



Our ref: PRH

20 February 2004

Australian Competition and Consumer
Commission
Level 35
The Tower
360 Elizabeth Street
Melbourne Central
MELBOURNE VIC 3000
By courier

120 Collins Street
Melbourne VIC 3000
PO Box 4301PP
Melbourne VIC 3001
Australia
DX 147 Melbourne
Tel +61 3 9274 5000
Fax +61 3 9274 5111
www.phillipsfox.com

Adelaide
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Canberra
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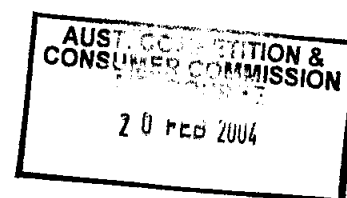
Application for Authorisation of REMCo Retail Market Rules

We enclose an application by REMCo in relation to REMCo's Retail Market Rules under Part VII of the Trade Practices Act 1974.

We enclose a cheque for \$10,500 in relation to the fee.

Yours sincerely

Paul Holm
Partner
Direct +61 2 9286 8035
Email paul.holm@phillipsfox.com



APPLICATION FOR AUTHORISATION OF REMCO RETAIL MARKET RULES

UNDER PART VII OF THE TRADE
PRACTICES ACT 1974



APPLICATION FOR AUTHORISATION

OF

REMC RETAIL MARKET RULES

Application To The Australian Competition and Consumer Commission
For Authorisation under Part VII of the Trade Practices Act 1974

Retail Energy Market Company Ltd (ACN 103 318 556)

(REMC)

20 February 2004

RETAIL MARKET RULES

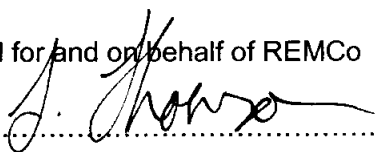
SUBMISSION TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

RELATING TO AN APPLICATION FOR AUTHORISATION

This is the Submission comprising 22 pages referred to in each of the applications for authorisation in respect of the Retail Market Rules, namely:

- (a) Form A: Exclusionary provisions dated 20 February 2004;
- (b) Form B: Agreements affecting competition dated 20 February 2004; and
- (c) Form E: Exclusive dealing dated 20 February 2004.

Signed for and on behalf of REMCo

.....

Mr Stephen Thomson
Chief Executive Officer
Retail Energy Market Company

Table of contents

1	BACKGROUND	1
1.1	Introduction.....	1
1.2	The RMR	1
1.3	REMCo	2
1.4	Facilitating Full Retail Competition.....	4
1.5	Gas market in South Australia and Western Australia	5
1.6	Swing Service Provisions of the RMR	5
1.7	Causation compensation regime.....	7
2	Applications.....	7
2.1	Authorisation under Part VII TPA.....	7
2.2	Interim authorisation application	8
2.3	Parts of the RMR requiring authorisation.....	8
2.4	Form of RMR.....	9
2.5	Period of Authorisation	9
2.5.1	Requirements under the TPA.....	9
2.5.2	Proposed Period of Authorisation	9
2.6	Parties to be Covered by the Authorisation Applications.....	10
2.6.1	Sub-section 88(6).....	10
2.6.2	Sub-section 88(10).....	11
2.6.3	Sub-section 88(13).....	11
2.7	Contact Details	12
3	CRITERIA FOR AUTHORISATION.....	12
3.1	Statutory Test for Substantial Lessening of Competition and Exclusive Dealing	12
3.2	Statutory Test for Exclusionary Provisions and Third Line Forcing.....	13
3.3	Application of Statutory Tests	13
3.4	Statutory Definition of Markets	13
3.5	Market Definitions.....	14
3.6	Defining Public Benefits and Detriments.....	14
3.7	Counterfactual	16
4	PUBLIC BENEFITS AND POTENTIAL DETRIMENTS ARISING FROM RMR.....	16
5	NET PUBLIC BENEFIT RESULTING FROM RMR	18
6	CONCLUSION	18
Schedule 1.....	20	
Forms A, B and E	20	
Schedule 2.....	38	
List of RMR Participants in South Australia and Western Australia	38	
Schedule 3.....	40	
REMCo Retail Market Rules version 3.3A	40	

1 BACKGROUND

1.1 Introduction

The purpose of these applications and submission is to seek authorisation of portions the Retail Market Rules (**RMR**) that may involve participants in conduct in breach of provisions of Part IV of the Trade Practices Act 1974 (**TPA**). The authorisation period sought is a 10 year period commencing 31 May 2004.

The RMR are the rules under which the retail gas market systems are to be operated in each of South Australia and Western Australia. Market launch in accordance with the RMR is scheduled for 31 May 2004 in Western Australia and 28 June 2004 in South Australia.

1.2 The RMR

The RMR have been drafted by the Retail Market Rules Working Group under the coordination of Retail Energy Market Company Ltd (**REMC****o**) and will be given legal effect in each of South Australia and Western Australia by respectively, the Gas Act 1997 (South Australia) and associated licensing obligations¹ and Energy Coordination Act 1994 (Western Australia)².

In each of South Australia and Western Australia each network operator and user participating in the gas retail markets may become a REMCo member. As the REMCo Constitution requires that REMCo members comply with the RMR and the REMCo Constitution is a contract between REMCo and the member, the RMR are also an enforceable contract between REMCo and its members.

The RMR must initially be approved by the relevant Ministers in each of South Australia and Western Australia and any subsequent amendments must be approved by the Essential Services Commission of South Australia (**ESCOSA**)³ and the Western Australian Minister of Energy.⁴

¹ Gas Act, section 26(1)(a) for distribution licensees, section 26A(2)(a) for retail licensees and section 26B(1)(a) for REMCo.

² Section 11ZOC requires gas distributors and retailers to be bound by agreement to relevant provisions of an 'approved retail market scheme'. In addition, gas transmission operators and persons prescribed under regulations must comply with relevant provisions of the retail market rules of an approved retail market scheme. Section 11ZOK empowers the Minister for Energy to declare when an approved retail market scheme comes into force.

³ It is a requirement of REMCo's Gas Retail Market Administration Licence that subsequent amendments to the RMR's be submitted for approval to ESCOSA (Gas Act s. 26B(1)(d)).

⁴ The Western Australian Minister of Energy must approve the RMRs and any amendments to the RMRs in the course of approving a gas retail market system for a gas distribution system. The Minister's responsibility for approving the RMRs and any amendments to the RMRs will be transferred to the Energy Regulation Authority (ERA) one year after the contestable retail gas market provisions to be inserted into the Energy Coordination Act 1994 by the Energy Legislation Amendment Act 2003 come into operation. This will occur on the proclamation of the contestable retail gas market provisions.

1.3 REMCo

REMCo has been established by industry participants as the retail market administrator for both the South Australian and Western Australian gas retail markets. It is a non-profit making company to be funded by industry participants.

REMCo is licensed by ESCOSA and will be subject to ESCOSA's review and oversight for its South Australian operations. In Western Australia, REMCo will initially be subject to the review and oversight of the Western Australian Minister for Energy. However, this function will be transferred to the Economic Regulation Authority (ERA) one year after the commencement of the FRC provisions.⁵

The functions of REMCo as retail market administrator is to support meter registration, to effect customer transfers and to undertake balancing and the apportionment and reconciliation of gas supply between retailers. To permit this to occur, all gas retailers and the gas distributors will need to interface their information systems with those of REMCo.

REMCo has appointed LogicaCMG to implement REMCo's Gas Retail Market Systems, which will operate constantly and will interface with IT systems of gas retailers and network operators. The Gas Retail Market Systems will process the data required to enable customers to transfer to a preferred retailer and will communicate with retailers and network operators. It has also appointed the Marketplace Company to provide market implementation and operation services, including analytical, administrative and investigative services to support REMCo and the compliance panel with their rule changes, disputes and enforcement activities.

