issues that supporting submissions should address (e.g. public benefit, public detriment, market definition and so on—see chapter 5). They can also point out where the ACCC would expect claims to be backed by evidence.

Lodging an application

Forms

- 3.5 The *Competition and Consumer Act 2010* requires that applications for authorisation be made in writing using the prescribed forms.²³
- 3.6 As discussed in chapter 2, the Act allows the ACCC to authorise conduct that might breach one of the prohibitions on anti-competitive conduct in the Act. There are different application forms for each prohibition. These are:
- Form A: exclusionary provisions and associated cartel provisions (often referred to as primary boycotts)
 - Form B: agreements affecting competition or incorporating related cartel provisions (including agreements as to price)
 - Form C: covenants affecting competition
 - Form D: secondary boycotts
 - Form DA: agreements affecting the supply or acquisition of goods or services

23 Section 89(1).

- Form E: exclusive dealing
- Form EA: resale price maintenance
- Form FA: application for minor variation
- Form FB: application for revocation
- Form FC: application for revocation and substitution.

3.7 The forms are similar. Generally, they require applicants to provide the following information:

- name and address of applicant
- short description of business, activity or occupation of applicant
- description of the conduct for which authorisation is sought
- public benefit claims
- description of the markets likely to be affected by the conduct for which authorisation is sought
- detriments to the public resulting or likely to result from the conduct for which the authorisation is sought
- reasons in support of application and facts relied upon
- identification/description of other parties that may be affected by the conduct.

3.8 Applicants must precisely describe the relevant conduct on the form. Alternatively, if the conduct is complex, it can be outlined on the application form, with a cross-reference to a more comprehensive description in the applicant's supporting submission. As the tribunal has stated:

... conduct must be capable of sufficiently precise description for the Tribunal to be able to apply the authorisation "test".²⁴

3.9 The application forms are set out in the Competition and Consumer Regulations and are available on the ACCC website (www.accc.gov.au).

Applying on behalf of other people

3.10 Someone may apply for authorisation on behalf of another person for conduct that the other person is to engage in. The Federal Court of Australia has stated that:

... although the expression "on behalf of" lacks precision, it requires a degree of formal connection, and of obligation, which, in general, precludes a party from acting on behalf of another when that party acts contrary to the express wishes of that other.

I accept that there are circumstances in which a person may be said to act on behalf of another without the consent of the other. For example, a person may act on behalf of another who lacks legal capacity. Similarly, it might be said that a person acts on behalf of another as an agent, where the doctrine of ostensible authority applies.²⁵

3.11 Consequently, the ACCC will usually expect persons applying on behalf of others to provide written evidence that the others consent to the application. Exceptions would include, for example, industry or professional associations applying on behalf of their members, when their members might be presumed to consent to the application. However, if members were to state to the ACCC that they did not consent to the application, the application would not be made on their behalf (although the Act provides other mechanisms to extend authorisation to these persons in certain circumstances—see paragraphs 3.33 and 3.39).

²⁴ *Re Tooth & Co Ltd* (1978), ATPR 40-065 at 18,200.

²⁵ *Jones v Australian Competition and Consumer Commission* (2002), FCA 1054 (27 August 2002) at paragraphs 56–57.

Applying under the Competition Code

- 3.12 Part IV of the Competition and Consumer Act generally applies to corporations.²⁶
- 3.13 However, each state has enacted competition code legislation essentially mirroring the Act. Consequently, all unincorporated entities as well as individuals are now subject to the prohibitions on anti-competitive conduct in the Act (outlined in chapter 2). They may also apply to the ACCC for authorisation to obtain immunity from these prohibitions.

Complex conduct

- 3.14 Complex conduct is conduct that has several, possibly interrelated, elements.
- 3.15 For example, industry codes of conduct might regulate quite different types of conduct by industry members. The code might therefore contain more than one breach of a particular prohibition in the Act. For example, the parts of a code regulating advertising and price setting might constitute separate agreements affecting competition.
- 3.16 Alternatively, different parts of the code might breach different prohibitions in the Act. For example, if, in addition to regulating advertising and price-setting, a code prohibits industry members from dealing with suppliers who do not meet particular standards, this part of the code might constitute an exclusionary provision.
- 3.17 The issue is then how many applications would be needed to ensure that authorisation, if granted, would fully protect industry members agreeing to comply with the code from court action under the Act.
- 3.18 Before considering this issue, applicants should try to identify the specific elements of the conduct that might breach the Act. Generally, authorisation should only be sought for these elements. However, occasionally the elements of an arrangement are so closely interrelated that it is not practically possible to separate out the elements that might breach the Act.
- 3.19 When different elements of an arrangement might breach different prohibitions in the Act, applicants should lodge separate forms for each element of the arrangement.
- 3.20 For example, in 2002 Qantas and Air New Zealand sought authorisation to coordinate certain activities (e.g. on scheduling and pricing) and for Qantas to buy an equity interest in Air New Zealand. Qantas and Air New Zealand lodged separate application forms for the equity purchase (then Form F) and the other conduct (forms A and B).²⁷
- 3.21 When different elements of an arrangement might each breach the same prohibition, the ACCC will often accept one application form for the whole arrangement. For example, the Royal Australasian College of Surgeons sought authorisation for its processes to:
- select, train and examine basic surgical trainees and advanced surgical trainees
 - accredit hospitals and hospital training posts as suitable for training surgeons
 - assess the qualifications of overseas trained practitioners who wish to work as surgeons in Australia
- in each of the nine surgical sub-specialities within the college. The ACCC accepted a single application (Form A) covering all elements of the conduct.²⁸

26 The *Commonwealth of Australia Constitution Act 1900* (United Kingdom) gives the Australian Parliament the power to regulate corporations. See s. 51(xx.) of the Constitution Act.

27 *Acquisition by Qantas Airways Limited of ordinary shares in Air New Zealand Limited and cooperative arrangements between Qantas, Air New Zealand and Air Pacific Limited* (A30220, A30221, A30222, A90862 and A90863).

28 *Royal Australasian College of Surgeons* (A90765), final determination, 30 June 2003.

- 3.22 However, sometimes the elements of an arrangement may be so different that, in reality, authorisation is being sought for two arrangements. Applicants should then lodge two or more applications.
- 3.23 The same element of an arrangement might breach more than one prohibition. Applicants should then consider lodging applications for each potential breach.
- 3.24 For example, Port Waratah Coal Services sought authorisation for a system for allocating coal loading capacity at the port of Newcastle between Hunter Valley coal producers. It lodged three applications to cover the system. The ACCC understands that this reflected a concern that the system might be construed as:
- a contract, arrangement or understanding that might constitute an exclusionary provision
 - a contract, arrangement or understanding that might substantially lessen competition
 - a secondary boycott.²⁹
- 3.25 A reduced fee is payable for additional related applications—see paragraph 3.41.

Anti-competitive agreements

- 3.26 Additional rules apply to applications for authorisation relating to contracts, arrangements or understandings that might contain cartel provisions, substantially lessen competition or constitute exclusionary provisions.
- 3.27 The Act allows persons to seek authorisation to **make**³⁰ or **give effect**³¹ to contracts, arrangements or understandings that might contain cartel provisions, substantially lessen competition or constitute exclusionary provisions.
- 3.28 The Act does not allow the ACCC to authorise persons to **make** a contract, arrangement or understanding when that contract, arrangement or understanding has already been entered into.³² However, the ACCC may grant authorisation to **give effect** to provisions of a contract, arrangement or understanding that has already been entered into. The Australian Competition Tribunal has stated that:

The legislature was concerned that, if the Commission's power to grant authorisation could be exercised with respect to the making of an agreement or arrangement or the arriving at an understanding so as to have retroactive effect, it would render nugatory the consequences of previous or existing breaches of provisions of Pt IV of the Act which may have occurred after the making of the relevant agreements or arrangements or the arriving at the relevant understanding. Subsection (12) does not therefore prevent authorisation being given to a corporation's future conduct which takes place pursuant to a contract or arrangement or understanding the making of which may itself be outside the jurisdiction of the Commission to authorise.³³

- 3.29 The ACCC cannot authorise an existing contract, arrangement or understanding retrospectively.
- 3.30 When people apply for authorisation to **make** a contract, arrangement or understanding, authorisation (if granted) automatically allows the persons to **give effect** to the contract, arrangement or understanding.³⁴

29 *Port Waratah Coal Services* (A9090–8), final determination, 9 July 2004.

30 Section 88(1)(a).

31 Section 88(1)(b).

32 Section 88(12).

33 *Re John Dee (Export) Pty Ltd* (1989), ATPR 40-938 at 50,209.

34 Section 88(1)(c).

- 3.31 In practice, persons should apply to **make** a contract, arrangement or understanding when they have not formally agreed to begin acting in accordance with the relevant contract, arrangement or understanding. The application would effectively be for a contract, arrangement or understanding that the parties propose to act in accordance with if authorisation is granted.
- 3.32 Applicants should apply to give effect to a contract, arrangement or understanding when they have already formally agreed to act in accordance with the relevant contract, arrangement or understanding.³⁵

Future and other parties

- 3.33 Applications for authorisation to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:
- persons who become party to the contract, arrangement or understanding at some time in the future³⁶
 - persons named in the authorisation as being a party or proposed party to the contract, arrangement or understanding.³⁷
- 3.34 Authorisation (if granted) would extend to these persons.

Contracts, arrangements or understandings in similar terms

- 3.35 Applications to authorise proposed or existing contracts, arrangements or understandings may be expressed to extend to other contracts, arrangements or understandings that are in similar terms.³⁸
- 3.36 Applications must state the names of the parties to existing 'similar terms' contracts for which authorisation is sought and the names of parties to proposed similar terms contracts when these names are known to the applicant.³⁹
- 3.37 The ACCC may grant a single authorisation covering all the contracts, arrangements and understandings, including those in similar terms. Alternatively, it may grant separate authorisations for any one or more of them.⁴⁰
- 3.38 If an authorisation is granted for a proposed contract when not all the parties are known to the applicant, it is deemed to be subject to a condition that any party to the contract will provide the ACCC with the names of all the parties to the contract, if requested.⁴¹ This is to ensure it can be known with certainty who has immunity at any one time.

35 However, s. 45(9) provides that the making of a contract that might substantially lessen competition or contain an exclusionary provision does not breach s. 45(2) of the Act if it is subject to a condition preventing the relevant provisions from taking effect unless and until authorisation is granted, and an application is made for authorisation within 14 days of making the contract.

36 Section 88(10).

37 Section 88(6).

38 Sections 88(13) and 88(15)(a). These sections also apply to applications for exclusive dealing when the exclusive dealing conduct is required or permitted under a contract, arrangement or understanding.

39 Section 88(14)(a).

40 Section 88(13).

41 Section 88(14)(b).

Exclusive dealing

- 3.39 Applications for authorisation to engage in exclusive dealing when the conduct is expressly required or permitted under a contract, arrangement, understanding or industry code of practice, may be expressed to extend to:
- persons who become party to the contract, arrangement, understanding or code after authorisation is granted⁴²
 - persons named or referred to in the application as being a party or proposed party to the contract, arrangement, understanding or code.⁴³
- 3.40 Authorisation (if granted) would extend to these persons.

Fees

- 3.41 The fee for non-merger authorisation applications is \$7500.⁴⁴ A concessional fee of \$1500 is payable for additional applications if:
- there are reasonable grounds for the ACCC to believe that the first application and the additional application relate to conduct in the same market (or closely related markets)
 - each additional application is lodged with the ACCC within 14 days of the first application.⁴⁵
- 3.42 The fee for an application for revocation and substitution is \$2500.
- 3.43 The ACCC prefers fees to be paid by cheque.

Fee waivers

- 3.44 The Act has been amended to provide the ACCC with the discretion to waive, in whole or in part, the lodgment fee for applications for non-merger authorisations. A fee of \$2500 is likely to apply should the ACCC decide to waive a lodgment fee in part.
- 3.45 Requests for the ACCC to waive a lodgment fee should be made in writing to the ACCC **before** an application for authorisation is lodged. The request must include information about the nature of the proposed application for authorisation and set out arguments supporting the waiving of fees.
- 3.46 The Competition and Consumer Regulations provide that the ACCC may waive a lodgment fee if it is satisfied that the imposition of the entire fee would impose an unduly onerous burden on an applicant.
- 3.47 In considering the request, the ACCC will take into account all relevant information, including factors such as:
- Given the applicant's income, liabilities and assets, will the payment of the fee cause the applicant financial hardship?
 - Is the prospective applicant a not-for-profit organisation?
 - If the application is to be lodged on behalf of a number of parties, is it possible for each of these parties to contribute towards the fee?
 - Does one applicant intend to lodge a number of applications for authorisation?

42 Section 88(8AA)(d).

43 Section 88(8AA)(c).

44 Schedule 1B, Competition and Consumer Regulations 1974.

45 Clause 28(6), Competition and Consumer Regulations 1974.

- 3.48 If the ACCC decides to waive a lodgment fee (in whole or in part), it will advise the applicant in writing. The applicant may rely on this advice for a period of three months.
- 3.49 The full lodgement fee will apply if an application for authorisation is not accompanied by a copy of the ACCC's written confirmation that it will waive (in whole or in part) the lodgement fee.
- 3.50 The full lodgement fee will apply if an application for authorisation is accompanied by advice from the ACCC which has expired.

Invalid applications

- 3.51 An application may be invalid if:
- it is not made on the required form
 - the required fee has not been paid
 - required information has not been provided.
- 3.52 If the ACCC believes an application is invalid, it will write to the applicant informing it that the application is invalid and provide reasons and guidance as to how it may be remedied.
- 3.53 If an application is assessed as invalid within five days of it being received, the ACCC will return the lodgment fee.

Supporting submission

- 3.54 Applicants must satisfy the ACCC that their application should be granted. It is therefore important that, when applying for authorisation, an applicant also provides a supporting submission comprehensively explaining why the application should be granted. Matters that should be addressed in this submission are discussed in detail in chapter 5. Further guidance is provided in the form of a checklist at the end of this chapter.
- 3.55 An electronic copy of the supporting submission should be provided along with a hard copy.

Confidential information

- 3.56 Applicants may request that confidential information provided in support of an application be excluded from the public register. This process is discussed in paragraph 4.60.

How to lodge an application for authorisation

- 3.57 Applications and supporting submissions may be lodged in person at any office of the ACCC or by mail (see ACCC contacts).
- 3.58 The ACCC encourages applications to be lodged at its Canberra office because this enables the ACCC to assess the validity of applications as soon as possible. The ACCC prefers fees to be paid by cheque, made out to the Australian Competition and Consumer Commission. Applications may also be lodged by email adjudication@acc.gov.au or faxed to (02) 6243 1211. Applications lodged by email should be supported by a covering letter that includes details of how and when the lodgment fee will be paid. Applications will not be considered as validly lodged until the relevant fee has been paid.

Withdrawing applications

- 3.59 Applicants may withdraw their applications by writing to the ACCC at any time before the ACCC makes its final determination.⁴⁶
- 3.60 There is no provision to refund fees if an application is withdrawn.
- 3.61 The ACCC is required to keep withdrawn applications on a public register.⁴⁷

Checklist for supporting submissions

Submissions in support of an application for authorisation should be comprehensive and include discussion on:

- ☐ relevant market characteristics
- ☐ market shares of various market participants
- ☐ the parties engaging in the conduct for which authorisation is sought and other relevant stakeholders in the market
- ☐ how the conduct operates or is likely to operate in practice
- ☐ market and/or other relevant circumstances that would develop with, and without, the conduct
- ☐ how the conduct affects the ability of the parties engaging in the conduct and others in the market to behave competitively
- ☐ how the conduct has been framed to minimise the public detriment
- ☐ the public benefits which result or are likely to result from the proposed conduct
- ☐ the beneficiaries of the conduct and how the benefits are to be distributed
- ☐ the period for which authorisation is sought and why this period is considered appropriate
- ☐ any prospective need for changes to the detail of the conduct.