In South Australia, the Gas Act and licence conditions require REMCo, as the retail market administrator, to publish retail market rules that will govern the conduct and operations of the market. In Western Australia, the Energy Coordination Act requires REMCo to prepare a Retail Market Scheme, including retail market rules, that will achieve the same result. In both States, retailers and distributors are required to comply with the retail market rules via their licensing requirements.

REMCo has similar objectives and is expected to operate in a very similar way to the Gas Market Company (GMCo), its counterpart in NSW and the ACT, where FRC in gas started on 1 January 2002. One major difference between REMCo and GMCo market rules is the provisions for a swing service and swing service bid stack in the RMR.

Two important features of REMCo are the governance arrangements, and the jurisdictional specific regulatory oversight detailed below:

(a) REMCo Governance

REMCo is company limited by guarantee, governed by an independent Board of Directors, and funded by industry on a cost recovery basis.

⁵ Regulation of the retail market operator arises because it forms part of an approved retail market system. However, there are no express licensing provisions for the retail market administrator under the Energy Legislation Amendment Act 2003.

Accordingly, REMCo ensures that it meets its legislative and stakeholder obligations as efficiently and economically as possible.

REMCo's board of directors are:

- John Dawkins (Chairman) (Independent Director)
- Mark Kelly (Independent Director)
- Ian Devenish (AlintaGas Networks Pty Ltd)
- Donald Mackenzie (Alinta Sales Pty Ltd)
- Peter Cain (Envestra Ltd)
- Renee Klimczak (TXU Australia Pty Ltd)
- Peter Vines (Origin Energy Retail Ltd)
- Robert Petersen (AGL Energy Sales and Marketing Ltd)

(b) Jurisdictional Regulatory Oversight

As noted above REMCo is subject to regulatory oversight by ESCOSA and, 1 year after the commencement of the FRC provisions in Western Australia, the ERA. This extends to being required to seek approval of changes to the RMR.

In regard to their oversight of changes to the RMR, each of ESCOSA and the ERA have similar policy objectives.⁶, including the following:

- The promotion of competitive and fair market conduct.
- The prevention of misuse of monopoly or market power.
- The protection of long term interests of consumers in relation to price, quality and reliability of essential services in South Australia, or goods and services provided in the relevant market in Western Australia.

In addition the South Australian Gas Act has the following specific objectives:

- To promote efficiency and competition in the gas supply industry;
- To promote the establishment and maintenance of a safe and efficient system of gas distribution and supply;

⁶ Section 26(1) of the Economic Regulation Act 2003 (WA); Section 6(1) of the Essential Services Commission Act 2002.

- To establish and enforce proper standards of safety, reliability and quality in the gas supply industry;
- To establish and enforce proper safety and technical standards for gas installations and appliances; and
- To protect the interests of consumers of gas.⁷

(c) Rule Change Committee

The rule change process is prescribed in the RMR and allows any person or organisation to propose changes to the RMR.⁸ Final approval of a rule change is subject to regulatory approval, by ESCOSA in South Australia or either a Government Minister or the ERA in Western Australia.

REMCo will establish a Rule Change Committee in due course.

1.4 Facilitating Full Retail Competition

The RMR are specifically designed to facilitate the implementation of full retail competition (**FRC**) by providing efficient arrangements for facilitating customer transfers between retailers, and meet the respective jurisdictions competition policy obligations to implement FRC.

In particular the RMR allow the extension of FRC to small commercial (less than 10TJ per annum) and all domestic customers in both South Australia and Western Australia. This includes providing for:

- (a) allocation and management of delivery point identifiers;
- (b) metering of delivery points;
- (c) transfer of delivery points between retailers; and
- (d) administration of the RMR, including establishing dispute resolution, rule change and REMCo cost recovery processes.

In addition, the implementation of FRC requires market systems to bridge the gap between the daily settlement of the wholesale market and the basic meters used by small commercial and domestic retail customers, which generally only have quarterly manual reads. This requires forecasting of load for each basic meter for each day by reference to historical usage and initial settlement on the basis of these load forecasts. It also requires an ongoing reconciliation upon actual metering data being received.

The RMR therefore embodies rules to assist with the:

- (a) balancing, allocation and reconciliation of wholesale gas; and

⁷ Section 3 Gas Act.

⁸ Part 9.2 RMR.

(b) Swing Service provision.

Access issues are not dealt with by the RMR and remain regulated by contracts and the National Third Party Access Code for Natural Gas Pipeline Systems.

1.5 Gas market in South Australia and Western Australia

In South Australia, there are two main pipelines, the Moomba- Adelaide pipeline (which also diverts into Whyalla and Port Pirrie) and the SEAGas pipeline from Port Campbell, Victoria to Adelaide. There are 14 separate sub-networks in South Australia which rely on supply of gas from these pipelines.

In Western Australia, there are two main pipelines, the Dampier to Bunbury Natural Gas Pipeline and the Parmelia Pipeline. There are 16 separate sub-networks in Western Australia which rely on supply of gas from these pipelines.

Both the South Australian and Western Australian gas markets are 'contract carriage' regimes. Existing contracts applying upstream of the distribution sub-networks are therefore unaffected by the RMR. Importantly, the RMR does not create a wholesale spot market for gas. Instead gas retailers in each of South Australia and Western Australia must have contractual arrangements in place for purchase, transmission and distribution of gas. The wholesale gas price and terms and conditions of supply are governed by those agreements and not the RMR.

1.6 Swing Service Provisions of the RMR

The need for swing service arises where there are two or more pipelines which connect to a gas sub-network, as occurs in both South Australia and Western Australia. In these circumstances, the gas supplied by each pipeline is mixed in the sub-network and supplied to retail customers. In order to protect the operational integrity of the pipelines and the sub networks to which they are connected, it is necessary to maintain pressure in each pipeline while seeking to match physical supply and demand with the underlying contractual arrangements. As some imbalances are inevitable, users on any particular day will be allocated a 'swing service' for any day on which pipeline injections differ from the users' deemed withdrawals from a particular pipeline. In operational terms this process can be described as follows:

- Gas is purchased from a supplier by a user (retailer). Gas is injected into the sub-network pursuant to instructions from a user which must be provided on a daily basis in advance and which is therefore a forecast of the amount of gas which the user expects its customers will consume on the relevant day.
- If the amount forecast by a user is less or more than the actual gas withdrawn by the user's customers, or the user's withdrawal does not match forecast demand allocations from particular gas suppliers/pipelines, the need for a swing service will arise.
- There are two types of swing service: a 'park' swing service and a 'loan' swing service. Neither type of swing service involves a physical supply of gas, rather both types of swing service relate to the provision of capacity for a particular pipeline.

- A park swing service is supplied by a Swing Service Provider (**SSP**) when a user over estimates consumption of gas by its customers from a particular pipeline on any particular day. The gas which was requested in advance, but not used is notionally 'parked' in the pipeline from which it had been forecast to be supplied. The 'parked' gas is utilised by being deducted from the user's forecast for the second day after the swing service was initiated.
- A 'loan' swing service is supplied by an SSP if the actual consumption of gas by a user's customers is greater than forecast for a particular pipeline on a particular day. The SSP permits a user to 'borrow' (or notionally withdraw) gas from a pipeline at a particular gate point, on the terms of a swing service contract. The gas notionally withdrawn must be returned by the user by an equivalent injection of additional gas on the second day after the loan swing service is initiated.

A SSP is a person with a transmission contract in a pipeline, whom has offered to provide the swing service through the submission of a bid (or bids) to REMCo or under an 'off market' swing service supply contract with a user. If there are insufficient bids in the bid stack to cover demand, swing service will be provided by an SSP of last resort.

REMCo is required to calculate the amount of swing service for each pipeline in accordance with Part 5.10 of the RMR. The swing service is allocated to SSPs and procured by users pursuant to a five step process:

- 1 REMCo determines how much swing service occurred.
- 2 REMCo determines whether a user is responsible for the swing because of inaccurate forecasting and allocates the swing service, which the user is deemed to have caused, to that user ('user specific' swing service).
- 3 REMCO then allocates the remainder of the swing service to all users in the sub-network on a proportionate basis ('socialised' swing service).
- 4 Users may procure all or part of their swing service off-market from one or more SSPs and advise REMCo of these arrangements by issuing a procurement instruction to REMCo. This is optional and, if no off market arrangements are in place a user will be charged for its swing service via the bid stack process.
- 5 The remainder of the swing service is resolved through a bid stack and allocated to SSPs based upon loan bids and park bids made by the SSPs for each gate point. Bids are placed in a stack based on price and volume. REMCo then identifies the marginal clearing price for the total swing service, the marginal clearing price for the 'blame free' (or socialised) swing service and the marginal clearing price for the 'user specific' swing service.

Payment is made for the swing service, not the gas which is temporarily loaned or parked in the pipelines. It is expected that the price payable by users for the swing service will be considerably less than the cost of the physical gas.

Payment for physical gas remains the subject of separate contractual arrangements between users, producers and shippers and is not regulated by the RMR.

Thus the swing service regime intends to:

- (a) create incentives for retailers to be accurate in their forecasting;
- (b) help protect gas pipeline system integrity; and
- (c) allow pipeline operators/shippers to ascribe a value to the provision of a swing service and to provide a mechanism to ascribe a fair market value to the provision of the swing service.

1.7 Causation compensation regime

Part 5.12A (clause 300A) of the RMR provides for a swing service compensation regime, which will be triggered if REMCo forms the opinion that a person acted in a manner which contributed materially to the causation of a swing service. The regime aims to compensate users who were required to pay for the swing service as a consequence of another user profiteering at their expense.

2 Applications

2.1 Authorisation under Part VII TPA

These applications for authorisation are made by REMCo under Part VII of the TPA and the Competition Code, in respect of the RMR, such authorisation to take effect from 31 May 2004.

These applications are made under:

- (a) sub-section 88(1) of the TPA and sub-section 88(1) of the Competition Code for an authorisation under those sub-sections to make and give effect to any contract, arrangement or understanding, constituted by or under the RMR, where a provision of the proposed contract, arrangement or understanding would or might be an exclusionary provision within the meaning of sections 45 and 4D of the TPA and sections 45 and 4D of the Competition Code;
- (b) sub-section 88(1) of the TPA and sub-section 88(1) of the Competition Code for an authorisation under those sub-sections to make and give effect to any contract, arrangement or understanding constituted by or under the RMR, where a provision of the proposed contract, arrangement or understanding would or might have the effect of substantially lessening competition within the meaning of section 45 of the TPA and section 45 of the Competition Code (including any deemed lessening of competition through price fixing arrangements within the meaning of section 45A of the TPA and section 45A of the Competition Code); and
- (c) sub-section 88(8) of the TPA and sub-section 88(8) of the Competition Code for an authorisation under those sub-sections to make and give effect to the RMR to the extent that making the RMR or giving effect to a provision of the RMR, involves engaging in conduct that would or might constitute the

practice of exclusive dealing within the meaning of section 47 of the TPA and section 47 of the Competition Code.

2.2 Interim authorisation application

In the event that the authorisation application is not finalised prior to market commencement of the RMRs on 31 May 2004 in Western Australia and 28 June 2004 in South Australia, REMCo is also seeking the above authorisations on an interim basis.

2.3 Parts of the RMR requiring authorisation

While a full copy of the RMR is being made available to the ACCC for information purposes, authorisation is not being sought for the entire RMR, but only for those provisions that potentially could involve REMCo and RMR Participants (including the 'user', 'network operator', 'shipper', 'swing service provider' or 'self contracting user', as each are defined in the RMR and including any future participants) in contraventions of Part IV of the TPA.

In particular this authorisation application does not apply to Chapter 1-4 or Chapters 7 – 10 inclusive of the RMR, as these provisions relate to administrative issues, establishment of databases, meter identification, reporting and auditing requirements, the rule change process and related issues. These matters are not considered to give rise to any likely contravention of section 45, 45A, or 47 TPA by REMCo, REMCo members or RMR participants.

This application applies to Chapter 5, dealing with 'Allocation, Reconciliation and Swing' and Chapter 6, dealing with 'Disputes', and the related ancillary contracts, being the Swing Service Provision Umbrella Deed (**SSPUD**) and the Swing Service Provider of Last Resort Umbrella Deed (**SSPOLRUD**), which are respectively Appendix 7 and Appendix 8 of the RMR. Chapter 5 includes Part 5.10, 5.12 and 5.12A, which detail the operation of a bid stack by REMCo. The bid stack has the purpose of establishing a user price for swing service, where the user has not otherwise arranged off market swing service procurement. The operation of the bid stack and the entering into the SSPUD and SSPOLRUD may constitute REMCo and RMR participants entering into contracts, arrangements or understandings that have the purpose or likely effect of substantially lessening competition in a market, or of fixing maintaining or controlling price of swing service provision in contravention of sections 45 and 45A TPA. The processes under the SSPUD and SSPOLRUD may also involve RMR participants in exclusive dealing to the extent that SSP's provide services on the condition that users acquire services from REMCo.

While the bid stack is designed to produce a competitive market price for the swing service it is acknowledged that the price information supplied to subscribers and provisions allowing withdrawal and variation of bid books lodged could inadvertently involve REMCo and RMR participants in conduct that may contravene the TPA.

Part 5.12A allows REMCo to require a member to make a 'swing service causation compensation payment' where that person, in REMCo's reasonable opinion, acted in a way that materially contributed to the causation of swing service on a particular day (clause 300A). This is designed as a deterrent to 'gaming' the swing service payments and as a way to claw back any gains from such activity. Enforcing any such

judgement in accordance with the RMR may involve REMCo and REMCo members in exclusionary conduct in contravention of section 45 TPA.

Chapter 6 requires the creation of an independent compliance panel, which can make determinations in regard to matters as detailed at clause 324. This includes the ability to impose financial penalties on RMR participants or REMCo and to order a RMR participant or REMCo to take action, or cease action, to ensure compliance with the rules (clause 343 and 368). Such activities may involve REMCo and RMR participants in exclusionary conduct in contravention of section 45, or exclusive dealing in contravention of section 47 TPA.

2.4 Form of RMR

The final form of the RMR is expected to be available in mid-March, after a review by ESCOSA to ensure that the RMR does not contradict any of the provisions of the Energy Codes in South Australia. Accordingly, these applications seek authorisation of:

- (a) the RMR in their current form, which have been approved by the REMCo Board (Version 3.3A); and
- (b) such amendments as may be required by, or provided for, in the final RMRs as approved by the relevant South Australian and Western Australian Ministers.

As part of its ongoing review of the RMR, REMCo may seek authorisation of further changes to the RMR during the period the Commission is considering these applications. However REMCo does not at this time anticipate any material changes will be made to either the provisions relating to the provision and allocation of swing service or compliance panel processes.

2.5 Period of Authorisation

2.5.1 Requirements under the TPA

Section 91(1) of the TPA indicates that an authorisation may be expressed to be in force for a period as specified in the authorisation and will remain in force for that period.

2.5.2 Proposed Period of Authorisation

If the Commission decides that the authorisation pursuant to these applications should be in force for a specified period, REMCo submits that the authorisation should remain in force for a period of 10 years, being from 31 May 2004 until 31 May 2014.