Matters that should be addressed in a supporting submission are discussed in greater detail in chapter 5.

46 Section 88(16).

47 Section 89(3).

4. The authorisation process

- 4.1 The authorisation process allows the Australian Competition and Consumer Commission (ACCC) to assess applications in an informed, objective and transparent manner.
- 4.2 Given that authorisation provides immunity from the law (effectively a licence to engage in anti-competitive conduct), the authorisation process is necessarily a thorough and rigorous one. Applicants should not expect the granting of authorisation to be a mere formality.
- 4.3 Generally, the ACCC tests applicants' claims through an open, transparent and public consultation process. In particular, it invites parties likely to be affected by the conduct (such as customers, competitors, suppliers, government bodies, consumer groups and trade organisations) to comment on applications made to the ACCC. A decision to grant authorisation provides the applicant with immunity from legal action under the *Competition and Consumer Act 2010* not only by the ACCC but by any third party. Therefore it is important for the ACCC to fully understand the likely impact of proposed conduct.
- 4.4 Authorisation decisions made by the ACCC are also reviewable by the tribunal. It is therefore in the best interests of all parties that the ACCC rigorously assesses applications in the first instance.

Overview

- 4.5 The authorisation process begins once a valid application and a supporting submission have been lodged and the appropriate fees paid.
- 4.6 Broadly, the process involves the ACCC:
 - inviting interested parties to lodge written (or oral) submissions commenting on the application and supporting submission
 - meeting with the applicant and interested parties as appropriate
 - inviting the applicant to lodge a written submission in response to interested party submissions
 - conducting its own market inquiries and research while consulting with interested parties
 - issuing a draft determination
 - inviting written submissions in response to the draft determination, and inviting the applicant or interested parties to call a conference so that oral submissions can be made to a commissioner
 - holding a conference, if one is called
 - issuing a final determination.

Transparency of the authorisation process

The authorisation process is public and transparent. All submissions from the applicant and interested parties are open to public scrutiny and are available for inspection on the public register (except for those that are withheld on the basis of confidentiality or otherwise). By consulting extensively with the public, the ACCC aims to ensure that it only authorises conduct that is in the public interest.

Six-month time limit

- 4.7 A six-month time limit applies to the ACCC's consideration of applications for authorisation.
- 4.8 The six-month time limit only applies to new applications for authorisation. It does not apply to applications for revocation, revocation and substitution, or minor variation.
- 4.9 The six-month period can be extended by up to a further six months if:
 - the ACCC has issued a draft determination
 - the applicant agrees to the extension.
- 4.10 The six-month period begins when a **valid** application for authorisation is lodged with the ACCC.
- 4.11 If a pre-decision conference is called, the six-month consideration period is increased by the number of days between receiving the request for a pre-decision conference and seven days after the pre-decision conference has finished.

Assessing applications within six months

- 4.12 A six-month time limit on the ACCC's consideration of authorisation applications imposes a discipline on all those involved in the authorisation process.
- 4.13 To avoid delaying the start of the six-month period, applicants should ensure that their application is valid.
- 4.14 The ACCC encourages potential applicants to contact the ACCC before lodging an application form so that the requirements of a valid application can be discussed.
- 4.15 Once an application for authorisation is received, the ACCC will evaluate its validity and advise the applicant if the application is considered to be invalid within five days. While not subject to a six-month time limit, the validity of applications for revocation, revocation and substitution, and minor variation will also be assessed within five days.
- 4.16 If it later becomes apparent that there are deficiencies in an application and they are not addressed by the applicant, the application may still be considered invalid and the ACCC may not be able to grant authorisation.
- 4.17 Once the six-month time period has begun, the ACCC will accept minor amendments to an application. Any substantial change needing additional consultation may not be accepted by the ACCC.
- 4.18 Consultation with interested parties will take place according to strict deadlines for the submission of information. The ACCC will be limited in its ability to take into account information provided after the established deadline for consultation. The ability of applicants to respond to late information will also be limited.

- 4.19 When a valid application for authorisation is received, the ACCC will set an indicative timetable for its consideration of the application. An indicative six-month timetable is set out below. It is for indicative purposes only. For the majority of matters, the ACCC will be working to a tighter timetable.
- 4.20 A streamlined authorisation process for collective bargaining by small businesses sets a three-month timetable for consideration.⁴⁸

Indicative timetable for authorisation consideration

Without PDC*	With PDC*	
Week	Week	
		Consultation with the ACCC before lodging an application
1–4	1–4	Lodgment of application and supporting submission ACCC assess validity of the application Public consultation process begins ACCC considers any request for interim authorisation
5	5	Closing date for submissions from interested parties
7	7	Applicants respond to issues raised in the public consultation process
7–12	7–12	ACCC assessment
13	13	Draft determination issued Public consultation on draft determination
15	15	Deadline to request a pre-decision conference
N/A	19	Pre-decision conference held
19	23	Deadline for submissions in response to issues raised in the draft determination or at the pre-decision conference Applicant given opportunity to respond to outstanding issues
20–24	24–28	Applicant's response to outstanding issues ACCC assessment
25	29	Final determination issued

*PDC: pre-decision conference.

Steps in the authorisation process

Inviting written submissions from interested parties

- 4.23 The Australian Competition Tribunal has stated that:

At the first stage of consideration of an application for authorisation any person may make a submission, whatever their interest.⁴⁹

- 4.24 In practice, applicants should include in their supporting submission a list of persons they consider could be interested parties. The ACCC is likely to add to this list.

⁴⁸ See *Streamlined collective bargaining for small business*, available from the ACCC website (www.accc.gov.au).

⁴⁹ *Re Alliance Agreement—application by PK Wakeman* (1999), ATPR 41-675 at 42,637.

- 4.25 The ACCC then writes or emails, usually within the first week of receiving an application, to interested parties inviting written submissions. Generally, this letter:
- outlines the conduct proposed for authorisation and the public benefit and public detriment the applicant claims will flow from that conduct
 - invites parties to comment on these claims
 - often identifies specific issues that the ACCC wants interested parties to address
 - nominates an ACCC contact officer for the application
 - requests submissions by a specified date, usually between two and four weeks from the date of the letter depending on the complexity of the application.
- 4.26 A copy of the application and supporting submission is usually attached to the letter. The application and supporting submission will also be available from the ACCC website by following the public registers and authorisations links.
- 4.27 A copy of the letter to interested parties is sent to the applicant.
- 4.28 Any other person who becomes aware of an application, but who was not written to, may lodge a submission. A copy of the relevant authorisation application and applicant's supporting submission can be obtained from the ACCC website.⁵⁰
- 4.29 The ACCC takes all submissions received into account.⁵¹ However, in complying with the six-month timeframe described earlier, the ACCC is unlikely to significantly extend deadlines for lodging submissions. The ACCC may be limited in its ability to take into account information provided after the established deadline for consultations. The ability of applicants to respond to late information will also be limited.

How to lodge a submission

- 4.30 Submissions should be lodged electronically if possible (even if a hard copy is also lodged). Submissions should be emailed to adjudication@accc.gov.au and copied to the nominated contact officer.
- 4.31 If electronic lodgment is not possible, submissions may be lodged by mail. Submissions should be sent to:
- General Manager
Adjudication Branch
GPO Box 3131
Canberra ACT 2601
- 4.32 Interested parties may ask that confidential information provided in a submission be excluded from the public register. This is discussed further in paragraph 4.60.

Response from applicant

- 4.33 The ACCC forwards all public submissions from interested parties to the applicant for a response by a specified date. Responses received from applicants after the specified date may not be able to be taken into account to the same extent as if they had been lodged on time.

⁵⁰ Section 89(2) requires the ACCC to publicise the receipt of an application 'in such manner as it thinks fit'.

⁵¹ Section 90(2).

Draft determination

- 4.34 The ACCC issues a written draft determination stating whether it proposes to grant authorisation.⁵² In practice, the draft determination comprises:
- The reasons for the ACCC's proposed decision. This part usually consists of a series of chapters which:
 - detail the conduct for which authorisation is sought
 - outline the applicant's submission(s) in support of the application
 - outline interested parties' submissions
 - outline the relevant authorisation test
 - provide an evaluation of the public benefit and public detriment that the ACCC considers flow from the conduct, and set out the ACCC's conclusion on whether the authorisation test was met (and if not, whether any conditions can be imposed to ensure that the test is met).
 - A final chapter containing the formal draft determination stating whether the ACCC proposes to grant authorisation, and whether any grant is subject to conditions.
- 4.35 The ACCC sends copies of draft determinations to the applicant and interested parties. It invites applicants and interested parties to lodge written submissions responding to the draft determination, and provides an opportunity to call a conference.
- 4.36 The Australian Competition Tribunal has stated that:
- Once the draft determination is published the Commission is required to invite submissions only from the applicant and persons whose interest is 'real and substantial' (although this is not to say that in a particular case the Commission may not extend the invitation more widely to anyone who has made a submission, without strictly applying a 'real and substantial' test).⁵³
- 4.37 Written submissions are requested by a specified date. This date may be extended if a conference is called (see paragraph 4.51).
- 4.38 A copy of the draft determination is placed on the public register and on the ACCC website.

Calling a conference

- 4.39 The ACCC's letter inviting applicants and interested parties to call a conference will nominate a date by which this must be done. Requests for a conference must be made in writing by that date. The Competition and Consumer Act does not allow the ACCC to extend this deadline.⁵⁴ Parties calling a conference should state why they consider themselves to have a real and substantial interest in the application.⁵⁵

52 Section 90A(1).

53 *Re Alliance Agreement—application by PK Wakeman* (1999), ATPR 41-675 at 42,637.

54 Section 90A(2) requires the ACCC to nominate a date (not being a date before the date the ACCC wrote to interested parties and the applicant). This date will usually be the date of the letter to interested parties. A conference must be called within 14 days of this date.

55 Section 90A(12) defines 'interested persons' as those who have notified the ACCC in writing that they (or an unincorporated association of which they are members) claim to have an interest in the application, and the ACCC considers that this interest is real and substantial.

If a conference is not called

- 4.40 If a conference is not called by the date specified by the ACCC, the Act allows it to issue a final determination.⁵⁶ The ACCC usually allows a period of between two and four weeks for the applicant and interested parties to lodge submissions in response to a draft determination (depending on the complexity of the matter).

Holding a conference

- 4.41 If a conference is called, it must be held no later than 30 days after the date nominated for calling the conference.⁵⁷
- 4.42 The ACCC writes to the applicant and interested parties to:
- inform them of the date, time and location of the conference⁵⁸
 - outline conference procedures
 - ask that they notify the ACCC if they wish to attend the conference
 - ask that, if a business or organisation is to be represented by more than one person, it nominates a chief spokesperson
 - ask that they provide a brief outline of any issues they intend to raise
 - ask for contact details to allow notification of any late changes to conference arrangements.
- 4.43 Conferences are chaired by a commissioner.⁵⁹ They may be attended by the applicant, interested parties and any other person whose attendance is considered appropriate by the ACCC. Attendees may have other persons (e.g. legal advisers) present to assist, but they are not entitled to participate in the conference.⁶⁰
- 4.44 Generally, the purpose of a conference is to allow the applicant and interested parties to make oral submissions to a commissioner. While the commissioner may question attendees, they will not engage in debate about the merits of the draft determination.
- 4.45 Conferences are conducted informally. After a short introduction from the chairing commissioner, the party who called the conference is usually invited to give an opening statement. The other interested parties are then invited to speak. Finally, the applicant is invited to respond to the comments of interested parties.
- 4.46 The ACCC may then identify a number of specific issues it seeks further comment on. Usually attendees will be invited to comment on these issues in the order that opening statements were made. The chairing commissioner may then ask if any attendees have any final statements to make.
- 4.47 The commissioner will end the conference when all attendees have had a reasonable opportunity to express their views.⁶¹ In practice, it is rare for conferences to last for more than half a day.

56 Section 90A(5).

57 Section 90A(6).

58 Section 90A(6).

59 This commissioner must have participated in the preparation of the draft determination—see s. 90A(7)(a).

60 Sections 90A(7)(b) and 90A(7)(c). Corporations may be represented by directors, officers or employees— see s. 90A(7)(b).

61 Section 90A(9)(b).

- 4.48 Persons who use insulting language or otherwise disrupt the conference may be excluded from the conference.⁶²
- 4.49 The ACCC must take oral submissions made at a conference into account.⁶³ To facilitate this, the ACCC prepares a record of conference discussions.⁶⁴ This record is not a verbatim record of attendees' statements. Rather, it records the issues they raised. The conference record is sent to interested parties and placed on the public register.
- 4.50 The ACCC does not circulate draft conference records to attendees for comment. The ACCC will not amend a conference record at the request of an attendee, although it may place submissions received from attendees who consider that the record is inaccurate on the public register.

Final written submissions following a conference

- 4.51 The ACCC may issue a final determination at any time after a conference finishes.⁶⁵ However, in practice, it usually invites interested parties to lodge final written submissions on the application.

Final determination

- 4.52 The typical structure of an ACCC final determination mirrors that of a draft determination (see paragraph 4.34).⁶⁶
- 4.53 The ACCC sends a copy of the final determination to the applicant and all other interested parties. A copy is placed on the public register. Copies are published by commercial legal reporting services as well.

Commencement of final determinations

- 4.54 ACCC determinations come into force on the day specified in the determination. This date may not be earlier than 21 days after the determination is issued. Should an application to review the determination be made to the tribunal before the 21-day period expires, the commencement is deferred pending a decision of the tribunal.⁶⁷ If the application to the tribunal is subsequently withdrawn, the ACCC determination takes effect on the day the application is withdrawn.⁶⁸ The role of the tribunal is discussed in chapter 9.

Public register

- 4.55 The authorisation process should be as open and transparent as possible, particularly so that claims made by those supporting an application can be tested and interested parties have the opportunity to put their views.

62 Section 90A(9)(a).

63 Section 90A(11).

64 Section 90A(8).

65 Section 90A(11).

66 A copy of a final determination, which is certified to be a true copy by a person so authorised by the ACCC, shall be received in all courts as evidence of the determination—see s. 165(4).

67 Competition and Consumer Regulations 1974, r. 20(1)(b).

68 Section 91(1A).

- 4.56 The Competition and Consumer Act requires the ACCC to keep a public register containing the following documents:
- applications for authorisation, minor variations, revocation and revocation and substitution, as well as ACCC proposals for the revocation and revocation and substitution of authorisations⁶⁹
 - submissions from applicants and interested parties (oral or written)
 - draft determinations
 - records of conferences⁷⁰
 - records of meetings held with applicants or interested parties
 - final determinations.⁷¹
- 4.57 The register is open for public inspection at any ACCC office⁷², but a few days' notice may be needed to ensure the relevant documents are available in a particular office. The ACCC will, on request, provide copies of documents on the public register.⁷³ The regulations set a fee of \$1 per page.⁷⁴

ACCC website

- 4.58 Key documents are also available free of charge from the ACCC website (www.accc.gov.au).
- 4.59 The ACCC website contains copies of:
- all applications for authorisation, minor variations, revocation and revocation and substitution, along with the applicant's supporting submission(s)
 - ACCC proposals for the revocation and revocation and substitution of authorisations
 - all substantive interested party submissions
 - ACCC decisions and key correspondence.