It is REMCo's submission that a 10 year period would:

- (a) provide certainty for REMCo and its members;
- (b) provide certainty in the evolving South Australian and Western Australian retail gas markets, recognising that uncertainty affects price and investment;

- (c) recognise the efficacy of the processes established pursuant to the RMR to manage Rule change to address changing industry and market requirements;
- (d) recognise that the RMR and REMCo are subject to significant ongoing regulatory oversight by the jurisdictional regulators of each of South Australia and Western Australia and that regulatory duplication within the proposed 10 year period will increase costs and decrease certainty;
- (e) be consistent with the duration of comparable market rules in electricity and gas (i.e., the National Electricity Code and VENCORP MSOR).

REMCo notes it is not uncommon for the Commission to grant authorisations for lengthy periods in appropriate cases, as illustrated by the Commission's determinations in respect of the North West Shelf Project (7 years) and Mereenie Producers (effectively 10 years) authorisation applications.⁹

2.6 Parties to be Covered by the Authorisation Applications

These authorisation applications are made by REMCo, and not on behalf of any other corporation or other person. However, any contract, arrangement or understanding constituted by or under the RMR will be between REMCo and a RMR participant or between RMR participants. Any exclusive dealing conduct constituted by giving effect to the RMR may be engaged in by RMR participants and members as well as by REMCo. REMCo submits that the benefit of any authorisation extend not only to REMCo, but also to RMR participants.

The TPA contains several provisions which could facilitate the attainment of this objective and we note that the Commission adopted this approach in terms of its Final Determination on VENCORP's MSOR authorisation application¹⁰.

2.6.1 Sub-section 88(6)

Sub-section 88(6) provides:

'An authorisation granted by the Commission to a person under any of the preceding provisions of this section to:

- (a) make a contract or arrangement or arrive at an understanding;*
- (b) give effect to a provision of a contract, arrangement or understanding; ...*

has effect as if it were also an authorisation in the same terms to every other person named or referred to in the application for the authorisation as a party to the contract, arrangement or understanding or as a proposed party to the proposed contract, arrangement or understanding ...'

⁹ National Electricity Code Determinations – 2001, North West Shelf Project Determination – 29 July 1998 and Mereenie Producers – Gasgo Sales Agreement Determination – 7 April 1999.

¹⁰ ACCC, 18 December 2002.

The Commission has found in similar circumstances that, under sub-section 88(1), an authorisation should apply to any persons who are or become participants in a market, for example its 2002 authorisation of the VENCORP Market and System Operations Rules.

Accordingly REMCo now submits that the applications made in Form A, Form B and Form E should apply to all existing RMR participants as well as any future RMR participants under the RMR.

2.6.2 Sub-section 88(10)

Sub-section 88(10) provides:

'An authorisation to a corporation under sub-section (1) may be expressed so as to apply to or in relation to another person who:

- (a) in the case of an authorisation to make a contract or arrangement or arrive at an understanding – becomes a party to the proposed contract or arrangement at a time after it is made or becomes a party to the proposed understanding at a time after it is arrived at; or*
- (b) in the case of an authorisation to give effect to a provision of a contract, arrangement or understanding – becomes a party to the contract, arrangement or understanding at a time after the authorisation is granted.'*

In relation to the authorisation sought under sub-section 88(1), REMCo requests that the authorisations granted pursuant to these applications be expressed so as to apply to or in relation to each member or participant who:

- (a) in the case of an authorisation to make a contract, arrangement or understanding constituted by or under the RMR, becomes a party to that contract, arrangement or understanding at any time in the future; or
- (b) in the case of an authorisation to give effect to a provision of a contract, arrangement or understanding constituted by or under the RMR, becomes a party to the contract, arrangement or understanding by becoming a REMCo member or RMR participant at a time after the authorisation is granted.

2.6.3 Sub-section 88(13)

Sub-section 88(13) provides:

'An application made to the Commission under this section for an authorisation in relation to a particular contract or proposed contract ... may be expressed to be made also in relation to another contract or proposed contract that is or will be, or in relation to two or more other contracts or proposed contracts that are or will be, in similar terms to the first-mentioned contract or proposed contract and, where an application is so expressed, the Commission may grant a single authorisation in respect of all the contracts or proposed contracts or may grant separate authorisations in respect of any one or more of the contracts or proposed contracts.'

Sub-section 88(15) defines 'Contract' for the purpose of sub-section 88(13) to include an arrangement, understanding, industry code of practice or covenant.

Consistent with the Commission's authorisation of the VENCORP Market and System Operation Rules, REMCo submits that sub-section 88(13) applies to any applications made to the Commission under section 88 generally. REMCo now submits that to the extent that any contract, arrangement or understanding is constituted by the making of or giving effect to the RMR between REMCo and a RMR participant, or between two RMR participants, such contract, arrangement or understanding should be regarded as a particular 'contract or proposed contract' within the meaning of sub-section 88(13). Upon any similar contract, arrangement or understanding being formed when a person is admitted as a RMR participant under the RMR, it is submitted that such contract, arrangement or understanding may be regarded as 'another contract or proposed contract ... in similar terms to the first mentioned contract or proposed contract' within the meaning of sub-section 88(13).

REMCo requests that any authorisation granted by the Commission be expressed as a single authorisation in respect of all such contracts, arrangements or understandings as may be constituted by or under the RMR. A current list of present and intending RMR participants appears as **Schedule 2** to this Submission. However, the identity of any other future RMR participants is not known at the time of these applications. REMCo notes however that as provided for in paragraph (b) of sub-section 88(14), if an authorisation is granted by the Commission in respect of each proposed contract, arrangement or understanding, that authorisation would be deemed to be expressed to be subject to a condition that any party to such a proposed contract will, when so required by the Commission, furnish the Commission with the names of all parties to that proposed contract.

2.7 Contact Details

The address for service of documents on REMCo in regard to these applications is:

Mr Stephen Thomson
Chief Executive Officer
Retail Energy Market Company
Level 40, 140 William Street
Melbourne VIC 3000

3 CRITERIA FOR AUTHORISATION

3.1 Statutory Test for Substantial Lessening of Competition and Exclusive Dealing

This section sets out REMCo's understanding of the relevant statutory tests, and hence the rationale for the arguments that follow.

Sub-section 90(6) provides that the Commission must not grant an authorisation under sub-section 68(1) or 88(8) in respect of a proposed contract, arrangement or understanding or proposed conduct which:

- (a) would or might have the effect of substantially lessening competition; or
- (b) would constitute exclusive dealing (other than conduct to which sub-section 47(6) or (7) applies),

unless it is satisfied in all the circumstances that:

- (a) the contract, arrangement or understanding or conduct would result, or be likely to result, in a benefit to the public; and
- (b) the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or would be likely to result, from the contract, arrangement or understanding or proposed conduct.

3.2 Statutory Test for Exclusionary Provisions and Third Line Forcing

Sub-section 90(8) provides that the Commission must not grant an authorisation under sub-section 88(1) or (8) in respect of:

- (a) a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
- (b) proposed conduct which amounts to third line forcing under sub-section 47(6) or (7), unless the Commission is satisfied in all 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, arrangement or understanding or proposed conduct should be allowed.

3.3 Application of Statutory Tests

While the tests under sub-section 90(6) and sub-section 90(8), exhibit some variation in language, the Australian Competition Tribunal (**Tribunal**) has expressed the view that:

... the practical application of this language gives rise to a test that is essentially the same necessitating the establishment of likely benefit to the public, and a weighing against that benefit of any likely detriment to the public from lessening competition.¹¹

Further, it is understood that the mere act of making application for authorisation is not to carry with it any presumption as to the arrangements in question contravening a provision of Part IV of the TPA.

The assessment of whether or not the Commission may grant an authorisation involves the following key elements:

- (a) identification of the relevant markets;
- (b) an examination of the public benefits arising from the arrangements or conduct in question;
- (c) an examination of any detriment constituted by any lessening of competition; and
- (d) a weighing of the public benefits against any detriments.

3.4 Statutory Definition of Markets

Section 4E of the TPA defines a 'market' as meaning:

¹¹ Re: Media Council of Australia (No.2) (1987) ATPR 40–774.

'a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first mentioned goods or services.'

Markets are defined by reference to:

- (a) product type;
- (b) geographical scope; and
- (c) functional level.

Consideration should also be given to time and likely future developments in relevant markets.

3.5 Market Definitions

We submit in the current instance that the relevant markets for the purpose of REMCo's authorisation applications consists of the following dimensions:

- (a) Product markets: Gas.
- (b) Geographical markets: Each of South Australia including the town of Mildura in the state of Victoria and its environs, and Western Australia.
- (c) Functional market: Retail sale of gas.

Although the SEAGas pipeline in South Australia commences from Port Campbell in Victoria, it is submitted that the geographical market is limited to South Australia and Mildura as the RMR are effective only in relation to retail gas sales made in South Australia and Mildura.

We submit that the relevant markets for the assessment of these applications do not include wholesale or up-stream gas markets in either South Australia and Western Australia because the RMR's effect on the wholesale gas markets are limited to facilitating multi shipper allocation through metering data collection at pipeline gate points and making this data available to market participants. This process allows the allocation of a user's gas consumption to a shipper and the consequent settling of wholesale contracts between users and shippers. However, the legal obligation to settle those contracts remains the contracts themselves and not the RMR. Further, this process does not effect wholesale gas prices, or any other aspects of the operation of the wholesale markets.

3.6 Defining Public Benefits and Detriments

Public benefits and detriments arising from the RMR must be assessed within the context of the relevant markets.

What constitutes a 'public benefit' or 'detriment' is not defined under the TPA. Both terms however have been considered by the Tribunal on numerous occasions and it has been considered that both terms should be given a wide ambit.

In Victorian Newsagency¹² the Tribunal discussed public benefit in the following terms:

'Public benefit has been, and is, given a wide ambit by the Tribunal as, in the language of QCMA ... "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.'

The types of public benefits that have been recognised by the Commission and the Tribunal in the past are extensive..¹³

In assessing public detriments the primary emphasis should be on those detriments that affect economic efficiency.¹⁴ Detriments which have been previously recognised include:

- (a) a reduction in the number of effective competitors in a market;
- (b) increased restrictions on entry to a market; and
- (c) constraints on competition by market participants affecting their ability to innovate effectively and conduct their affairs efficiently and independently.¹⁵

As previously submitted, anti-competitiveness does not necessarily equate to detriment.

In *Re Media Council of Australia (No. 2)*¹⁶ it was stated that:

'It is erroneous to equate anti-competitiveness with detriment. Anti-competitive behaviour may in certain circumstances be a positive benefit.'

Present and likely competition must be assessed within a market structure. In *Re Applicant by Concrete Carters Association (Victoria)*¹⁷ it was put by the Tribunal as follows:

¹² (1994) ATPR 41–347 at 42,677.

¹³ ACCC Guide to Authorisations and Notifications at page 20.

¹⁴ ACCC Guide to Authorisations and Notifications at page 20.

¹⁵ ACCC Guide to Authorisations and Notifications at page 23.

¹⁶ (1987) ATPR 48–406 at 48–419.

¹⁷ (1978) 31 FLR 193 at 216.

'Competition is an active process rather than a passive situation. Nevertheless, the existence and extent of competition or likely competition between those competing with a market will depend, to a large extent, upon the distinctive, albeit evolving structure of the market.'

3.7 Counterfactual

In determining whether to grant an authorisation, the Commission must compare the likely shape of the future both with and without the relevant conduct for which authorisation is being sought.¹⁸

In the present instance if the Commission were not to authorise the RMR it would prevent the implementation of gas full retail contestability (FRC) in South Australia and Western Australia.

In South Australia, while the Gas Act has provided a legal framework for FRC since 1 July 2001, due to the absence of mass market systems only 150 large customers have to date had the option to switch retailers.

In Western Australia, the Energy Legislation Amendment Act 2003 was assented to on 8 October 2003 and the FRC provisions will come into operation when they are proclaimed. However, under the transitional provisions of the Energy Legislation Amendment Act 2003, a proposed retail market system for a distribution system may be submitted to the Western Australia Minister for Energy for approval, so that a retail market system is ready to be implemented as soon as the FRC provisions commence.

In this regard we note that the inclusion of swing service in the RMR was a requirement of pipeline operators in each of South Australia and Western Australia and that without the swing service provisions the RMR are unlikely to be approved by either jurisdiction.

Therefore, we propose that the appropriate counterfactual is the South Australian and Western Australian retail gas markets without FRC.

4 PUBLIC BENEFITS AND POTENTIAL DETRIMENTS ARISING FROM RMR

The swing service provisions in Chapter 5 and compliance panel provisions in Chapter 6 are integral components of the RMR. Therefore the public benefits of the RMR as a whole must be considered when considering the public benefits of the swing service and compliance panel provisions of the RMR.

The expected public benefits from the RMR can be summarised as:

- (d) Implementation of FRC, including the creation of an open and competitive environment for the retailing of gas in each of South Australia and Western Australia;

¹⁸ Re Tooth & Co Ltd and Tooheys Ltd (1979) ATPR 40-113 at 18, 186-187.

- (e) fulfilment of the Council Of Australian Government's (**COAG**) obligations of the South Australian and Western Australian governments to implement gas FRC;
- (f) the promotion of economic efficiency and aiding in passing through the benefits of reform and competition to consumers;
- (g) a significant diminution of barriers to entry into South Australian and Western Australian retail gas markets;
- (h) an increase in customer choice;
- (i) general benefits to the South Australian and Western Australian economies by improved and more competitive gas retail services;

In addition, the swing service provisions of the RMR provides the following additional public benefits:

- (a) it provides a formal mechanism for recovering the cost of providing the swing service. Previously, there has not been any mechanism to recover the costs of providing the swing service, or indeed a recognition that the service was being provided. This will result in a more efficient upstream gas market;
- (b) the swing service rules in the RMRs will allocate the cost of providing swing service to the parties responsible for the need for services, thereby creating an incentive for users to improve the accuracy of their forecasting of gas retail requirements, leading to improved operational efficiency of the pipelines and gas sub-networks.
- (c) The swing service rules will support system integrity and increase efficiency in the provision of gas carriage services and, as a consequence, ultimately improve the services provided to users and customers.

Similarly the creation of a compliance panel and alternative dispute resolution processes provide the following public benefits:

- (a) An independent industry funded low cost fast track resolution of disputes with regard to alleged breaches of the RMR, the interpretation of the RMR and any other matters in relation to the RMR; and
- (b) A mechanism for the enforcement of the RMR, which is necessary for the RMR's to be effective and produce the benefits of implementation of FRC in each of South Australia and Western Australia.

Potential public detriments may include:

- (a) the additional costs to consumers of gas as a result of the following costs:
 - (i) costs incurred by users as a result of REMCo charges. In South Australia, these costs will be regulated by ESCOSA and are not expected to be significant. As previously mentioned, REMCo is a

non-profit organisation funded by industry participants, and its costs are limited to those required to administer the RMR;

- (ii) costs incurred by users as a result of the introduction of charges for the provision of swing service; and
- (iii) costs incurred by REMCo and passed through to participants as a result of the dispute resolution regime in Chapter 6 of the RMR.

REMCo submits these costs will be minor in the context of size of the overall retail markets for gas and therefore will at most only constitute an incremental increase in the retail cost of gas, which is likely to be more than offset by efficiency gains from the introduction of competition into the retail gas markets.