Dealing with confidential information

- 4.60 Applicants and interested parties providing information for an authorisation application may ask that the information, or parts of it, be excluded from the relevant public register.
- 4.61 Under the Competition and Consumer Act, when a claim to exclude information from the public register is made, the ACCC must exclude the information if it contains details of:
- secret formulas or process
 - the cash consideration offered for the acquisition of shares or assets
 - the current manufacturing, producing or marketing costs of goods or services.⁷⁵
- 4.62 The ACCC also has the discretion, under the Act, to exclude material from the public registers, either because of the confidential nature of the material⁷⁶ or for any other reason⁷⁷, such as where the ACCC considers there may be certain sensitivities.

69 Under s. 89(3) the register must include applications that have been withdrawn or ACCC proposals that have been abandoned.

70 And certificates required under s. 90A(9).

71 Section 89(4).

72 Section 165(1)(a).

73 Section 165(1)(b).

74 Competition and Consumer Regulations, r. 28(1). An additional \$10 is payable for a copy certified to be a true copy by an officer so authorised by the ACCC—r. 28(2).

75 Section 89(5A)(a).

76 Section 89(5A)(b).

77 Section 89(5D).

How to request exclusion of information from the public register

- 4.63 The Competition and Consumer Regulations outline what parties need to do if they want information to be excluded from the public register.
- 4.64 The regulations state that if such a request is made for a whole document or parts of a document, the words ‘Restriction of Publication Claimed’ should appear in red writing near the top of each page.⁷⁸ When a request is made for exclusion for part of the document, the regulations state that the words ‘Restriction of Publication of Part Claimed’ should appear in red near the top of the first page and the part of the document for which exclusion is requested should also be clearly marked in red. If the claim is for a document longer than five pages, a description of the whereabouts of the parts for which exclusion is requested should be provided.⁷⁹
- 4.65 The ACCC asks that applicants provide a full copy of the document, and a public register version (with those parts the applicant is seeking to have excluded masked or removed).
- 4.66 Applicants should remove headers claiming ‘Confidential communication’ from documents (e.g. emails and faxes) unless they contain information the applicant wants excluded from the public register. If the information is not confidential and the header cannot be removed, parties should clearly state at the beginning of correspondence provided to the ACCC that exclusion from the public register is not requested.
- 4.67 Applicants and interested parties requesting exclusion from the public register must do so when they submit the information to the ACCC.⁸⁰ Reasons must be provided in support of a request for exclusion.

How does the ACCC assess exclusion requests?

- 4.68 Information subject to a request for exclusion will be excluded from the public register while the ACCC assesses the request.⁸¹
- 4.69 The ACCC aims to respond to requests within three to five business days. The ACCC’s ability to provide a prompt response is greatly enhanced if requests are limited to information that is genuinely confidential, if confidential information is clearly marked and if claims are accompanied by a detailed explanation of why exclusion is being sought.
- 4.70 When the ACCC agrees to a request, the information will be excluded from the relevant public register. This information may still be used by the ACCC under its powers, generally under the Competition and Consumer Act.
- 4.71 If the ACCC denies a request because the claim is not accompanied by sufficient justification or because it considers that the information is not confidential in nature, the ACCC will inform the relevant party of its decision.⁸² If the ACCC denies a request, the information for which exclusion was requested will be considered to be withdrawn from the ACCC’s consideration—unless the party advises the ACCC that it wishes to withdraw or amend the claim. As a general rule, the ACCC will allow the party one or two business days to respond.

78 Regulation 24(1)(a), Competition and Consumer Regulations.

79 Competition and Consumer Regulations. r. 24(1)(b).

80 Section 89(5).

81 Section 89(5E).

82 Section 89(5B).

- 4.72 Applicants should be aware that any claim for exclusion of information required by the forms for an authorisation that is refused by the ACCC may affect the validity of an application. Generally speaking, the ACCC will not accept requests from applicants to exclude information that is necessary to identify the conduct or arrangements for which immunity is sought.
- 4.73 A checklist for requests to exclude information claims is provided in the ACCC publication, *Guidelines for excluding information from the public register for authorisation and notification processes*, which is available free online at www.accc.gov.au.

Exclusion from the public register and Freedom of Information requests

- 4.74 Parties should be aware that a decision to exclude information from the public register does not provide any broader 'confidentiality' protection.
- 4.75 An ACCC decision to exclude information from the public register cannot also constitute a decision by the ACCC to deny access to the document under the *Freedom of Information Act 1982*. This is because the ACCC may only make a decision under the FOI Act once it has received a request for access to the relevant document. It cannot pre-determine that access to particular documents should be denied.
- 4.76 However, the ACCC may not grant FOI requests to access documents that it is satisfied are 'exempt' documents. Grounds for the ACCC deciding that a document is 'exempt' include where:
- it relates to the commercial or professional affairs of a person or organisation and
 - disclosing the document could reasonably be expected to unreasonably affect that person or organisation in respect of their lawful commercial or professional affairs, or prejudice the future supply of information to the ACCC in administering the Competition and Consumer Act and the authorisation process.⁸³
- 4.77 When the ACCC receives a request for documents about the commercial or professional affairs of a person or business, the FOI Act also requires the ACCC, where practical, to consult with the person or business before deciding to grant or deny the request.⁸⁴
- 4.78 Further, the ACCC may be obliged to release documents excluded from the public register as part of court or tribunal processes. In these circumstances, a court or tribunal will consider the appropriateness of imposing a confidentiality regime.

Confidentiality and statements of reasons

- 4.79 Under the *Administrative Decisions (Judicial Review) Act 1977*, when the ACCC receives a request for a statement of reasons for a decision, it is not required to disclose business information supplied to it in confidence.⁸⁵

Provision of documents to applicants

- 4.80 Applicants for authorisation, minor variation, revocation or revocation and substitution can request the ACCC to provide them with a copy of all documents that tend to establish the applicant's case (other than documents prepared by an officer or professional adviser of the ACCC).⁸⁶ A fee of \$1 per page applies.⁸⁷

83 Freedom of Information Act, s. 43(1)(c).

84 *ibid.*, s. 27(1).

85 *Administrative Decisions (Judicial Review) Act 1977*, s. 13A.

86 Section 157(1).

87 Regulation 28(1), Competition and Consumer Regulations. An additional \$10 is payable for a copy certified to be a true copy by an officer so authorised by the ACCC; r. 28(2).

5. When will the ACCC grant authorisation?

- 5.1 The Act specifies when the Australian Competition and Consumer Commission (ACCC) may grant authorisation. Broadly, conduct may be authorised if the public benefit outweighs any public detriment.

The tests

- 5.2 The Act contains different tests for authorising different types of conduct. The two different tests are as follows:
- The ACCC may not grant authorisation for the making or giving effect to proposed or existing contracts, arrangements or understandings that might contain cartel provisions, might substantially lessen competition or involve exclusive dealing (other than third line forcing) unless it is satisfied in all circumstances that the agreement or conduct:
 - is likely to result in a public benefit that outweighs the likely public detriment constituted by any lessening of competition (the first test).⁸⁸
 - The ACCC may not grant authorisation to proposed exclusionary provisions (primary boycotts), secondary boycotts, third line forcing and resale price maintenance unless it is satisfied in all the circumstances that the proposed provision or proposed conduct:
 - is likely to result in such a benefit to the public that the provision should be permitted to be made or the conduct should be allowed to take place (**the second test**).⁸⁹
- 5.3 The Act also sets out that when considering what constitutes public benefits in the case of an application for authorisation of an acquisition that occurs outside Australia, the following must be regarded as public benefits:
- a significant increase in the real value of exports
 - a significant substitution of domestic products for imported goods.
- 5.4 In assessing an application for authorisation of an acquisition that occurs outside Australia, the ACCC must also take into account all other matters relevant to the international competitiveness of any Australian industry.⁹⁰
- 5.5 The tests are reproduced in full at the end of this chapter.

88 Sections 90(5A), 90(5B), 90(6) and 90(7). This test also applies to applications for authorisation of proposed covenants that substantially lessen competition. The test for granting applications for authorisation for existing agreements also requires that public benefit and public detriment that has resulted from the agreement be taken into account.

89 Sections 90(8)(a), 90(b) and 90(9). The test for granting applications for authorisation for existing exclusionary provisions is the same except that public benefit that has resulted from the agreement is also taken into account—see s. 90(8)(b).

90 Section 90(9A).

The same test in practice

- 5.6 The Australian Competition Tribunal has interpreted the second test to mean that authorisation may not be granted unless the conduct in question is likely to result in a public benefit that outweighs **any** likely public detriment. In contrast, only public detriment constituted by a lessening of competition is relevant to the first test.⁹¹
- 5.7 For many authorisations, the only likely detriments are those constituted by a lessening of competition. In these circumstances there is no difference between the two tests for the purposes of the ACCC's assessment.
- 5.8 The ACCC believes the phrase 'constituted by a lessening of competition' should not be interpreted narrowly. Some detriments may not at first appear to result from a lessening of competition but on closer inspection it becomes apparent that there is a direct link.
- 5.9 The tribunal has also stated that for the first test:
- [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.⁹²
- 5.10 Consequently, when applying either test, the ACCC can take all public detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

The concepts of public benefit and public detriment

- 5.11 Public benefit is not defined in the Act. However, the tribunal has defined it to be:
- ... anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress'. Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources. We bear in mind that (in the language of economics today) efficiency is a concept that is usually taken to encompass 'progress'; and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency.⁹³
- 5.12 The tribunal noted in its decision on the **VFF Chicken Meat Growers'** authorisation that it had previously taken a broad view of what is a benefit, stating that:
- ...they have been taken to include anything which...increases...the well-being of members of society...Particular emphasis is placed on positive...consequences for the achievement of the goal of maximising economic efficiency (including dynamic efficiency leading to economic progress).⁹⁴

91 *Australian Association of Pathology Practices Incorporated* (2004), ATPR 41-985 at 48,549-550. This view was supported in *Re VFF Chicken Meat Growers' Boycott Authorisation* (2006), AcompT 9 at paragraph 67.

92 *Re Association of Consulting Engineers, Australia* (1981), ATPR 40-2-2 at 42,788. See also *Media Council case* (1978), ATPR 40-058 at 17,606, and *Application of Southern Cross Beverages Pty Ltd, Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981), ATPR 40-200 at 42,763 and 42,766.

93 *Re 7-Eleven* (1994), ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976), ATPR 40-012, at 17,242.

94 *Re VFF Chicken Meat Growers' Boycott Authorisation* (2006), AcompT 9 at para. 75.

5.13 Public detriment is also not defined in the Act. The tribunal has defined it as:

... any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency...⁹⁵

5.14 As such, public detriment is essentially the opposite of public benefit. For convenience, the discussion below refers to economic and non-economic public benefits. However, the same principles apply to public detriment. Public detriment is discussed further at paragraph 5.85.

Economic public benefits

5.15 Economic public benefits result from improved economic efficiency. As stated at paragraph 5.11, economic efficiency has three aspects:

- Productive efficiency relates to the production of goods and services using the most cost-effective means. For example, the achievement of economies of scale may increase productive efficiency.
- Allocative efficiency relates to the optimal level of resources being employed in a market at a given time. When allocative efficiency is achieved, because of the responses of firms to market signals, the socially optimal mix and level of output will be produced and allocated through sales and purchases to those parties who most value the relevant products. Allocative efficiency is reduced when there is market failure—for example, if producers have market power, they may reduce the quantity of production to increase the price. Similarly, agreements between competitors about price will ordinarily distort market outcomes.
- Dynamic efficiency is a less precisely defined term. It generally refers to the economically efficient use of resources over time—incorporating innovation and responses to changes in the market. Arrangements that provide incentives for efficient investment in research and development will promote dynamic efficiency.

Treatment of efficiencies as public benefits

The ACCC considers all efficiency gains constitute public benefits. In determining how much weight to place on particular efficiency gains in assessing an application for authorisation, the ACCC will take account of the following:

- Has the applicant provided sufficient evidence to support a claim that efficiency gains are of a particular size?
- Is the achievement of the efficiency gains sufficiently certain? In particular, gains expected to be achieved a number of years after the conduct starts would be given less weight to reflect the inherent and underlying uncertainty.
- Are the efficiency gains likely to be offset (partially or even fully) by efficiency losses—for example, from productive efficiency losses, flowing from a reduction in competitive pressures in the market (i.e. 'x-inefficiency')?
- Should the efficiency gains be given less weight due to the limited breadth, scope or the nature of beneficiaries? (See discussion from paragraph 5.21 on public benefit standard.)

95 *Re 7-Eleven* (1994), ATPR 41-357 at 42,683.

Non-economic public benefits

- 5.16 The proposition that a benefit is a public benefit ultimately relies on a value judgment. However the value judgment is often uncontroversial. For example, improving public safety is a public benefit, as it is uncontroversial that the community values the safety of its members. Another example would be protecting the environment.
- 5.17 Sometimes the value judgment is less obvious. For example, the:
- **Homeworkers' Code of Conduct**⁹⁶ authorisation was for an industry code of conduct seeking to ensure that garment sewers who work from home received the terms and conditions available under the relevant industrial award. The public benefit accepted was an improvement in the working conditions of clothing workers.
 - **Abbott Australia**⁹⁷ authorisation was for an industry code restricting the marketing and advertising of infant formula (based on a United Nations convention). The ACCC accepted that infant formula marketing undermined the decision of women to breastfeed. The code generated a public benefit by preventing such marketing from occurring.
 - **Speedo Knitting Mills**⁹⁸ authorisation was for an arrangement under which Speedo would sponsor the Amateur Swimming Union of Australia as long as it had exclusive rights to ASUA swimming competitions (e.g. swimmers would wear only Speedo swimmers, only Speedo would be advertised at the competition and so on). The ACCC accepted that the sponsorship would generate a public benefit by promoting sport.
- 5.18 The ACCC will be more likely to accept that a claimed non-economic benefit is a public benefit when the applicant's submission, interested party submissions and any other relevant evidence indicate that the community broadly supports this proposition. Limited opposition would not necessarily defeat a claim. Community views may also change over time, meaning that public benefits accepted in one authorisation might not be accepted in a later matter.
- 5.19 The ACCC recognises that some benefits presented as 'non-economic' public benefits may actually remedy market failures. For example, an authorisation application from **Refrigerant Reclaim Australia**⁹⁹ was for a levy on the sale of refrigeration and air-conditioning products to fund a scheme to reduce the greenhouse gases emitted from such products when they are repaired, scrapped or go into landfill. The levy covered the cost of removing and appropriately disposing of the refrigerant gases from the products before they are repaired or scrapped. This application claimed to generate environmental public benefits. However, it could also have been framed as addressing a market failure if environmental costs were not factored into the costs of producing refrigeration and air-conditioning products.
- 5.20 Similarly, industry codes requiring businesses to comply with certain standards might address a potential for market failure when consumers are unable to assess the quality of a good or service. However, applications are often framed as claiming that an industry code protects the public from, for example, dangerous products or unethical behaviour.¹⁰⁰ Either way of framing an application is acceptable.

96 A90722-725, determination, 31 July 2000.

97 *Abbott Australia* (1992), ATPR (Com), 50-123.

98 *Speedo Knitting Mills* (1981), ATPR (Com), 50-016.

99 *Refrigerant Reclaim Australia*, final determination, 7 May 2003.

100 See, for example, *Australian Tyre Dealers and Retreaders Association* (1994), ATPR (Com), 50-162, under which tyre re-treaders were to adhere to certain operational practices, including a code of practice to promote public safety.