As mentioned previously, REMCO is licensed by the jurisdictional regulator in South Australia, ESCOSA and will be subject to ESCOSA's review and oversight for its South Australian operations. In Western Australia, REMCo will initially be subject to the review and oversight of the Western Australian Minister for Energy and later the ERA. These regulators have ultimate powers to address pricing issues, both with respect to regulation of distribution and retail tariffs and, in South Australia, with respect to REMCo charges.

Due to REMCo being a 'not for profit' company and this ongoing regulatory oversight of its charges, we submit that these charges will remain inconsequential in the context of the overall retail markets in each of South Australia and West Australia and be no greater than is necessary to cover REMCo's reasonable and actual operational and running costs.

5 NET PUBLIC BENEFIT RESULTING FROM RMR

REMCo submits the information detailed in sections 4 clearly demonstrates:

- (a) the ongoing public benefits created by the RMR implementing FRC and putting in place the swing service regime in the South Australian and Western Australian gas markets; and
- (b) that potential detriments from the continued authorisation of the RMR are minor and clearly outweighed by the public benefits,

and therefore there is a substantial and significant net public benefit in providing authorisation of the RMR.

6 CONCLUSION

The RMR are an essential element for the implementation of FRC in South Australian and Western Australia. The RMR are also a fundamental component of the regime by which South Australia and West Australia meet their COAG obligations in respect of the implementation of national competition policy. The swing service and dispute resolution provisions of Chapter 5 and 6 RMR are integral to the RMR and therefore are necessary for the proposed introduction of FRC in South Australia and

Western Australia. Further, these provisions will enhance the operational integrity and efficiency of the respective upstream gas markets.

REMCo submits the statutory tests for authorisation of the RMR in their entirety have been satisfied and requests that

- (a) the Commission authorise REMCo's applications; and
- (b) if the Commission is to impose a time limit upon such authorisation, that such period be ten years commencing on 31 May 2004.

Phillips Fox

20 February 2004

Schedule 1

Forms A, B and E

Form A

Commonwealth of Australia

Trade Practices Act 1974 – Sub-section 88(1)

EXCLUSIONARY PROVISIONS: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under sub-section 88(1) of the *Trade Practices Act 1974* for an authorisation under that sub-section

- (a) to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of that Act; and
- (b) to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of section 45 of that Act.'

- | | |
|---|---|
| 1. (a) Name of applicant | Retail Energy Market Company Ltd (REMCo) |
| (b) Short description of business carried by applicant | <p>REMCo is a company limited by guarantee, governed by an independent Board of Directors, and funded by industry participants on a cost recovery basis.</p> <p>REMCo is established by the industry participants to act as the retail market administrator for both the South Australian and Western Australian gas retail markets.</p> <p>The functions of the retail market administrator are to support meter registration, to effect customer transfer and to undertake balancing and the apportionment and reconciliation of gas supply between retailers and shippers.</p> |

- | | |
|--|--|
| <p>(c) Address in Australia for service of documents on the applicant</p> | <p>C/- Mr Stephen Thomson
Chief Executive Officer
Retail Energy Market Company Ltd
Level 40
140 William Street
Melbourne VICTORIA 3000</p> |
|--|--|
-
- | | |
|---|--|
| <p>2. (a) Brief description of contract, arrangement or understanding and, where already made, its date</p> | <p>Any contract, arrangement or understanding constituted between REMCo and Participants¹⁹ under Chapters 5 and 6 of the Retail Market Rules (RMR), the Swing Service Provision Umbrella Deed (SSPUD) and the Swing Service Provider of Last Resort Umbrella Deed (SSPOLRUD). A copy of the RMR is provided as an attachment to REMCo's submission (Submission) to the Australian Competition and Consumer Commission lodged in support of this application dated 20 February 2004.</p> |
| <p>(b) Brief description of those provisions of the contract, arrangement or understanding that are, or would or might be, exclusionary provisions</p> | <p>The provisions are set out in Chapters 5 and 6 of the RMR.</p> |
| <p>(c) Names and addresses of other parties or proposed parties to contract, arrangement or understanding</p> | <p>REMCo, and Participants under the RMR. The names and addresses of all future Participants are not known at this time. The names and addresses of current and intending Participants are shown at Schedule 2 to the Submission.</p> |
-
- | | |
|---|--|
| <p>3. Names and addresses (where known) of parties and other persons on whose behalf application is made</p> | <p>This application is not made on behalf of any other corporations or other person. However, REMCo requests that any authorisation granted pursuant to this application be expressed so as to apply to or in relation to each Participant who:</p> <ul style="list-style-type: none"> • in the case of an authorisation to make a contract, arrangement or understanding constituted by or under the RMR becomes a party at any time in the future; or • in the case of an authorisation to give effect to a provision of a contract, arrangement or understanding constituted by or under the RMR, |
|---|--|

¹⁹ Participants means a 'user', 'network operator', pipeline operator', 'shipper', 'swing service provider' or 'self contracting user' as defined in the RMR.

becomes a party by becoming a Participant at the time after the authorisation is granted within the meaning of section 88(10) of the Act.

Further, to the extent that the RMR constitutes a contract, arrangement between REMCo and Participants or between Participants, the authorisation be expressed to me made also in relation to other proposed contracts, arrangements or understandings that will be in similar terms to the RMR within the meaning of sections 88(13), (14) and (15) of the Act.

4. (a) **Grounds for grant of authorisation** Authorisations is sought on the grounds set out in the Submission.
- (b) **Facts and contentions relied upon in support of those grounds** The facts and contentions relied upon in support of those grounds are set out in the Submission.
5. **This application for authorisation may be expressed to be made also in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understanding, that are or will be in similar terms to the abovementioned contract, arrangement or understanding.**
 - (a) **Is this application to be so expressed?** Yes. See above.
 - (b) **If so, the following information is to be furnished:**
 - i. **The names of the parties to each other contract, arrangement or understanding** REMCo and any Participants, under the RMR. The names and addresses of all future Participants are not known at this time. The names and addresses of current and intending Participants are shown at Schedule 2 to the Submission.
 - ii. **The names of the parties to each other proposed contract, arrangement or understanding which names are known at the date of this application** REMCo. The other parties to each other proposed contract, arrangement for the purposes of sections 88(13), (14) and (15) of the Act will be any persons who subsequently become Participants. The names of all future Participants are not known at this time.
6. (a) **Does this application deal with a matter relating to a joint venture (See section 4J of the Trade Practices Act 1974)?** No.
- (b) **If so, are any other applications being made simultaneously with** Not applicable.

this application in relation to that joint venture?

(c) If so, by whom or on whose behalf are those other application being made?

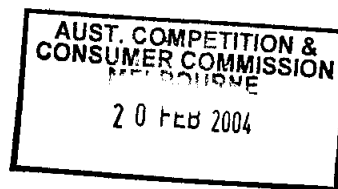
Not applicable.

7. Name and address of person authorised by the applicant to provide additional information in relation to this application

Mr Stephen Thomson
Chief Executive Officer
Retail Energy Market Company Ltd
Level 40
140 William Street
Melbourne VICTORIA 3000

Date: 20 February 2004

Signed on behalf of Retail Energy Market Company Ltd



.....
Stephen Thomson

Mr Stephen Thomson
Chief Executive Officer
Retail Energy Market Company Ltd

***Notes** References in this application to the Act are references to the Trade Practices Act 1974 and also include the Competition Codes of South Australia and Western Australia as defined in the Competition Reform legislation in forces in each jurisdiction.

DIRECTIONS

- 1 Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.
- 2 Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1(a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
- 3 In item 1(b), describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which the application is made.
- 4 Furnish with the application particulars of the contract, arrangement or understanding in respect of which the authorisation is sought. Those particulars shall be furnished:
 - (a) in so far as the particulars of any of them have been reduced to writing - by lodging a true copy of the writing; and
 - (b) in so far as the particulars or any of them have not been reduced to writing - by lodging a memorandum containing a full and correct statement of the particulars that have not been reduced to writing.
- 5 Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.

NOTICES

- 1 In relation to item 4, your attention is drawn to sub-section 90(8) of the *Trade Practices Act 1974* which provides as follows:

“(8) The Commission shall not—

(a) make a determination granting:

- (i) an authorisation under sub-section 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 authorisation under sub-section 88(7) or (7A) in respect of proposed conduct; or
- (iii) an authorisation under sub-section 88(8) in respect of proposed conduct to which sub-section 47(6) or (7) applies; or
- (iv) an authorisation under sub-section 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 authorisation 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.”

- 2 If an authorisation is granted in respect of a proposed contract, arrangement or understanding the names of the parties to which are not known at the date of the application, the authorisation shall, by sub-section 88(14) of the *Trade Practices Act 1974*, be deemed to be expressed to be subject to a condition that any party to the contract, arrangement or understanding will, when so required by the Commission, furnish to the Commission the names of all the parties to the contract, arrangement or understanding.

Form B

Commonwealth of Australia

Trade Practices Act 1974 – Sub-section 88(1)

AGREEMENTS AFFECTING COMPETITION:

APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under sub-section 88(1) of the *Trade Practices Act 1974* for an authorisation under that sub-section:

- (a) to make a contact or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of that Act.
- (b) to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.

- | | | |
|---|--|---|
| 1 | (a) Name of Applicant | Retail Energy Market Company Ltd (REMCo) |
| | (b) Short description of business carried on by applicant | <p>REMCo is a company limited by guarantee, governed by a Board of Directors, and funded by industry participants on a cost recovery basis.</p> <p>REMCo is established by industry participants to act as the retail market administrator for both the South Australian and Western Australian gas retail markets.</p> <p>The functions of the retail market administrator are to support meter registration, to effect customer transfer and to undertake balancing and the apportionment and reconciliation of gas supply between retailers.</p> |

- | | | |
|-----|---|---|
| (c) | Address in Australia for service of documents on the applicant | C/- Mr Stephen Thomson
Chief Executive Officer
Retail Energy Company Ltd
Level 40
140 William Street
Melbourne VICTORIA 3000 |
|-----|---|---|
-
- | | | |
|---|---|---|
| 2 | (a) Brief description of contract, arrangement or understanding and, where already made, its date | Any contract, arrangement or understanding constituted between REMCo and Participants ²⁰ under Chapters 5 and 6 of the Retail Market Rules (RMR), the Swing Service Provision Umbrella Deed (SSPUD) and the Swing Service Provider of Last Resort Umbrella Deed (SSPOLRUD). A copy of the RMR is provided as an attachment to REMCo's submission (Submission) to the Australian Competition and Consumer Commission lodged in support of this application dated 20 February 2004 |
| | (b) Names and addresses of other parties or proposed parties to contract, arrangement or understanding | REMCo and Participants under the RMR. The names and addresses of all future Participants are not known at this time. The names and addresses of current and intending Participants are shown at Schedule 2 to the Submission. |
-
- | | | |
|---|---|--|
| 3 | Names and addresses (where known) of parties and other persons on whose behalf application is made | <p>This application is not made on behalf of any other corporations or other person. However, REMCo requests that any authorisation granted pursuant to this application be expressed so as to apply to or in relation to each Participant who:</p> <ul style="list-style-type: none"> • in the case of an authorisation to make a contract, arrangement or understanding constituted by or under the RMR becomes a party at any time in the future; or • in the case of an authorisation to give effect to a provision of a contract, arrangement or understanding constituted by or under the RMR, becomes a party becoming a Participant at the time after the authorisation is granted |
|---|---|--|

²⁰ Participants means a 'user', 'network operator', pipeline operator, 'shipper', 'swing service provider' or 'self contracting user' as defined in the RMR..

within the meaning of section 88(10) of the Act.

Further, to the extent that the RMR constitute a contract, arrangement between REMCo and Participants or between Participants, the authorisation be expressed to be made also in relation to other proposed contracts, arrangements or understandings that will be in similar terms to the RMR within the meaning of sections 88(13), (14) and (15) of the Act.

- | | | |
|---|--|--|
| 4 | (a) Grounds for grant of authorisation | Authorisation is sought on the grounds set out in the Submission. |
| | (b) Facts and contentions relied upon in support of those grounds | The facts and contentions relied upon in support of these grounds are set out in the Submission. |
| 5 | This application for authorisation may be expressed to be made also in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the above mentioned contract, arrangement or understanding. | |
| | (a) Is this application to be so expressed? | Yes. See above. |
| | (b) If so, the following information is to be furnished: | |
| | (i) the names of the parties to each other contract, arrangement or understanding | REMCo and any Participants, who meet the definition of Participant under the RMR. The names and addresses of future Participants are not known at this time. |
| | (ii) the names of the parties to each other proposed contract, arrangement or understanding which names are known at the date of this application | REMCo. The other parties to each other proposed contract, arrangement for the purposes of sections 88(13), (14) and (15) of the Act will be any persons who subsequently become Participants. The names of future Participants are not known at this time. |
| 6 | (a) Does this application deal with a matter relating to a joint venture (See section 4J of the Trade Practices Act 1974) | No. |
| | (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture | Not applicable. |

(c) If so, by whom or on whose behalf are those other applications being made

Not applicable.

7 Name and address of person authorised by the applicant to provide additional information in relation to this application

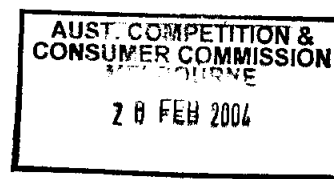
Mr Stephen Thomson
Chief Executive Officer
Retail Energy Market Company
Level 40
140 William Street
Melbourne VICTORIA 3000

Date: 20 February 2004

Signed on behalf of Retail Energy Market Company Ltd



Mr Stephen Thomson
Chief Executive Officer
Retail Energy Market Company Ltd



***Notes:** References in this application to the Act are references to the Trade Practices Act 1974 and also include the Competition Codes of South Australia and Western Australia as defined in the Competition Reform legislation in forces in each jurisdiction.

DIRECTIONS

- 1 Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.
- 2 Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1(a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
- 3 In item 1(b), describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which the application is made.
- 4 Furnish with the application particulars of the contract, arrangement or understanding in respect of which the authorisation is sought. Those particulars shall be furnished—
 - (a) in so far as the particulars or any of them have been reduced to writing – by lodging a true copy of the writing; and
 - (b) in so far as the particulars or any of them not been reduced to writing – by lodging a memorandum containing a full and correct statement of the particulars that have not been reduced to writing.
- 5 Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the matter in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.

NOTICES

- 1 In relation to item 4, your attention is drawn to sub-sections 90(6) and (7) of the Trade Practices Act 1974 which provide as follows: -
- “(6) The commission shall not make a determination granting an authorisation under sub-sections 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, 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 authorisation under sub-section 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.”
- 2 If an authorisation is granted in respect of a proposed contract, arrangement or understanding the names of the parties to which are not known at the date of this application, the authorisation shall, by sub-section 88(14) of the Trade Practices Act 1974, be deemed to be expressed to be subject to a condition that any party to the contract, arrangement or understanding will, when so required by the Commission, furnish to the Commission the names of all the parties to the contract, arrangement or understanding.

Form E

Commonwealth of Australia

Trade Practices Act 1974 – Sub-section 88(8)

EXCLUSIVE DEALING:

APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under sub-section 88(8) of the Trade Practices Act 1974 for an authorisation under that sub-section to engage in conduct that constitutes or may constitute the practice of exclusive dealing.