Public benefit standard

- 5.21 A longstanding issue is whether benefits—particularly cost savings from increases in productive efficiency from conduct proposed for authorisation—need to be passed through to consumers as lower prices to constitute a public benefit.
- 5.22 Some tribunal statements arguably limit the circumstances when increases in productive efficiency that do not flow through to consumers constitute public benefits.¹⁰¹ Other tribunal statements suggest a wider understanding of public benefit.¹⁰²
- 5.23 In **VFF Chicken Meat Growers** the Australian Competition Tribunal stated that:
- The Tribunal previously has adopted...a definition of ‘the public’ which would include all members of society in all their roles—for example as investors, shareholders or workers as well as consumers and also people incidentally affected by market outcomes. Moreover, it also has taken the view that, by and large, there should be no difference in the weight attached to the benefits ... irrespective of who are the beneficiaries ...¹⁰³
- 5.24 The Australian Competition Tribunal stated for the **Qantas Airways** authorisation that the question of whether a benefit is a public benefit should be directed towards:
- ... the extent to which the benefit has an impact on members of the community, that is society. Does it fall into the category of “anything of value to the community generally”?
- It follows that cost savings achieved by a firm in the course of providing goods or services to members of the public are a public benefit which can and should be taken into account ... where they result in pass through which reduces prices to final consumers, or in other benefits, for example, by way of dividends to a range of shareholders or being returned to the firm for future investment.¹⁰⁴
- 5.25 When describing its approach to public benefit analysis in **Qantas**, the tribunal noted it ‘... should not be seen as a new development in the jurisprudence of authorisation’.¹⁰⁵
- 5.26 Consistent with the tribunal’s approach, the ACCC considers that cost savings arising from increases in productive efficiency constitute public benefits, as the community at large has an interest in resource savings because these savings are released for use elsewhere in the economy.
- 5.27 The tribunal described its approach to public benefit analysis in **Qantas Airways** as ‘a form of the total welfare standard’, stating that:
- ... whilst the Tribunal does not require that efficiencies generated by a merger or set of arrangements necessarily be passed on to consumers, it may be that, in some circumstances, gains that flow through only to a limited number of members in the community will carry less weight.¹⁰⁶

101 See, for example, *Queensland Co-operative Milling Association Ltd* (1976), ATPR 40-012, at 17,242; *Re Rural Traders Co-operative (WA) Ltd* (1979), ATPR 40-110 at 18,123; *Howard Smith Industries Pty Ltd* (1977), ATPR 40-023, at 17,334; *Re Queensland Independent Wholesalers Ltd* (1995), ATPR 41-438 at 40,928; and *Re Alliance Agreement—application by PK Wakeman* (1999), ATPR 41-675 at 42,636.

102 See *Qantas Airways Ltd* (2004), ACompT 9 at pp. 44–52; *Australian Performing Rights Association* (1999), ATPR 41-701 at 42,985; and *Re Queensland Independent Wholesalers Ltd* (1995), ATPR 41-438 at 40,965.

103 *Re VFF Chicken Meat Growers’ Boycott Authorisation* (2006), ACompT 9 at para. 75.

104 See *Qantas Airways Ltd* (2004), ACompT 9 at p. 51.

105 *ibid.*

106 See *Qantas Airways Ltd* (2004), ACompT 9 at p. 50.

5.28 The tribunal also stated that the relevant question was:

[W]hat weight should be given to that benefit, having regard to its nature, characterisation and the identity of the beneficiaries of it.¹⁰⁷

5.29 The term ‘total welfare standard’ has a variety of uses and meanings in economic and legal literature. To avoid any potential confusion, the ACCC proposes to refer to the approach taken by the tribunal in **Qantas Airways** as the application of a ‘public benefit standard’. The ACCC will apply a public benefit standard when determining the weight to be given to productive efficiency savings in considering authorisation applications.

5.30 The tribunal in **Qantas Airways** referred to whether benefits ‘are of value to the community generally’ when determining whether benefits are public benefits. The ACCC considers the same principle applies to the weight to be given to a public benefit—that is, how much weight does society consider should be attached to a public benefit. Of particular interest will be the number and identity of the proposed beneficiaries.

5.31 The ACCC will assess community views on this issue by referring to the applicant’s submission, interested party submissions, and any other relevant evidence.

5.32 The ACCC considers the application of a public benefit standard represents a natural evolution of the ACCC’s approach, informed by tribunal determinations.

Assessing authorisation applications

5.33 This part examines the ACCC’s approach to assessing public benefit and detriment in particular applications. It assumes that particular benefits or detriments would, if demonstrated to exist on the facts, constitute public benefits or detriments as defined in paragraph 5.11 of this chapter.

Applicants must satisfy the ACCC

5.34 It is for applicants to satisfy the ACCC that authorisation should be granted. The tribunal has stated that:

The onus is upon the applicant to satisfy the Tribunal that there is sufficiently substantial public benefit to outweigh the detriment, especially any anti-competitive detriment, and so justify authorization. Given the value placed upon the promotion and preservation of competition by the Act as a whole, it is a heavy onus.¹⁰⁸

5.35 Generally, the evidentiary burden on applicants to prove the existence of a public benefit increases with the level of public detriment. Consequently, the evidentiary burden on applicants wishing to engage in conduct that is less likely to affect competition would be lower than that for an applicant wishing to engage in conduct that would generate substantial detriment.

5.36 In practice, this means an applicant for authorisation has to provide evidence of significant public benefit when applications are considered (at least initially) likely to generate substantial public detriment. Applicants would need to:

- initially provide comprehensive and detailed submissions in support of their application
- respond fully to all issues raised by interested parties or the ACCC during the authorisation process.

107 See *Qantas Airways Ltd* (2004), ACompT 9 at p. 51.

108 *Queensland Co-operative Milling Association Ltd* (1976), ATPR 40-012, at 17,244.

- 5.37 In the context of applying the test at s. 90(8)¹⁰⁹ of the Act, the tribunal commented that ‘something more than a negligible benefit is required before the power to grant authorisation can be exercised.’¹¹⁰

Future with and without test

- 5.38 A benchmark must be established against which to identify and weigh public benefit and detriment claims. As the tribunal has stated:

In weighing relevant public benefits and detriments, the Tribunal must compare the position which would or would be likely to exist in the future, on the one hand if authorisation were to be granted, and on the other hand if it were absent.¹¹¹

- 5.39 The ACCC determines the future without the authorisation—the counterfactual—on a case-by-case basis. The tribunal has stated that:

That does not mean that we prophesy the future. As QCMA expressed the point:

We are to be concerned with probable effects rather than with possible or speculative effects. Yet we accept the view that the probabilities with which we are concerned are commercial or economic likelihoods which may not be susceptible of formal proof. We are required to look into the future but we can be concerned only with the foreseeable future as it appears on the basis of evidence and argument relating to the particular application.¹¹²

- 5.40 Under this test, the ACCC will usually assume that the conduct for which authorisation is sought will not be engaged in without authorisation. Exceptions include when authorisation is sought for complex conduct—for example, industry codes of conduct—when it is clear that only some aspects of the conduct risk breaching the Act. Where these aspects of the conduct are severable from the rest, the rest are likely to be assumed to continue without authorisation (although ideally applicants should only seek authorisation for those aspects of their conduct that might risk breaching the Act).

Market definition

- 5.41 This section outlines the basic principles of market definition. The ACCC publication, *Merger guidelines*, contains a comprehensive discussion of this topic.¹¹³
- 5.42 It will usually be helpful to define the markets affected by conduct proposed for authorisation to specifically assess the level of public detriment from any lessening of competition.
- 5.43 However, depending on the circumstances, the ACCC may not need to comprehensively define the relevant markets as it may be apparent that a net public benefit would or would not arise regardless of the scope of the market.

109 The test at s. 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

110 *Re Application by Michael Jools, President of the New South Wales Taxi Drivers Association* (2006), ACompT 5 at para. 22.

111 *Australian Performing Rights Association* (1999), ATPR 41-701 at 42,936. See also, for example, *Australian Association of Pathology Practices Incorporated* (2004), ATPR 41-985 at 48,556; and *Re Media Council of Australia* (No. 2) (1987), ATPR 40-774 at 48,419.

112 *Re Queensland Independent Wholesalers Ltd* (1995), ATPR 41-438 at 40,960-961. See also *Queensland Co-operative Milling Association Ltd* (1976), ATPR 40-012 at 17,243.

113 ACCC, *Merger guidelines*, June 1999, pp. 31–42. This publication is available free online (www.accc.gov.au).

- 5.44 Section 4E of the Act provides that the term market ‘includes a market for those goods and services and other goods and services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services’. Market definition identifies the sellers and buyers who effectively constrain the price and output decisions of the firms engaged in the conduct for which authorisation is sought.
- 5.45 Substitutability may be thought of by asking the question: What would be the responses on the demand side and the supply side to a relatively small percentage increase in the price of the good or service? The tribunal has stated that:
- A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them ... Within the bounds of a market there is substitution—substitution between one product and another, and between one source of supply and another, in response to changing prices ... It is the possibilities of such substitution which set the limits upon a firm’s ability to ‘give less and charge more’. Accordingly, in determining the outer boundaries of the market we ask a quite simple but fundamental question: if the firm were to ‘give less and charge more’ would there be, to put the matter colloquially, much of a reaction?¹¹⁴
- 5.46 The boundaries of the relevant market are a question of degree. The tribunal stated that:
- ... all competition or substitution does not cease at the outer boundaries of the market; the economy as a whole is a network of substitution possibilities in consumption and production; competition is a matter of degree.¹¹⁵
- 5.47 A market has four dimensions:
- product
 - geographic
 - functional
 - time.
- 5.48 The process of establishing the market boundaries starts with the product and geographic areas where the good or service is supplied. These are then extended in product, geographic and functional space to include all those sources, and potential sources, of close substitutes.
- 5.49 On the demand side the ACCC will examine which goods or services consumers consider are close substitutes and which geographic sources of supply they consider to be substitutable. If, in the event of a small but significant price rise for the applicant’s goods or services, some (but not necessarily all or even most) consumers would switch to these alternatives, these products and sources of supply will be included in the relevant market.
- 5.50 On the supply side the ACCC will consider which suppliers could, without significant investment, switch their production or distribution facilities to supply a substitute product to that supplied by the applicant, or switch from supplying another geographic area to that supplied by the applicant. If, in the event of a small but significant price rise for the applicant’s goods or services, these suppliers could find it in their economic interest to switch their supply, these suppliers will be included in the relevant market.
- 5.51 Delineation of the relevant functional market requires identification of the vertical stages of production and/or distribution which comprise the relevant arena of competition.

114 *Queensland Co-operative Milling Association Ltd* (1976), ATPR 40-012 at 17,247.

115 *Re Tooth & Co Ltd* (1979), ATPR 40-113 at 18,196–197.

5.52 The time dimension of the market refers to the period over which substitution possibilities should be considered. The tribunal has stated that:

It is plain that the longer the period allowed for likely customer and supplier adjustments to economic incentives, the wider the market delineated. In our judgement, given the policy objectives of the legislation, it serves no useful purpose to focus attention upon a short-run transitory situation. We consider we should be basically concerned with substitution possibilities in the longer run.¹¹⁶

5.53 To define the relevant markets for analysis of an authorisation application, the ACCC will consider substitution possibilities over the longer term (but still in the foreseeable future) that will effectively constrain the exercise of significant market power by the applicant. This means that the notion of 'longer term' is likely to be applied in terms of the timeframe for implementation of capital investment/expansion decisions, rather than the common economic meaning of 'longer term', which is linked to the productive economic life of capital plant.

5.54 The functional dimension of the market refers to the stage of the production process relevant to the goods and services under analysis. For example, a product may be sold to final consumers at a retail functional stage or it may be sold from one manufacturer to another at a wholesale functional stage of production. Market definition considers both the substitution possibilities at the relevant functional stage as well as broader alternative goods and services that are produced across a range of functional stages. On the latter, for example, a vertically integrated producer may constrain the behaviour of a firm at the wholesale level (even though the integrated producer may make no wholesale sales) if final consumers can substitute between the relevant products at the retail level.

Measuring public benefit and detriment

5.55 It can be difficult to put a precise numerical value on benefits and detriments. Generally, the ACCC qualitatively assesses authorisation applications. In the **Queensland Co-operative Milling Association (QCMA)** case, the tribunal stated that:

The benefit ... need not, it is plain, be necessarily capable of quantitative assessment; but it should be sufficiently definable—have sufficient substance—as to permit some factual judgment of its relative importance.¹¹⁷

5.56 In practice, a qualitative assessment involves making a judgment about the existence and size of the public benefit and detriment based on a set of indicators derived from:

- The facts of the application.
- If relevant, the application of economic principles. This may involve developing an economic model to systematically identify the various effects of an arrangement on the relevant market(s), and possibly which effects are likely to be more significant than others. However, the ACCC will not usually quantify effects. Quantification is discussed further in paragraph 5.60.

5.57 For example, in **Re AGL Cooper Basin Natural Gas Supply Arrangements**¹¹⁸, the tribunal, without quantifying either factor, concluded that the public detriment was 'significant' but was outweighed by the 'substantial' public benefit.¹¹⁹

116 *Re Tooth & Co Ltd* (1979), ATPR 40-113 at 18196.

117 *Queensland Co-operative Milling Association Ltd* (1976), ATPR 40-012, at 17,243.

118 *Re AGL Cooper Basin Natural Gas Supply Arrangements* (1997), ATPR 41-593.

119 *ibid.*, at 44,220.

Meaning of 'likely to result'

- 5.58 The tests the ACCC must apply to determine whether to grant authorisation require that for particular benefits or detriments to be relevant, the conduct in question must 'result, or be likely to result, in' them.
- 5.59 The Australian Competition Tribunal has provided some guidance on how the phrase 'likely to result' should be interpreted:

Thus, for a benefit or detriment to be taken into account, we must be satisfied that there is a real chance, and not a mere possibility, of the benefit or detriment eventuating. It is not enough that the benefit or detriment is speculative or a theoretical possibility. There must be a commercial likelihood that the applicants will, following the implementation of the relevant agreements, act in a manner that delivers or brings about the public benefit or the lessening of competition giving rise to the public detriment. We must be satisfied that the benefit or detriment is such that it will, in a tangible and commercially practical way, be a consequence of the relevant agreements if carried into effect and must be sufficiently capable of exposition (but not necessarily quantitatively so) rather than "ephemeral or illusory", to use the words of the Tribunal in **Re Rural Traders Co-operative (WA) Ltd** (supra) at 263.¹²⁰

Quantification

- 5.60 Quantification requires determining monetary estimates of the size of individual public benefits and detriments. To obtain an estimate, an economic model able to analyse appropriate data will often need to be developed.
- 5.61 The tribunal stated:
- The Act does not require an applicant for authorisation to quantify, in precise terms, the benefits claimed to arise if authorisation is granted. However, there must be a factual basis for concluding that the public benefits are likely to result.¹²¹
- 5.62 The ACCC encourages quantification by applicants when possible, but recognises that it will often not be possible to calculate accurate monetary estimates for public benefits and detriments. Quantification typically needs models to be developed as well as a series of potentially contentious assumptions. Quantification will generally only provide guidance on the relative weight to be attributed to those factors capable of quantification in the overall assessment.¹²²
- 5.63 For example, in **Port Waratah Coal Services** the ACCC considered a system for rationing coal exports through the Port of Newcastle to substantially reduce a queue of coal ships off the Port of Newcastle. Coalmines were paying fees, known as demurrage, to shipowners for each day that ships spent in the queue. The applicant provided a model for calculating the amount of demurrage expected to be paid by coalmines. This model predicted that total demurrage savings would increase as the expected length of the ship queue increased. The ACCC accepted the model, but did not fully accept the applicant's forecast of the likely length of the ship queue (if the rationing system did not proceed). The ACCC concluded a likely cost savings of between US\$80 million and US\$140 million in 2004. This range reflected the ACCC's estimate of the lowest and highest likely queue size.¹²³

120 *Qantas Airways Ltd* (2004), ACompT 9 at p. 42.

121 *Qantas Airways Ltd* (2004), ACompT 9 at p. 55.

122 See A Fels and T Grimwade, 'Authorisation: is it still relevant to Australian competition law?' (2003), vol. 11, no. 2, *Trade Practices Law Journal*, pp. 187–214.

123 *Port Waratah Coal Services*, final determination (A90906–8), 9 July 2004.

5.64 In contrast, in **Qantas Airways** (2004), the tribunal was concerned about the quantification of the claimed benefits:

... the applicants attempted to quantify with some precision a number of claimed benefits. As a general note, we observe that if parties wish to rely upon quantifiable monetary benefits it is desirable, indeed necessary, that the calculation of such monetary benefits be justified and explained. We expect the basic assumptions underlying the quantification to be spelled out, along with the reasoning process by which the final figures are derived. In a number of respects, such exercises were not carried out in support of the figures that were put before us in the present proceeding ...

Accordingly, we place little weight on the precise quantification of benefits presented by the applicants.¹²⁴

5.65 Moving along the spectrum, monetary estimates become progressively less credible as economic models become more speculative and data more difficult to obtain.

5.66 In particular, public benefits arising from addressing market failures can only be credibly quantified in exceptional circumstances. Consequently, the weight given to public benefit claims of this nature will usually need to be qualitatively assessed. The nature of this assessment will often be the same as that for assessing non-economic public benefit claims (see paragraph 5.67), given that these claims can often be reframed as benefits from addressing market failures.

Assessing non-economic public benefits and detriments

5.67 In practice, non-economic public benefit claims typically rely on the validity of a series of propositions. For example, the **Refrigerant Reclaim Australia**¹²⁵ authorisation was for a levy on refrigeration and air-conditioning products to fund a scheme for reducing the greenhouse gases emitted from such products when products are repaired or scrapped. The ACCC accepted that the levy would generate an environmental public benefit on the following broad propositions:

- global warming exists and is an environmental problem
- reducing greenhouse gas emissions would slow global warming
- the levy would be used to reduce greenhouse gas emissions.

5.68 When considering a non-economic public benefit claim, the ACCC will identify the propositions that the claim relies on, and divide them into ones:

- it can properly assess itself
- that fall outside its expertise.

5.69 For example, the first two propositions above from **Refrigerant Reclaim Australia** involve scientific theories and evidence that the ACCC does not have the technical expertise or resources to assess independently.

5.70 However, the final proposition contains aspects within the ACCC's expertise. For example, while this concern did not actually arise in the matter, had it arisen, the ACCC would have been able to assess a concern about whether the scheme contained appropriate safeguards to ensure that the levy funds were used as intended. The ACCC also relied on its own expertise in concluding that the small increase in the price of refrigeration and air-conditioning products caused by the scheme would have a negligible effect on consumers.

124 *Qantas Airways Ltd* (2004), ACompT 9 at p. 57.

125 *Refrigerant Reclaim Australia*, final determination, 7 May 2003.

- 5.71 When the ACCC needs to rely on the views of others about a proposition, it will be guided by consultation with interested parties. In particular, broad (but not necessarily universal) community support for a proposition will significantly increase the likelihood that the ACCC will accept it.
- 5.72 When conduct appears likely to generate minimal public detriment, the level of assurance required by the ACCC about the support for a proposition underpinning a public benefit claim would be correspondingly lower.
- 5.73 Propositions which the ACCC can evaluate itself will be assessed qualitatively.
- 5.74 The ACCC would need to be satisfied that all propositions underpinning a non-economic public benefit claim hold true before accepting that claim.
- 5.75 Once it is accepted that conduct generates a non-economic public benefit, that benefit needs to be evaluated. Generally, the ACCC will not attempt to determine the absolute size of the non-economic public benefit. Rather, it will reach a conclusion on whether it outweighs the public detriment. This approach is possible because, in the ACCC's experience, authorisation applications that make a non-economic public benefit claim usually rely primarily on this claim—see, for example, the applications outlined at paragraph 5.17.
- 5.76 The ACCC will be more likely to conclude that a non-economic public benefit outweighs the public detriment when there is broad community support for granting authorisation. Limited community opposition would not necessarily mean that an application would be denied, particularly when the conduct generates minimal public detriment. However, the ACCC is less likely to grant an application relying on a non-economic public benefit to which there is significant community opposition (even if there is limited community support).
- 5.77 Whether there is broad support would be assessed by reference to the applicant's submission, interested party submissions and any other relevant evidence available to the ACCC.
- 5.78 The ACCC emphasises that it takes account of broad community support for granting authorisation for a specific purpose, this being to measure a non-economic public benefit that it has found flows from the conduct in question. Applications that are broadly supported may still not be granted if a proposition on which a public benefit claim relies is invalid (this is possible particularly when the ACCC is able to assess a proposition itself). Further, broad community support for granting an authorisation application would not guarantee this outcome because, for example, the ACCC might conclude that the applicant and interested parties had underestimated the public detriment.

Compliance with statutory requirements

- 5.79 The ACCC has considered several applications claiming that the arrangements, for which authorisation is sought, will facilitate compliance with legislative or regulatory requirements and that this constitutes a public benefit.
- 5.80 It can be argued that legislative requirements should be complied with without authorisation and that the benefit of compliance should therefore not be attributed to the arrangements for which authorisation is sought. However, when a clear link can be made between the arrangements and increased compliance, there may be a case.
- 5.81 In an application lodged by **CSR Ltd**¹²⁶ the applicant submitted that the concrete cartage allocation arrangement improved public safety because it eliminated the carriers' perception that they were required to speed to obtain their share of available work.

126 *CSR Limited* (2003), A90769.

- 5.82 It was the ACCC's view that adherence to statutory obligations, such as speed limits and laws relating to safety in the workplace, was in the public interest. However, the ACCC considered that adherence to the law would not necessarily be determined by the cartage allocation arrangements, but rather by the professionalism of individual carriers. As such, the ACCC did not accept that improved compliance with legislative requirements was a public benefit that was likely to result from the cartage allocation system.
- 5.83 In contrast, when considering the **Homeworkers Code of Practice**¹²⁷, the ACCC accepted as public benefits that the code:
- lessened the risk of exploitation of a susceptible group
 - improved the flow of information to homeworkers
 - facilitated compliance with federal and state awards and other legislative and statutory requirements.
- 5.84 This assessment was based on evidence that the arrangements would lessen the likelihood of unlawful conduct—namely, the exploitation of homeworkers.

Public detriment from a lessening of competition

- 5.85 To properly assess the effect of a lessening of competition, it is important to understand the concept of competition and the benefits it brings:

Competition may be valued for many reasons as serving economic, social and political goals. But in identifying the existence of competition in particular industries or markets, we must focus upon its economic role as a device for controlling the disposition of society's resources. Thus we think of competition as a mechanism for discovery of market information and for enforcement of business decisions in the light of this information. It is a mechanism, first, for firms discovering the kinds of goods and services the community wants and the manner in which these may be supplied in the cheapest possible way. Prices and profits are the signals which register the play of these forces of demand and supply. At the same time, competition is a mechanism of enforcement: firms disregard these signals at their peril, being fully aware that there are other firms, either currently in existence or as yet unborn, which would be only too willing to encroach upon their market share and ultimately supplant them.

Competition expresses itself as rivalrous market behaviour. ... In our view effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers.

Competition is a process rather than a situation. Nevertheless, whether firms compete is very much a matter of the structure of the markets in which they operate.¹²⁸

- 5.86 Detriment from a lessening of competition may arise in many forms, including:
- increased prices to final consumers associated with fewer sales, reductions in quality or terms of sale (allocative inefficiency)
 - increased costs of production due to inefficient practices being protected (productive inefficiency)
 - reduced innovation and improvement over time by lowering incentives to innovate and slowing the uptake of new technologies (dynamic inefficiency).

127 *Homeworkers Code of Practice Committee Inc.* (2005), A90975–8.

128 *Re Queensland Co-operative Milling Association Ltd* (1976), ATPR 40-012, at 17245–246.

- 5.87 It can be important to keep in mind that the focus here is on detriments from less competition, not detriment for individual competitors through, for example, loss of sales or profits.
- 5.88 The magnitude of public detriment from particular conduct may largely depend on the circumstances of the market within which the conduct takes place. The following factors may be relevant when making an assessment:
- the number of competitors in the market and the level of concentration
 - the extent to which substitutes are available, including the level of import competition
 - the height of market entry barriers
 - the degree of countervailing power in the market
 - the degree of vertical integration.
- 5.89 A detailed discussion of these factors can be found in the ACCC's *Merger guidelines*.

Role of the ACCC

- 5.90 When assessing an application for authorisation, the ACCC considers the arrangements put before it. The ACCC must consider the benefits and detriments flowing from all the essential aspects of a set of arrangements. In these circumstances it cannot grant authorisation to those parts that deliver benefits but deny authorisation to other parts that cause detriments.
- 5.91 However, the tribunal has stated that in some circumstances it is appropriate to consider the benefits and detriments of individual elements of arrangements:
- Only if a particular feature is not essential would it then be appropriate to consider whether that feature, standing alone, has a net public benefit.¹²⁹
- 5.92 Further, the tribunal has determined that even where a particular component of a set of arrangements which causes an anti-competitive detriment is not severable, if it can be modified in a way to reduce the detriment without 'impairing essential components of the arrangements', this should be done.¹³⁰
- 5.93 In 1999 the tribunal considered an application for review of an authorisation determination granted to the Australasian Performing Right Association, a voluntary collecting society. The members of APRA are either original music composers or lyricists or their heirs or assignees. Under APRA's framework of collective administration, writers and music publishers grant an exclusive assignment of copyright in the performing right of all their musical works to APRA. APRA licences the use of the musical works on conditions and against fees which it determines, subject only to constraints that might be imposed by the Copyright Tribunal. APRA monitors the public performance use of the works, collects licence fees and distributes them among its members.
- 5.94 The Australian Competition Tribunal concluded that the public benefits arising from APRA's collective administration of performing rights exceeded the anti-competitive detriments flowing from its operations. Nevertheless, the tribunal held that the input arrangements of APRA, which require an exclusive assignment of performing rights, should be modified to remove or lessen the potential for detriment without creating an undue risk to the essential elements of APRA's role as a collecting society.

129 *Re Applications by Australasian Performing Right Association* (1999), ACompT 3 (16 June 1999) at p. 310.

130 *ibid.*, p. 311.

- 5.95 The tribunal required APRA to develop rules for a non-exclusive opt-out system on a work-by-work basis and an alternative dispute resolution procedure.¹³¹

Imposing conditions

- 5.96 The Act permits the ACCC to grant authorisation subject to conditions.¹³² Generally, the ACCC will only impose conditions to ensure that the authorisation test is met or continues to be met over the period of the authorisation.
- 5.97 Consistent with this principle, the ACCC may impose conditions when there is uncertainty about whether a net public benefit exists—for example, when the public benefit and public detriment appear to be of similar size. As noted at 5.37, something more than a negligible net benefit may be required before the ACCC can grant authorisation.
- 5.98 In these cases, given the onus on the applicant, the ACCC will generally not be satisfied that the public benefit generated by the application outweighs the anti-competitive detriment. However, it may consider whether it is possible to grant authorisation subject to conditions aimed at reducing, as far as possible, any uncertainty about whether the public benefit exceeds the anti-competitive detriment.
- 5.99 For example, in **Royal Australasian College of Surgeons**, the ACCC concluded that the college's training and assessment processes were likely to generate significant public benefits, particularly in maintaining high surgical standards but also because the college provides certain services on a pro bono basis. However, the ACCC was also concerned that the college's training and assessment processes potentially generated significant public detriment, arising from their potential to inappropriately restrict entry into the surgical profession. The ACCC granted authorisation subject to a range of conditions aimed at increasing external involvement in, and the transparency of, the college's processes.¹³³
- 5.100 The tribunal has stated that even when a set of arrangements gives rise to a net public benefit, authorisation can be granted on condition that changes are made to the arrangements to lessen the potential for detriment of parts of the arrangements, so long as those changes do not negatively affect their essential components.
- ... if aspects of APRA's collective administration which are identified as anti-competitive can be modified so as to remove or lessen the potential for detriment without impairing essential components of APRA's operations, then authorisation should be granted on terms that bring about those modifications.¹³⁴
- 5.101 The ACCC may initiate the process for revoking an authorisation if a condition is not complied with (see paragraph 7.29). In some cases, failure to comply with a condition of authorisation may also mean that the conduct being engaged in falls outside the terms of the authorisation and therefore is not covered by the immunity provided by the authorisation.
- 5.102 The ACCC recognises that, in some circumstances, there is a risk that conditions may have unforeseen consequences. In these circumstances, it may be preferable to avoid imposing conditions by encouraging applicants to amend their applications to address any concerns before a final determination is issued.

131 *Re Applications by Australasian Performing Right Association* (1999), ACompT 3, 16 June 1999.

132 Section 91(3).

133 *Royal Australasian College of Surgeons*, final determination (A90765), 30 June 2003.

134 *Re Applications by Australasian Performing Right Association* (1999), ACompT 3 (16 June 1999) at p. 311.

- 5.103 Preferably draft determinations would indicate where applicants should consider amending their applications. However, new concerns can arise after a draft determination has been issued. If applicants are unable to dispel these concerns, and the ACCC considers that the concerns are of sufficient weight to justify denying authorisation, it may inform applicants that they should consider amending their applications to address the concerns.

Length of authorisation

- 5.104 The ACCC may grant authorisation for a limited period of time¹³⁵ and, in practice, will only grant perpetual authorisations in exceptional circumstances. This allows the ACCC to review the authorisation after an appropriate period.
- 5.105 For example, in **Australasian Performing Rights Association**, authorisation was sought for several aspects of APRA's system for ensuring that its members (music composers and lyricists) received fees from businesses using their music. The tribunal considered that:
- ... it would be appropriate to grant an authorisation until 30 June 2004 [a five-year period]. We do not think the authorisation should be for longer as technological and other changes are constantly having an effect on aspects of the relevant market.¹³⁶
- 5.106 The ACCC considers the duration of authorisation on a case-by-case basis. In recent years the ACCC has granted authorisation for arrangements for limited periods, typically for no more than five years. The ACCC might grant authorisation for longer periods when, for example, conduct requires investments that would only be likely if the conduct is authorised for a longer period.
- 5.107 The ACCC might grant authorisation for shorter periods if, for example, market conditions, regulation or other factors are likely to change in a way that affects whether the conduct would continue to generate a net public benefit. Or market conditions may be too uncertain for the ACCC to conclude that conduct would be likely to continue to generate a net public benefit.
- 5.108 The ACCC will not generally grant authorisation for longer than the period sought by applicants. Applicants can reapply for authorisation or can seek to extend the period by lodging an application for revocation and substitution.