- | | | |
|----------|---|---|
| 1 | (a) Name of applicant | Retail Energy Market Company Ltd (REMCo) |
| | (b) Short description of business carried on by applicant | <p>REMCo is a company limited by guarantee, governed by a Board of Directors, and funded by industry participants on a cost recovery basis.</p> <p>REMCo is established by the industry participants to act as the retail market administrator for both the South Australian and Western Australian gas retail markets.</p> <p>The functions of the retail market administrator are to support meter registration, to effect customer transfer and to undertake balancing and the apportionment and reconciliation of gas supply between retailers.</p> |
| | (c) Address in Australia for service of documents on the applicant | <p>C/- Mr Stephen Thomson
Chief Executive Officer
Retail Energy Company Ltd
Level 40
140 William Street
Melbourne VICTORIA 3000</p> |

-
- 2 (a) **Description of the goods or services in relation to the supply or acquisition of which this application relates**
- Services provided by or to Participants²¹ under Chapters 5 and 6 of the Retail Market Rules (RMR), the Swing Service Provision Umbrella Deed (SSPUD) and the Swing Service Provider of Last Resort Umbrella Deed (SSPOLRUD). A copy of the RMR is provided as an attachment to REMCo's submission (Submission) to the Australian Competition and Consumer Commission lodged in support of this application dated 20 February 2004
- (b) **Description of the conduct that would or may constitute the practice of exclusive dealing**
- i. Making Chapters 5 and 6 of the RMR, the Swing Service Provision Umbrella Deed (SSPUD) and the Swing Service Provider of Last Resort Umbrella Deed (SSPOLRUD) to the extent that making Chapters 5 and 6 of the RMR and the SSPUD and SSPOLRUD is making a contract or arrangement or arriving at an understanding that contains provisions that would or may constitute the practice of exclusive dealing;
 - ii. Giving effect to each and any provision of Chapters 5 and 6 of the RMR, SSPUD and SSPOLRUD that would or may constitute the practice of exclusive dealing; and
 - iii. Engaging in each and any practice required under a provision of Chapters 5 and 6 of the RMR, SSPUD and SSPOLRUD, being a practice that would or may constitute the practice of exclusive dealing.
- 3 (a) **Class or classes of persons to which the conduct relates**
- The classes of persons are:
- i. REMCo; and
 - ii. Any persons who become Participants under the RMR.
- The application is made on behalf of REMCo.
In addition:
-

²¹ Participants means a 'user', 'network operator', 'pipeline operator', 'shipper', 'swing service provider' or 'self contracting user' as defined in the RMR.

- a. The authorisation being applied for by this application is, in accordance with section 88(8AA) of the Act, to be expressed so as to apply to REMCo and every person who becomes a Participant under the RMR; and
- b. This application is expressed to be made also in relation to other proposed contracts, arrangements or understandings that will be in similar terms to RMR within the meaning of sections 88(13), 88(14) and 88(15) of the Act.
- (b) **Number of those persons**
- (i) **At the present time:**
- | | |
|--------------------------|----|
| REMCo | 1 |
| Others described in 3(a) | 11 |
- (ii) **Estimated within the next year:**
- | | |
|--------------------------|----|
| REMCo | 11 |
| Others described in 3(a) | 11 |
- (c) **Where number of persons stated in item 3(b)(i) is less than 50, their names and addresses**
- See Schedule 2 of the Submission.
- 4 (a) **Grounds for grant of authorisation**
- Authorisation is sought on the grounds set out in the Submission.
- (b) **Facts and contentions relied upon in support of those grounds**
- The facts and contentions relied upon in respect of those grounds are set out in the Submission
- 5 (a) **Does this application deal with a matter relating to a joint venture (See section 4J of the Trade Practices Act 1974)**
- No.
- (b) **If so, are any other applications being made simultaneously with this application in relation to that joint venture**
- Not applicable.
- (c) **If so, by whom or on whose behalf are those other applications being made**
- Not applicable.

6 Name and address of person authorised by the applicant to provide additional information in relation to this application

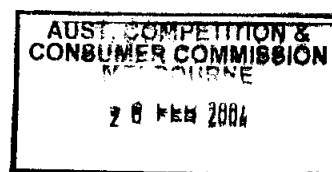
Mr Stephen Thomson
Chief Executive Officer
Retail Energy Market Company Ltd
Level 40
140 William Street
Melbourne VICTORIA 3000

Date: 20 February 2004

Signed on behalf of Retail Energy Market
Company Ltd



.....
Mr Stephen Thomson
Chief Executive Officer
Retail Energy Market Company Ltd



***Notes:** References in this application to the Act are references to the Trade Practices Act 1974 and also include the Competition Codes of South Australia and Western Australia as defined in the Competition Reform legislation in forces in each jurisdiction.

DIRECTIONS

- 1 Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.
- 2 Where the application is made by or on the behalf of a corporation, the name of the corporation is to be inserted in item 1(a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
- 3 In item 1(b), describe that part of the applicant's business in the course of which the conduct is engaged in.
- 4 Where particulars of a condition or of a reason of the type referred to in sub-sections 47(2) to (9) (inclusive) of the Trade Practices Act 1974 have been reduced in whole or in part to writing, a copy of the writing is to be furnished with the application.
- 5 In item 3(a), describe the nature of the business carried on by the persons referred to therein.
- 6 In item 3(b)(ii), state an estimate of the highest number of persons with whom the applicant is likely to deal in the course of engaging in the conduct at any time during the next year.

NOTICE

In relation to item 4, your attention is drawn to sub-section 90(6) of the Trade Practices Act 1974 which provides as follows:-

- “(6) The Commission shall not make a determination granting an authorisation under sub-section 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 a proposed conduct, 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.”

Schedule 2**List of RMR Participants in South Australia and Western Australia****South Australia**

Retailers	Origin Energy Retail Ltd	AGL South Australia Pty Ltd	TXU Pty Ltd	Energy Australia Pty Ltd#
Network Operators	Envestra Ltd			
Shippers	Origin Energy	AGL	TXU	TerraGas Trader
Pipeline Operators	Epic Energy	SEAGas		

#Intending Retailer

Western Australia

Retailers	Alinta Sales Pty Ltd	CMS Energy	Origin Energy	AGL	TXU	Western Power Retail
Network Operators	Alinta Gas Networks Pty Ltd					
Shippers	Alinta Sales Pty Ltd	CMS Energy	Western Power Generation	Origin Energy	AGL	TXU
Pipeline Operators	Epic Energy	CMS Energy				

Market	Company name	Address
South Australia	Origin Energy Retail Ltd	Level 5, 1 King William St, Adelaide 5000
South Australia	Envestra Ltd ACN 078 551 685	Level 10, 81 Flinders St, Adelaide 5000
South Australia	Epic Energy	26 High St, Dry Creek 5094
South Australia	AGL	226 Greenhill Rd, Eastwood 5063
South Australia	SEAGas	Level 4, 70 Hindmarsh Square, Adelaide 5001
South Australia	TXU	104 Frome St, Adelaide 5000
South Australia	Energy Australia Pty Ltd ABN 24 070 374 293	570 George Street, Sydney NSW 2000
South Australia	Terra Gas Trader	168 Greenhill Rd, Parkside

		5063
Western Australia	Alinta Sales Pty Ltd ABN 92 089 531 984	The Quadrant, 1 William St Perth 6000
Western Australia	Epic Energy	Level 7, 239 Adelaide Tce Perth 6000
Western Australia	AlintaGas Networks Pty Ltd ABN 90 089 531 975	The Quadrant, 1 William St, Perth WA 6000
Western Australia	CMS Energy	8 Marchesi St, Kewdale 6105
Western Australia	Origin Energy Retail Ltd ABN 22 078 868 425	34 Colin St, West Perth 6005
Western Australia	Western Power Generation/Western Power Retail	363 Wellington St, Perth 6000
Western Australia	AGL	15-17 William St, Perth 6000

Schedule 3

REMCo Retail Market Rules version 3.3A