Acting outside the terms of authorisation

- 5.109 If an applicant engages in anti-competitive conduct that is outside the terms of the authorisation granted by the ACCC, that conduct is not covered by the immunity conferred by the authorisation. In these circumstances the ACCC's authorisation is still valid; however, the business risks legal action from the ACCC or any third party to the extent that such conduct might constitute a breach of the Act.
- 5.110 In some cases, the authorisation may set out the manner in which the parties are authorised to act—for example, a process for collective bargaining. In these cases, actions not in accordance with the authorised process may not be protected.

135 Section 91(1).

136 *Australian Performing Rights Association* (1999), ATPR 41-701 at 42,997.

The tests for authorisation

Competition and Consumer Act 2010

Section 90—Determination of applications for authorisations

- (1) The Commission shall, in respect of an application for an authorization:
 - (a) make a determination in writing granting such authorization as it considers appropriate; or
 - (b) make a determination in writing dismissing the application.
- (2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (4) The Commission shall state in writing its reasons for a determination made by it.
- (5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

- (5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:
 - (a) that the provision would result, or be likely to result, in a benefit to the public; and
 - (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
 - (i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and
 - (ii) the provision were given effect to.
- (5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:
 - (a) that the provision has resulted, or is likely to result, in a benefit to the public; and
 - (b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.
- (6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or 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:
 - (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;

(b) the proposed covenant were given, and were complied with; or
(c) the proposed conduct were engaged in;
as the case may be.

(7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.

(8) The Commission shall not:

(a) make a determination granting:

- (i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
- (ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
- (iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
- (iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

(b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

(9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

(9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):

(a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):

- (i) a significant increase in the real value of exports;
- (ii) a significant substitution of domestic products for imported goods; and

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

6. Interim authorisation

What is an interim authorisation?

- 6.1 Interim authorisation allows an applicant to engage in the conduct proposed for authorisation as if authorisation has been granted, before the issuing of a final determination.¹³⁷ Interim authorisation may be sought for part or all of the conduct proposed for authorisation.
- 6.2 The Act empowers the Australian Competition and Consumer Commission (ACCC) to grant interim authorisation:
- to allow parties to engage in the proposed conduct while due consideration is given to the application for authorisation
 - during the 21-day period during which applicants or interested parties may apply to the tribunal for a review of an ACCC determination
 - during the period while the tribunal considers an application for review of an ACCC determination
 - for any other reason.¹³⁸
- 6.3 The ACCC may grant an interim authorisation for:
- New applications.
 - Applications for minor variation (see paragraph 7.4). Interim authorisation protects the subject matter of the proposed variation.¹³⁹
 - Applications for revocation and substitution (see paragraph 7.37). The interim authorisation protects the conduct the subject of the substitute authorisation. To grant interim authorisation, the ACCC must first suspend the authorisation proposed for revocation.¹⁴⁰

When will the ACCC grant interim authorisation?

- 6.4 The ACCC will only grant interim authorisation in special circumstances. This is because interim authorisation allows an applicant, for a limited period, to engage in conduct before the ACCC has been able to fully assess whether the conduct satisfies the authorisation test (see chapter 5).
- 6.5 In practice, requests for interim authorisation are usually considered:
- shortly after an application for authorisation is lodged
 - when the ACCC issues a draft determination proposing to grant authorisation
 - when the ACCC issues a final determination proposing to grant authorisation.

¹³⁷ *International Air Transport Association and Alitalia Linea Aerea Italiana SPA* (1985), 40-537 at 46,335.

¹³⁸ Sections 91(2)(a) to 91(2)(c).

¹³⁹ Section 91(2)(e).

¹⁴⁰ Section 91(2)(f).

6.6 However, the particular facts of a matter may result in a request for interim authorisation being considered at other times during the authorisation process.

6.7 In **International Air Transport Association and Alitalia Linea Aerea Italiana SPA**, the Australian Competition Tribunal stated that:

It would be unwise, if not impossible, to attempt the task of defining all relevant principles that govern the grant of interim authorization by the Tribunal. Much depends on the facts of the particular case, the urgency of the occasion and the conduct of the application by the parties.¹⁴¹

6.8 While it is not possible to list all factors that the ACCC will take into account when assessing an application for interim authorisation, the key factors include:¹⁴²

- That the policy of the Act is clearly opposed to arrangements that lessen competition. The ACCC is therefore unlikely to grant interim authorisation to arrangements that are highly anti-competitive unless compelling reasons are provided.
- The extent to which the relevant market will change if interim authorisation is granted. Interim authorisation is more likely to be granted when it will maintain the market status quo. Interim authorisation is unlikely to be granted if doing so would permanently alter the competitive dynamics of the market or inhibit the market from returning to its pre-interim state if final authorisation is later denied.
- The urgency of the need for interim authorisation. Relevant to this, the ACCC will consider whether it was realistically possible for an application to have been lodged sufficiently early to have made the request for interim authorisation unnecessary.
- The possible harm, if any, to the applicant if a grant of interim authorisation is denied.
- The possible harm to other parties (such as customers and competitors) if a request for interim authorisation is granted or denied.
- Any possible benefit or detriment to the public that the ACCC could assess at the time of considering the request for interim authorisation. However, the ACCC is not required to determine whether the relevant conduct would satisfy the authorisation test.

The tribunal has stated that:

... generally it would be inappropriate to examine too closely or precisely questions of law which arise in the matter or to determine questions of credibility of witnesses or to sift through extensive material to determine questions of fact in issue between the parties and which may be finely balanced. It would be unfair to the parties, and a task of supererogation, to come to conclusions on difficult questions involved at an early stage of the process of review. But no rigid test can be prescribed to meet all cases. Sometimes the hearing of an application for interim authorization will reveal that, on any view of the matter, the case for authorization, whether interim or final, is so weak or strong, as the case may be, that firm conclusions may be reached and expressed by the Tribunal at an early stage. Most cases would probably fall somewhere in between these two extremes.¹⁴³

141 *International Air Transport Association and Alitalia Linea Aerea Italiana SPA* (1985), 40-537 at 46,336.

142 A number of these factors were expounded by the tribunal in *Re Queensland Timber Board* (1975), ATPR 40-005 at 17,122-123.

143 *International Air Transport Association and Alitalia Linea Aerea Italiana SPA* (1985), 40-537 at 46,337-338.

Applying for interim authorisation

- 6.9 A request for interim authorisation may only be made if an application for authorisation has also been lodged for the same conduct.¹⁴⁴
- 6.10 There is no application form for interim authorisation. In practice, applicants should write to the ACCC requesting interim authorisation. The letter should indicate when the applicants wish interim authorisation to start, and then address the factors listed at paragraph 6.8. No additional fee is payable.

Process for assessing applications for interim authorisation

- 6.11 While the Act does not require it, the ACCC will generally make inquiries and/or seek submissions from interested parties about the effect of granting interim authorisation (except in particularly urgent matters). Market inquiries about requests for interim authorisation are generally conducted over shorter timeframes than market inquiries for the substantive authorisation application.
- 6.12 The ACCC aims to make a decision on a request for interim authorisation within 30 days of the request.
- 6.13 The ACCC is not required to provide reasons for a decision on an interim authorisation (although it will ordinarily provide a summary of its reasons).
- 6.14 In granting interim authorisation, the ACCC can specify the date on which the interim authorisation will come into effect (although this date cannot be before the date on which interim authorisation is granted) and also the period for which the interim authorisation will apply (e.g. until a specified date or until the ACCC's draft or final determination is issued).
- 6.15 The ACCC can also revoke interim authorisation at any time but will usually consult with interested parties and the applicant if it contemplates doing so.

Implications of interim authorisation decisions for the substantive authorisation application

- 6.16 ACCC decisions to grant (or deny) interim authorisation should not be taken to indicate that it is likely to grant (or deny) substantive authorisation.
- 6.17 For example, **Farm Pride Foods Limited**¹⁴⁵ received interim authorisation, but authorisation was subsequently denied and the interim authorisation revoked following public consultation and detailed analysis.
- 6.18 Conversely, the **Australian Newsagents Federation's** request for interim authorisation was denied but final authorisation was subsequently granted. At the time of considering the applicant's request, the ACCC was not satisfied that the circumstances were sufficiently exceptional to warrant interim authorisation and noted that if new contracts were negotiated under interim, they could not be undone if the ACCC later denied authorisation.

¹⁴⁴ Or at least conduct including the conduct for which interim authorisation is sought.

¹⁴⁵ ACCC determination (A90621), application for authorisation by Farm Pride Foods Limited regarding its Franchise and Marketing Agreement, 2 August 2000.

What are the powers of the Australian Competition Tribunal?

- 6.19 Applicants and interested parties cannot request the tribunal to review an ACCC decision to grant or deny interim authorisation.
- 6.20 However, if the tribunal is asked to review an ACCC decision on a substantive application for authorisation, it also has the power to grant interim authorisation while it conducts this review (even if the ACCC has previously denied interim authorisation).

7. Amending, revoking and substituting authorisations

- 7.1 A person to whom an authorisation has been granted may subsequently determine that it wishes to vary the authorised arrangements. The Act provides two mechanisms for varying authorisations. Depending on the nature of the proposed variation, the person (or a person on their behalf) may apply to the Australian Competition and Consumer Commission (ACCC) for:
- a minor variation to the authorisation
 - revocation of the existing authorisation and substitution of a new authorisation if the variation is more significant than a minor variation.
- 7.2 A person to whom an authorisation has been granted (or a person on their behalf) may also request that the ACCC revoke the authorisation.
- 7.3 In certain circumstances, the ACCC may review and possibly revoke or substitute an authorisation on its own initiative.

Minor variation

- 7.4 When assessing applications for minor variation, the ACCC must be satisfied of two things: first, whether the proposed variation satisfies the definition of a ‘minor variation’; and second, if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the arrangements.

What is a minor variation?

- 7.5 The Act limits applications for minor variation to applications for:
- ... a single variation that does not involve a material change in the effect of the authorisation.¹⁴⁶
- 7.6 A variation can only be considered to be ‘minor’ if it changes the conduct on which immunity has been conferred or changes the nature of the immunity that has been conferred in a way that is not substantial or significant.
- 7.7 In determining whether this is the case, it is appropriate to consider the extent and nature of the change to the conduct. This will typically involve both a quantitative and a qualitative element.
- 7.8 The quantitative element considers the extent of the change to the conduct that will be authorised. The greater the extent of the change, the more likely that the change will be material. The qualitative element considers the nature of the change. A change that relates to conduct that is likely to contravene Part IV or which is central to generating a public benefit or causing detriment is more likely to be material than one which is ancillary or peripheral to such matters.

146 Section 87ZD(1).

Granting applications for minor variation

- 7.9 The ACCC will only grant authorisation to a minor variation if it is satisfied that the variation will not result in a reduced net public benefit of the authorised arrangement.¹⁴⁷

Process for assessing applications for minor variation

- 7.10 If the ACCC is not satisfied that a proposed variation is minor, the application will be denied. The ACCC will inform the applicant of the reasons for its decision. The applicant may then consider whether to apply for revocation and substitution of the authorisation (see paragraph 7.37).
- 7.11 If the ACCC is satisfied that a proposed variation is minor, it is required to consult with interested parties. The ACCC writes to all parties it considers may be interested in the matter:
- indicating the nature of the application for minor variation
 - inviting them to lodge submissions by a specified date.¹⁴⁸
- 7.12 The ACCC will typically request interested parties to comment on whether the proposed variation:
- is minor
 - would result in a reduced net public benefit of the authorised arrangement.
- 7.13 After considering the application and any submissions received, the ACCC will issue a written decision about whether it grants the application¹⁴⁹ and giving its reasons.¹⁵⁰ The decision will confirm or otherwise whether the ACCC considers the variation to be minor and will explain whether it considers the net benefits of the authorisation to have increased or decreased.
- 7.14 Unlike applications for authorisation, the ACCC does not issue a draft determination when considering a minor variation. Nor are interested parties able to call a conference to make oral submissions about the application to a commissioner.
- 7.15 The ACCC will usually take around two months to complete its assessment of an application for minor variation. Assessment may take longer in certain circumstances, for example, where the applicant fails to make clear the nature of the variation or where interested parties raise significant concerns.
- 7.16 If the application for minor variation is granted, the arrangements as amended receive the protection of authorisation. The minor variation comes into effect either:
- on the day specified in the determination which cannot be earlier than 21 days after it is issued
 - if an application is made to the tribunal to review the ACCC's decision but is later withdrawn, when that application for review is withdrawn.¹⁵¹
- 7.17 Alternatively, if an application is made to the Australian Competition Tribunal to review the ACCC's decision but not withdrawn, the tribunal's determination comes into force on the day it is made.¹⁵²

147 Section 91A(4).

148 Sections 91A(2)(a) and 91A(2)(b).

149 Section 91A(3).

150 Section 90(4).

151 Section 91(1B).

152 Section 91(1B).

7.18 If the application is dismissed, protection is limited to the arrangements as originally authorised by the ACCC.

Applying for a minor variation

7.19 An application for minor variation must be lodged on Form FA. No lodgment fee is payable.

7.20 The ACCC may assess more than one application for minor variation at the same time if:

- the applications are lodged at the same time, or in such close succession that the ACCC can conveniently deal with the variations at the same time
- the ACCC is satisfied that the combined effect of the variations, if all were granted, would not involve a material change in the effect of the authorisation.¹⁵³

7.21 An application for minor variation may be withdrawn by writing to the ACCC at any time during its consideration of the application.¹⁵⁴

Revocation

7.22 A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation. The ACCC may also review an authorisation with a view to revoking it in certain circumstances.

Revocation at the request of the holder of an authorisation

Applying for revocation

7.23 Applications for revocation must be lodged on Form FB. No lodgment fee is payable.

Process for assessing applications for revocation

7.24 On receiving an application for revocation, the ACCC will write to all parties it considers to be interested in the matter:

- informing them that it has received an application for revocation
- indicating the basis on which the revocation has been applied for
- inviting them to make submissions about the proposed revocation within a specified period.¹⁵⁵

7.25 If no interested party objects to the revocation, and there are no other concerns about revoking the authorisation, the ACCC can be expected to issue a written determination revoking the authorisation¹⁵⁶ and giving its reasons.¹⁵⁷ The ACCC may disregard any objection it considers is vexatious or frivolous.¹⁵⁸

7.26 However, if an interested party objects to the revocation, the ACCC may only grant the revocation if it is satisfied that the authorised conduct no longer satisfies the relevant test for granting authorisation.¹⁵⁹

7.27 An application for revocation may be withdrawn by writing to the ACCC at any time during its consideration of the application.¹⁶⁰

153 Sections 91A(6) and 91A(7).

154 Section 91A(8).

155 Section 91B(2).

156 Section 91B(4).

157 Section 90(4).

158 Section 91B(7).

159 Section 91B(5).

160 Section 91B(6).

Revocation at the initiative of the ACCC

7.28 The ACCC may, in certain circumstances, review and possibly revoke an authorisation on its own initiative.

Commencing a review of an authorisation

7.29 The ACCC may start a review of an authorisation if it is satisfied that:

- the authorisation was granted on evidence or information that was materially false or misleading
- a condition of authorisation has not been complied with or
- there has been a material change of circumstances since the authorisation was granted.¹⁶¹

7.30 The tribunal has stated that:

To determine whether there has been a material change of circumstances since the authorisation was granted, the Tribunal must commence by examining the circumstances as they existed at the time the authorisation was granted. From that point the Tribunal then moves forward to the circumstances as they exist on the material before the Tribunal at the time it conducts the rehearing. Circumstances is a word of wide import which includes all facts, matters and conduct relevant to an authorisation and to a revocation.¹⁶²

7.31 A 'material' change of circumstances is one that has 'an impact or likely impact upon public benefit and/or detriment'.¹⁶³

7.32 The depth of analysis required before the ACCC may conclude that a material change of circumstances has occurred is low. The tribunal has stated that '[no] detailed analysis is required to establish the point'.¹⁶⁴

7.33 If the ACCC is satisfied that it can start a review of an authorisation, it will write to all parties it considers to be interested in the matter:

- informing them that it is reviewing the authorisation
- indicating the basis on which the revocation is proposed
- inviting them to make submissions about the proposed revocation within a specified period.¹⁶⁵

7.34 If neither the holder of the authorisation nor an interested party objects to the revocation, and there are no other concerns about revoking the authorisation, the ACCC can be expected to issue a written determination revoking the authorisation¹⁶⁶ and giving its reasons.¹⁶⁷ The ACCC may disregard any objection it considers is vexatious or frivolous.¹⁶⁸

7.35 However, if an interested party or the holder of the authorisation objects to the revocation, the ACCC may only revoke the authorisation if it is satisfied that the authorised conduct no longer satisfies the relevant test for granting authorisation.¹⁶⁹

161 Section 91B(3).

162 *Re Media Council of Australia* (1996), ATPR 41-497 at 42,240.

163 *Re AGL Cooper Basin Natural Gas Supply Arrangements* (1997), ATPR 41-593 at 44,212. See also *re 7-Eleven Stores Pty Ltd* (1998), ATPR 41-666 at 41,462.

164 *Re AGL Cooper Basin Natural Gas Supply Arrangements* (1997), ATPR 41-593 at 44,214; see also 44,213.

165 Section 91B(3).

166 Section 91B(4).

167 Section 90(4).

168 Section 91B(7).

169 Section 91B(5).

- 7.36 When considering applications to revoke an authorisation, or when it is reviewing an authorisation on its own initiative, the ACCC is not required to issue a draft determination and there is no opportunity for interested parties or the applicant to request a pre-decision conference.

Revocation and substitution of a new authorisation

- 7.37 The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place. The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.

Revocation and substitution at the request of the holder of an authorisation

Applying for revocation and substitution

- 7.38 Applications for revocation and substitution must be lodged on Form FC. A lodgment fee of \$2500 is payable. Applicants may request that the ACCC waive the lodgment fee. For more information about fee waivers, please see paragraph 3.45.
- 7.39 Applications for revocation and substitution must be lodged before the current authorisation expires. It is not possible to apply for revocation and substitution for an authorisation that has expired.
- 7.40 In practice, applications should be lodged at least six months before an authorisation expires.

Process for assessing applications for revocation and substitution

- 7.41 On receiving an application for revocation and substitution, the ACCC will write to all parties it considers to be interested in the matter:
- informing them that it has received an application for revocation and substitution
 - indicating the basis on which revocation and substitution has been applied for, and the nature of the proposed substitute authorisation
 - inviting them to make submissions about the proposed revocation and substitution within a specified period.¹⁷⁰
- 7.42 The process then mirrors the process for considering an application for authorisation.¹⁷¹ In particular, the ACCC:
- issues a written draft determination stating whether it proposes to grant the application for revocation and substitution
 - invites the applicant and interested parties to lodge written submissions in response to the draft determination.
 - the applicant or any interested party may call a pre-decision conference to make oral submissions in response to the draft determination.
- The ACCC then issues a written final determination revoking the authorisation and granting an authorisation in substitution for it, or deciding not to revoke the authorisation.
- 7.43 These processes—and the timelines involved—are set out in more detail in chapter 4.
- 7.44 The ACCC may only grant an application for revocation and substitution if it is satisfied that the proposed substitute authorisation satisfies the relevant test for granting authorisation.¹⁷²

170 Section 91C(2).

171 Sections 91C(4) to 91C(6).

172 Section 91C(7).

- 7.45 For example, if a proposed substitute authorisation is for conduct that constitutes resale price maintenance, the ACCC would need to be satisfied that the conduct would meet the relevant authorisation test for resale price maintenance—that is, that the proposed conduct generates such a public benefit that it should be allowed to take place.¹⁷³

*Withdrawing an application**

- 7.46 An application for revocation and substitution may be withdrawn by writing to the ACCC at any time during its consideration of the application.¹⁷⁴

Revocation and substitution at the initiative of the ACCC

- 7.47 The ACCC may, in certain circumstances, review and possibly revoke an authorisation and substitute a new authorisation in its place on its own initiative.

Starting a review of an authorisation

- 7.48 The ACCC may start a review of an authorisation if it is satisfied that:
- the authorisation was granted on the basis of evidence or information that was materially false or misleading
 - a condition of authorisation has not been complied with, or
 - there has been a material change of circumstances since the authorisation was granted.¹⁷⁵
- 7.49 The meaning of ‘material change of circumstances’ is discussed at paragraph 7.30.
- 7.50 If the ACCC is satisfied that it can start a review of an authorisation, it will write to all parties it considers to be interested in the matter:
- informing them that it is reviewing the authorisation
 - indicating the basis on which revocation and substitution is proposed and the nature of the proposed substitute authorisation
 - inviting them to make submissions about the proposed revocation and substitution within a specified period.¹⁷⁶
- 7.51 The process then mirrors the process for considering an application for authorisation.¹⁷⁷ In particular, the ACCC:
- issues a written draft determination stating whether it proposes to revoke the authorisation and grant a substitute authorisation
 - invites interested parties to lodge written submissions in response to the draft determination
 - any interested party may call a pre-decision conference to make oral submissions in response to the draft determination
- The ACCC then issues a written final determination revoking the authorisation and granting an authorisation in substitution for it, or deciding not to revoke the authorisation.
- 7.52 These processes—and the timelines involved—are set out in more detail in chapter 4.

173 Sections 90(8) and 88(8A).

174 Section 91C(8).

175 Section 91C(3).

176 Section 91C(3).

177 Sections 91C(4) to 91C(6).

- 7.53 The ACCC may only revoke the authorisation and grant a substitute authorisation if it is satisfied that the proposed substitute authorisation satisfies the relevant test for granting authorisation.¹⁷⁸
- 7.54 If the ACCC revokes the authorisation and grants a substitute authorisation, the arrangements identified in the substitute authorisation receive the protection of authorisation. The substitute authorisation comes into effect either:
- on the day specified in the determination, which cannot be earlier than 21 days after it is issued, or
 - if an application is made to the tribunal to review the ACCC's decision but is later withdrawn, when that application for review is withdrawn.¹⁷⁹
- 7.55 Alternatively, if an application is made to the tribunal to review the ACCC's decision but not withdrawn, the tribunal's determination comes into force on the day it is made.¹⁸⁰

Information gathering

- 7.56 The ACCC generally prefers to obtain information through cooperation. However, s. 155 of the Act specifically empowers the ACCC to require the provision of information relating to revocation and revocation and substitution decisions.

178 Section 91C(7).

179 Section 91(1C).

180 Section 91(1C).

8. When authorisations expire

- 8.1 As discussed in paragraph 5.104, the Australian Competition and Consumer Commission (ACCC) usually grants authorisation for a specified period. From the day the authorisation expires, the parties to the conduct no longer have immunity from legal action under the relevant provisions of the Act.
- 8.2 Towards the end of the period of authorisation, the holders of the authorisation may either:
 - apply for a new authorisation for the conduct or apply to revoke and substitute the existing authorisation
 - stop the conduct (unless they consider that the conduct no longer risks breaching the Act).
- 8.3 The process for applying for a new authorisation is set out in chapter 3.
- 8.4 The process for applying for revocation and substitution is discussed from paragraph 7.37 onward.
- 8.5 Applications for authorisation or revocation and substitution should be lodged at least six months before the existing authorisation expires.
- 8.6 Parties are encouraged to approach the ACCC before lodging an application, see paragraph 3.2.
- 8.7 Generally, applicants should not expect automatic re-authorisation of their conduct. Applications are considered afresh, in the light of the current market environment. This may differ significantly from what existed when authorisation was originally granted and may affect competition in the market. It may also have become evident—for example, from consultation with interested parties—that some or all of the public benefits expected to flow from the conduct when authorisation was originally granted did not arise or were not of the magnitude expected.

the 1990s, the number of people in the UK who are employed in the public sector has increased by 1.5 million, from 2.5 million in 1980 to 4 million in 1998. The public sector has become a major employer in the UK, and its growth has been a key factor in the overall growth of the economy.

The public sector has also become a major provider of social services, and its growth has been a key factor in the overall growth of the economy. The public sector has become a major provider of social services, and its growth has been a key factor in the overall growth of the economy.

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9. Reviewing ACCC authorisation decisions

- 9.1 The merits of Australian Competition and Consumer Commission (ACCC) final determinations may be reviewed by the Australian Competition Tribunal. Final determinations may also be appealed to the Federal Court of Australia on administrative law grounds.
- 9.2 For convenience, this chapter only refers to the reconsideration of ACCC decisions to grant or deny authorisation. However, it applies equally to the review of other ACCC authorisation determinations (e.g. a decision to grant a minor variation).
- 9.3 The tribunal has other roles in relation to merger and access decisions. In this context, the role of the tribunal differs from that set out below.

Australian Competition Tribunal

- 9.4 Applicants or interested parties who are unhappy with a final determination may ask the tribunal to reconsider the authorisation application.¹⁸¹
- 9.5 The tribunal is separate from and independent of the ACCC. It is located within the Federal Court.
- 9.6 The tribunal consists of :
- a president and a number of deputy presidents, all of whom are judges of the Federal Court
 - several lay members with knowledge or experience in industry, commerce, economics, law or public administration.¹⁸²
- 9.7 Members are appointed by the Governor-General¹⁸³ for a maximum of seven years.¹⁸⁴
- 9.8 Individual applications to reconsider ACCC decisions are heard by a panel comprising:
- the president or a deputy president
 - two lay members (typically an economist and a businessperson).¹⁸⁵
- 9.9 The presidential member:
- presides over the proceedings of the panel¹⁸⁶
 - presides over the procedural aspects of the panel alone—for example, the directions hearings (see paragraph 9.31)¹⁸⁷
 - decides questions of law.¹⁸⁸

181 Section 101(1) of the *Competition and Consumer Act 2010*. The tribunal may reconsider ACCC determinations on applications for authorisation and minor variation, and the revocation or revocation and substitution of authorisations.

182 Section 31.

183 Section 30(3).

184 Section 32.

185 Section 37.

186 Section 41.

187 Section 103(2).

188 Section 42(1).

9.10 All other matters are decided by majority.¹⁸⁹

The role of the tribunal

9.11 A review by the tribunal is a re-hearing of the authorisation application. Effectively, it reconsiders applications for authorisation almost as if the ACCC's assessment had not occurred. That is, the tribunal makes its own assessment and reaches an independent decision about whether to grant authorisation (possibly subject to conditions). Applicants must satisfy the tribunal that authorisation should be granted in the same way that they must satisfy the ACCC. Interested parties may seek to participate in the tribunal's rehearing of the application.

Status of ACCC determination

9.12 While ultimately the tribunal must affirm, vary or set aside the ACCC's decision¹⁹⁰, the tribunal has stated that the Act does not require it:

... to consider the Commission's detailed findings and reach conclusions upon them.

It is the determination of the Commission which the Tribunal is called upon to 'review', not the reasons for that determination. It is specifically provided that the Tribunal's review is a re-hearing of the application for authorization, although the Tribunal may, in a proper case, have regard to information furnished to the Commission or to documents produced or evidence given to the Commission in the course of its consideration of the matter. It is easy to imagine cases, particularly where the Commission has conducted a public hearing, where it would be sensible and proper to use some or all of the material before the Commission as a starting point for the Tribunal's inquiries. This might well be done by consent in some cases ...

The main value of [the Commission's] reasons to the Tribunal is that they alert the Tribunal, at a very early stage in its proceedings, to the issues which are likely to arise before it in the particular case ...

The reviewing body, in this case the Tribunal, must really do the task again from the beginning while using any short cuts provided by the earlier proceedings which may be appropriate in the particular case.¹⁹¹

9.13 The tribunal has also stated that:

There is, in my opinion, no presumption that any particular finding by the Commission is correct. There is no onus on an applicant to show that the Commission is in error.¹⁹²

Powers of the tribunal

9.14 The tribunal may exercise all the powers of the ACCC when considering an authorisation application¹⁹³ and applies the same authorisation tests as the ACCC (see chapter 5).¹⁹⁴

189 Section 42(2).

190 Section 102(1).

191 *QCMA* at 17226–227. See also *re Media Council of Australia* (No. 2) (1987), ATPR 40-774 at 48,419.

192 *QCMA* at 17,226.

193 Section 102(1).

194 Section 101(2).

Applying for a review

Who may apply to the tribunal?

9.15 Applications for review may be lodged by:

- the applicant for authorisation
- a party that the tribunal is satisfied has a sufficient interest in the subject matter of the authorisation.¹⁹⁵

9.16 The tribunal has stated that it:

... must be satisfied that the applicant, not being the applicant for the authorisation, has made out a prima facie case that it has a 'sufficient interest'. The test is not an unduly high one. If it were, it may involve determining the very questions that will loom large in the hearing on the merits of the determination... These are hardly matters that fall for determination at this stage. If it emerges during the course of the hearing that the applicant in truth may not have a 'sufficient interest' the Tribunal may then review the locus standi of the applicant and consider the future course of the application for review.¹⁹⁶

9.17 The tribunal has also stated that a 'sufficient interest' must be:

at the least real and substantial.

The question of what constitutes a real and substantial interest will depend on the subject matter of the conduct, or of the proposed contract arrangement or understanding which is under consideration, on the nature and extent of the interest possessed by the person asserting it, and in the way in which the grant of the authorisation will impact on that interest.

The interest should be one that is sufficient to warrant putting those who will be involved in the review to the very considerable time, effort and expense that a review involves. The requirement of "sufficient interest" is concerned primarily with the interest of the applicant in the subject matter of the authorisation (or revocation) rather than with the merits of the contentions which the applicant seeks to ventilate on the hearing of the review. However, if the contentions of the applicant are plainly without substance, or are irrelevant to the issues which the Tribunal would be required to consider on a review, the applicant would fail to satisfy the Tribunal that his or her interest was "sufficient" to warrant the Tribunal reviewing the Commission's Determination.¹⁹⁷

9.18 The tribunal has also stated that persons with a 'sufficient interest' include:

... a person who establishes that his business interests or prospects could be adversely affected by the proposed merger.¹⁹⁸

9.19 The tribunal has stated that persons relying on:

- their status as a taxpayer¹⁹⁹
- their status as a member of the public²⁰⁰ or

195 Section 101(1AA).

196 *Application of Wylie Steel for review of authorisation* (1980), ATPR 40-170 at 42,345. The tribunal's views in *Wylie* were endorsed by C J Bowen and J Franki in *Broken Hill Pty Co. Ltd. v Trade Practices Tribunal & Ors* (1980), ATPR 40-173 at 42,390 and 42,391 respectively.

197 *Re Alliance Agreement—application by PK Wakeman* (1999), ATPR 41-675 at 42,637.

198 *Application of Wylie Steel for review of authorisation* (1980), ATPR 40-170 at 42,344.

199 *Re Alliance Agreement—application by PK Wakeman* (1999), ATPR 41-675 at 42,638.

200 *Re Alliance Agreement—application by PK Wakeman* (1999), ATPR 41-675 at 42,638.

- a claim that is ‘remote, indirect or fanciful’²⁰¹

will not have a ‘sufficient interest’ in the subject matter of an application.

9.20 For broad-based public interest advocacy groups, the tribunal stated that:

It is not sensible to speak of this kind of corporation being adversely affected by a decision which relates to a topic about which it is interested by virtue of its objects and purposes. Its role as a public interest advocate is not affected by an actual decision which is arrived at one way or the other. Each organisation is to be distinguished from individual members who will have varied (perhaps competing) commercial and personal interests.²⁰²

9.21 However, the tribunal considered that a more narrowly focused representative body can have standing:

I therefore consider that it is open to the Tribunal to find that the NSWTD, as a body representing persons whose particular business or personal prospects may be adversely affected by the Authorisations, has standing, despite the fact that the commercial interests of the organisation itself are not adversely affected.²⁰³

Lodging an application for review

9.22 A person who wants the tribunal to reconsider an authorisation application must apply to the tribunal. This is done by lodging a Form I with one of the Federal Court’s registry offices. This application form must be lodged within 21 days of the date of the ACCC’s determination.²⁰⁴

9.23 The application must set out:

- the name of the party requesting the review
- the determination for which the review is requested
- the applicant’s interest in the determination (if not the original applicant for authorisation)
- the reasons why the applicant for review is dissatisfied with the determination
- the determination sought from the tribunal
- the facts and contentions on which the applicant for review relies and the issues the applicant for review considers relevant.

9.24 The tribunal has stated that the application form:

... serves to alert the Tribunal to the main issues likely to be raised in the hearing before it. The particulars given at that point are not in the nature of allegations which an appellant must prove.²⁰⁵

9.25 The applicant for review is also required to provide a copy of the application to the ACCC. If the applicant for review is not the original applicant for authorisation, a copy must also be provided to the original applicant for authorisation.²⁰⁶

201 *Re Alliance Agreement—application by PK Wakeman* (1999), ATPR 41-675 at 42,639.

202 *Re Application by Orica IC Assets Ltd; Re Moomba to Sydney Gas Pipeline (No. 2)* (2004), ATPR 41-991, at 48,610(12).

203 *Application by Michael Jools, President of the New South Wales Taxi Drivers Association* (2005), AcompT 4, at pp. 51 and 52.

204 Competition and Consumer Regulations, rr. 20(1)(a) and 20(1)(b).

205 QCMA at 17,227.

206 Competition and Consumer Regulations, r. 20(3).

Who can participate in tribunal proceedings?

- 9.26 Interested parties must have 'sufficient interest' to participate in the proceedings, and are required to apply for 'leave to intervene' before the tribunal.²⁰⁷ For example, if an applicant seeks reconsideration of an ACCC decision to deny authorisation, interested parties who support the ACCC's decision may wish to intervene to put their case.
- 9.27 The original applicant for authorisation is entitled to participate in proceedings before the tribunal.²⁰⁸
- 9.28 There can be multiple applicants for review. The tribunal will usually hear them together, with each applicant given leave to intervene in the other applications. The evidence in one application will be treated as evidence in all applications.²⁰⁹

Tribunal process

- 9.29 The tribunal's reconsideration of the authorisation application generally includes:
- the presidential member of the tribunal holding a directions hearing
 - parties providing the tribunal and each other with statements and evidence—this step may take several months to complete
 - the full tribunal holding a hearing, which may take several days
 - the tribunal issuing its decision—occasionally the reasons for a tribunal decision may be issued later.²¹⁰

Notifying interested parties

- 9.30 On receiving an application for review, the Tribunal Registrar requests from the ACCC copies of its determination and a list of all interested parties consulted by the ACCC on the application. The tribunal then notifies these parties that it has received an application for review.

The directions hearing

- 9.31 The directions hearing is held as soon as possible after an application has been lodged. At the directions hearing, the tribunal:
- Considers any claim that the applicant for review lacks a sufficient interest in the subject matter of the authorisation (see paragraph 9.15).
 - Considers whether the matter can be settled by a consent order (see paragraph 9.43).
 - Considers applications by parties wishing to participate in the proceedings (see paragraph 9.26).
 - Issues a timetable for the filing of statements and evidence by the parties if the matter is to proceed to a final hearing. The tribunal will consult the parties before issuing a timetable. Sometimes the parties will agree on a timetable beforehand and then seek to have this ratified by the tribunal.

207 Any person seeking leave to intervene before the tribunal must establish their interest under s. 109(2) of the Competition and Consumer Act and in accordance with r. 21 of the Competition and Consumer Regulations.

208 Section 109(1).

209 *Re Rural Traders Co-operative (WA) Ltd* (1979), ATPR 40-110 at 18,113.

210 For example, see *Qantas Airways Ltd* (2004), ACompT9; the tribunal announced on 12 October 2004 that it would grant authorisation and issued its reasons on 16 May 2005.

9.32 As an indication, a timetable may include the following:

- The ACCC will be required to provide the tribunal and the parties with a list of documents it considers relevant to the review of the authorisation decision.
- The applicant for authorisation will be required to provide the tribunal and the other parties to the proceedings with a statement of the facts, issues and contentions on which it relies to support of its application. The applicant's legal adviser will be able to help in preparing this statement.
- The party seeking the review of the decision (if this is not the applicant for authorisation), any parties granted leave to intervene in the proceedings and the ACCC will also provide the tribunal and the other parties with a statement of the facts, issues and contentions on which they rely.
- The parties will provide the tribunal and each other with a list of any documents they consider relevant to the application for review, in addition to those listed by the ACCC.
- The parties and the ACCC will provide the tribunal and each other with copies of any documents to be used at the hearing.
- The parties and the ACCC will provide the tribunal and each other with copies of statements of any witnesses, including expert witnesses, they intend to call on at the hearing.

9.33 Often the full timetable for the filing of statements and evidence, as well as the date for the final hearing, is set at the first directions hearing. However, depending on the complexity of the matter, and issues which arise as the matter progresses, it is often necessary to hold subsequent directions hearings to seek orders from the tribunal about the steps to follow for the matter to go to a final hearing.

The final hearing

9.34 The tribunal hearing will be conducted as informally as possible, and the tribunal is not bound by the rules of evidence.²¹¹

9.35 However, a tribunal hearing will share many of the elements of a traditional court hearing. Witnesses, including expert witnesses, will be questioned and may also be cross-examined. Parties and the ACCC are normally represented by a lawyer (although representation is not compulsory). The tribunal has power to take evidence on oath and may summon a person to give evidence or produce documents before the tribunal.²¹²

9.36 During the hearing, the original applicant for authorisation must satisfy the tribunal that authorisation should be granted. This remains the case even though:

- An interested party other than the original applicant for authorisation requested the tribunal's reconsideration of the ACCC's decision.
- The concerns that led to the tribunal application (either by the applicant or an interested party) relate only to part of the ACCC's decision rather than the decision overall. For example, an applicant may be dissatisfied with a particular condition of authorisation imposed by the ACCC.

211 Sections 103(1)(b) and 103(1)(c).

212 Sections 105(1) and 105(2).

- 9.37 If an interested party other than the original applicant for authorisation has asked the tribunal to reconsider the ACCC's decision, they are also expected to present a full case in support of their application for review of the ACCC's decision.
- 9.38 This means that parties appearing in proceedings typically need to re-present the views and supporting information they provided to the ACCC to the tribunal. New information may be presented to the tribunal.
- 9.39 In addition, the tribunal does not just have to rely on the information that is put before it by the parties. It may request information from other parties on matters about which it wishes to be informed (such as public benefits or anti-competitive detriment).
- 9.40 Tribunal hearings are held in public.²¹³ However, to protect confidential information, the tribunal can conduct a hearing or part of a hearing in private, or can prevent or limit the publication of information provided during the hearing.²¹⁴

Tribunal decisions

- 9.41 After the hearing, the tribunal will adjourn to consider its decision. There is no time limit on when the tribunal is required to make its decision for non-merger authorisation applications.
- 9.42 As previously mentioned, the tribunal may affirm, set aside or vary the ACCC's determination and perform all of the ACCC's functions and powers in so doing. Like the ACCC, the tribunal publishes reasons for its decisions and these are available from the Federal Court website (www.fedcourt.gov.au).

Consent determinations

- 9.43 In appropriate circumstances, the tribunal may make a determination by consent of all parties involved, so avoiding the need for a full hearing.²¹⁵ In such circumstances, the tribunal does not need to be satisfied on the statutory tests for authorisation.²¹⁶
- 9.44 For example, in March 2002 the ACCC granted conditional authorisation to the Australian **Dairy Farmers Federation** to allow members to bargain collectively with dairy processing companies. National Foods, a major dairy processor, sought the tribunal's review of some of the conditions of authorisation. In a hearing in August 2002 the tribunal granted a consent determination after National Foods, the Australian Dairy Farmers and the ACCC agreed to altered conditions of authorisation.

Interim authorisation

- 9.45 Just like the ACCC, the tribunal may grant interim authorisation while it is reconsidering an application for authorisation.
- 9.46 The tribunal has previously identified several guiding principles as relevant when considering an application for interim authorisation:
- The Act is clearly opposed to anti-competitive practices, and an applicant has to make a strong case for authorisation.

213 Section 106(1).

214 Sections 106(2)(a) and 106(2)(b).

215 Section 101(1A).

216 Section 101(1A).

- The tribunal should not, by refusing to grant interim authorisation, effectively deny a person the right to appeal the ACCC's refusal to grant authorisation. This may happen if, for example, the arrangement that had been denied authorisation by the ACCC could not be put in place if authorisation was later granted by the tribunal.
- Any possible harm to the person seeking review will be relevant, as will any possible harm to other parties.
- As the tribunal's ultimate concern is the public benefit, any possible benefit or detriment to the public will be given full weight.
- It may sometimes be preferable to maintain the existing position while the tribunal considers its decision.
- The length of time likely to elapse between the granting of interim authorisation and the final hearing may be important.²¹⁷

Costs

9.47 In reconsidering an authorisation decision of the ACCC, the tribunal does not have the power to award costs. A party to proceedings in the tribunal must bear its own costs regardless of the outcome.²¹⁸

Withdrawal of applications for review

- 9.48 There is no explicit provision in the Act providing for the withdrawal of an application for review. The applicant for review must seek leave of the tribunal to do so. Generally, if the applicant seeks to withdraw its application for review, they will be allowed to do so unless the tribunal considers it in the public interest for the process to continue.²¹⁹
- 9.49 When the application to withdraw is a procedural matter, it can be dealt with by the presidential member alone. Otherwise it is dealt with by all three sitting members.

The role of the ACCC in tribunal proceedings

9.50 The tribunal does not have any investigative staff or legal advisers assisting it. Instead, the ACCC assists the tribunal:

In proceedings before the Tribunal, the Commission's function is to assist the Tribunal to reach, in the public interest, the correct decision.²²⁰

- 9.51 Under the Act the tribunal has the power to require the ACCC to provide documents relied on in its consideration of the application for authorisation and otherwise provide information, make reports or provide assistance to the tribunal as it may direct.²²¹
- 9.52 In addition to the tribunal's power to require the ACCC's assistance, the ACCC as a rule will seek to participate as a substantive party to the proceeding. While the ACCC does not attend the hearing to try to uphold its decision, in many applications for review, the ACCC will be the contradictor to the applicant's case. In that context, the tribunal has previously identified the ACCC's role in proceedings as being to:

217 *Re The Queensland Timber Board* (1975), ATPR 40-005 at 17,122.

218 *Application by Michael Jools, President of the New South Wales Taxi Drivers Association* (2006), ACompT 5, at 52.

219 *Re Nursing Agencies Association* (2003), ATPR 41-936.

220 *Re Herald & Weekly Times Ltd* (1978), ATPR 40-058.

221 Sections 102(6) and 102(7).

- examine any statements of facts and contentions put before the tribunal by a party to see if all material facts and considerations are fully and fairly presented, and to submit to the tribunal the results of each such examination
- furnish the tribunal with such additional information as the ACCC considers material to the issues before the tribunal
- assist the tribunal to evaluate the information by such means as appropriate, including the cross-examination of witnesses and production of additional information to correct, qualify or contradict information already supplied
- make submissions to the tribunal on matters which the ACCC considers material to the hearing before the tribunal.²²²

9.53 The tribunal has confirmed this role:

The ACCC made submissions and adduced evidence for our assistance along the lines indicated by the Tribunal in *Re Queensland Co-operative Milling Association Ltd*. We have found the ACCC's submissions and evidence helpful although, as will be seen, we do not accept everything it has put before us ... Not everything the ACCC has put has been couched in terms of anodyne neutrality, but its role cannot be so restricted.

The Federal Court of Australia

9.54 The Federal court of Australia considers almost all civil matters, including matters arising under the Competition and Consumer Act, and some criminal matters.

ACCC decisions

- 9.55 The legality, rather than the merits, of ACCC decisions can also be challenged in the court under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act).
- 9.56 The ADJR Act provides for judicial review of Commonwealth administrative decisions made under legislation, such as those made by the ACCC under the Competition and Consumer Act. However, this kind of review is concerned only with the legality of the decision (e.g. whether the ACCC had the power to make the decision), not whether it was correct on the merits. The tribunal is the avenue for review on the merits of an ACCC decision about an authorisation application.

Tribunal decisions

- 9.57 Tribunal decisions can be appealed to the court. However, the court can hear appeals from tribunal decisions only on questions of law, not questions of fact.
- 9.58 Information about the court and the process of filing an application to appeal can be obtained from its website (www.fedcourt.gov.au).

222 *Re Queensland Co-operative Milling Association Ltd and Re Defiance Holdings Ltd* (1977), ATPR 40 012.

the 'information' and 'communication' fields. The 'information' field is defined as:

...the study of the nature, use and management of information, and the development of the means of its acquisition, storage, organisation, dissemination and communication. (p. 1)

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Further information

The Australian Competition and Consumer Commission (ACCC) has produced a number of publications related to authorisation and notification.

1. *Authorisations and notifications: a summary*, ACCC, free online.
2. *Guidelines for excluding information from the public register for authorisation and notification processes*, ACCC, free online and in printed form.
3. *Collective bargaining notifications—a summary*, free online and in printed form.
4. *Guide to exclusive dealing notifications*, ACCC, free online and in printed form.
5. *Guide to collective bargaining notifications*, ACCC, free online and in printed form.
6. *Streamlined collective bargaining for small business: more timely decisions/greater certainty of outcomes*, ACCC, free online and in printed form.

ACCC contacts

Infocentre: 1300 302 502

Website: www.accc.gov.au

For all other business information go to www.business.gov.au

Callers who are deaf or have a hearing or speech impairment can contact the ACCC through the National Relay Service www.relayservice.com.au

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the 'information' and 'communication' fields. The 'information' field is defined as:

...the study of the processes of information production, distribution, access, use and evaluation, and the study of the social, cultural, economic and political contexts in which these processes take place. (p. 10)

The 'communication' field is defined as:

...the study of the processes of communication production, distribution, access, use and evaluation, and the study of the social, cultural, economic and political contexts in which these processes take place. (p. 10)

The 'information science' field is defined as:

...the study of the processes of information production, distribution, access, use and evaluation, and the study of the social, cultural, economic and political contexts in which these processes take place. (p. 10)

The 'information studies' field is defined as:

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The 'information technology' field is defined as:

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The 'information systems' field is defined as:

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The 'information management' field is defined as:

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The 'information policy' field is defined as:

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The 'information law' field is defined as:

...the study of the processes of information production, distribution, access, use and evaluation, and the study of the social, cultural, economic and political contexts in which these processes take place. (p. 10)

The 'information ethics' field is defined as:

...the study of the processes of information production, distribution, access, use and evaluation, and the study of the social, cultural, economic and political contexts in which these processes take place. (p. 10)

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