



Australian
Competition &
Consumer
Commission

Draft Determination

Application for revocation and substitution

lodged by

Retirees WA (Inc)

in respect of

**Agreement between Western Australian funeral
directors for the provision of funeral director
services to members of Retirees WA (Inc)
at a fixed price**

Date: 7 February 2007

Authorisation no.: A91015

Public Register no.: C2006/1811

Commissioners: Samuel
Sylvan
King
McNeill
Smith
Willett

Summary

The ACCC proposes to grant authorisation to Retirees WA (RWA), to continue to enter into agreements with Western Australian Funeral Directors (WADFA) and individual Independent Funeral Directors to supply fixed-price funerals to eligible RWA members, for five years.

The authorisation process

The Australian Competition and Consumer Commission (ACCC) can grant immunity from the application of the competition provisions of the *Trade Practices Act 1974* (the Act) if it is satisfied that the benefit to the public from the conduct outweighs any public detriment. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

The application for authorisation

On 29 September 2006, Retirees WA (Inc) (RWA) lodged an application seeking revocation of authorisation A70012 and replacement by substitute authorisation A91015.

This authorisation (which was due to expire on 23 October 2006) concerns agreements negotiated between RWA¹ and the Western Australian Funeral Directors Association (WAFDA) and certain individual Independent Funeral Directors in WA (the ‘Nominated Funeral Agreements’) to supply RWA members with funeral services at a fixed price.

Eligible RWA members can obtain a fixed-price funeral service under these agreements by entering into a prepaid funeral contract with RWA (the ‘Funeral Fund’).

Public detriment

The ACCC considers that these arrangements are not likely to result in any significant anti-competitive detriment.

In particular, the ACCC notes that the arrangements cover a very small segment of funerals in WA (around 5 per cent) and that Funeral Fund members can opt out at any time should they be able to negotiate a better price individually. The ACCC also notes that there appears to be a high-degree of non-price competition in the relevant markets which is likely to continue if the arrangements were authorised.

Most significantly, the ACCC has formed the view on the available information that the arrangements are likely to result in a lower end price to fund members than would be negotiated without the arrangements.

Public benefit

The ACCC is satisfied that there are public benefits arising from the arrangements. In particular, the ACCC considers there is a public benefit in the provision of funeral directors services to a section of the community, some of which are financially disadvantaged, at a price lower than if the Funeral Fund in its current form was discontinued.

¹ The RWA was formally known as the Australian Pensioners’ League of Western Australia (APL). The APL changed its name to the Retirees WA (Inc) on 14 June 2004.

The ACCC also considers that the arrangements provide some public benefit in reduced administrative costs to both the RWA, members of WAFDA and certain individual Independent Funeral Directors which contribute to the viability of the Funeral Fund.

Balance of public benefit and detriment

On balance, the ACCC considers that in all the circumstances, the likely public benefits generated by the arrangements will outweigh the likely public detriment.

Length of authorisation

The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

In this instance, the ACCC considers it appropriate to grant authorisation for a period of five years.

Interim authorisation

RWA requested interim authorisation to continue the Nominated Funeral Agreements while the ACCC considered the merits of its substantive application.

On 18 October 2006, the ACCC granted interim authorisation on the grounds that it would prevent disruption to the RWA's administration of the Funeral Fund while the substantive application was considered.

Interim authorisation will continue to protect the arrangements until the ACCC releases a final determination, or until the ACCC decides to revoke interim authorisation.

The next steps

The ACCC will now seek further submissions from the applicant and interested parties in relation to this draft determination prior to making a final decision. The applicant and interested parties may also request that a conference be held to make oral submissions on the draft determination.

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1. Introduction

Authorisations

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business.
- 1.2 The Act, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way parties may obtain immunity is to apply to the ACCC for 'authorisation'. The ACCC may 'authorise' businesses to engage in anti-competitive conduct if it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.3 The ACCC conducts a public consultation process before making a decision to grant or deny authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.4 After considering submissions, the ACCC issues a draft determination proposing to either grant or deny the application.
- 1.5 Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.
- 1.6 The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.
- 1.7 Under section 91C of the Act, the ACCC may revoke an existing authorisation and grant another authorisation in substitution for the one revoked. The ACCC must consider the substitute authorisation in the same manner as the standard authorisation process.

The current application

- 1.8 On 29 September 2006, Retirees WA (Inc) (RWA) lodged an application seeking revocation of authorisation A70012 and replacement by substitute authorisation A91015. Authorisation A70012 was due to expire on 23 October 2006.

- 1.9 A70012 was granted by the ACCC on 24 October 2001. The authorisation concerned agreements between RWA² and the Western Australian Funeral Directors Association (WAFDA); and agreements between RWA and certain individual Independent Funeral Directors (hereafter referred to as the '**Nominated Funeral Agreements**') for the provision of low cost funeral services to eligible RWA members via a 'Funeral Fund'.
- 1.10 The RWA is seeking to revoke A70012 and to substitute a new authorisation (A91015) in respect of the same matter for a period of five years.³

Interim authorisation

- 1.11 RWA requested interim authorisation to continue the Nominated Funeral Agreements while the ACCC considered the merits of its substantive application.
- 1.12 On 18 October 2006, the ACCC suspended the operation of authorisation A70012 and granted interim authorisation to substitute authorisation A91015 on the same terms as A70012. The ACCC considered that interim authorisation would prevent disruption to the RWA's administration of the Funeral Fund while the substantive application was considered.

² The RWA was formally known as the Australian Pensioners' League of Western Australia (APL). The APL changed its name to the Retirees WA (Inc) on 14 June 2004.

³ Specifically, RWA applied for a replacement authorisation for the period 25 October 2006 to 24 October 2011.

2. Background

The Applicant⁴

- 2.1 RWA is a registered charitable organisation that has been operating in WA since 1931. Its stated purpose and function is to benefit the elderly.
- 2.2 RWA is an organisation through which pensioners' issues (both individually and as a collective) can be canvassed and, wherever necessary, action taken so as to improve the personal, social and economic conditions of the elderly in Western Australia (WA).
- 2.3 RWA presently has in excess of 8,438 members and operates 31 branches throughout suburban and rural WA. Over 1,000 of these members are actively involved in the activities of the RWA.
- 2.4 Some of the functions performed by the RWA include:
- providing meeting facilities, residential care, rental accommodation, access to legal services and a weekly podiatry clinics for its members
 - providing an insurance scheme specifically designed for pensioners
 - managing and operating (and in some cases owning) several retirement villages and
 - acting in an advisory capacity on most seniors' issues, including involvement in legislating for reforms or amendments which are relevant to seniors.
- 2.5 Some of the benefits which RWA has achieved for the elderly have included:
- WA Seniors Card entitling seniors to many commercial benefits and discounts
 - subsidised rental accommodation
 - \$50 spectacle subsidy for members
 - concessional travel for pensioners, including free rail and bus trip each year and
 - free public transport for pensioners on Sundays and public holidays.
- 2.6 In addition, as part of its operations, RWA also administers the Funeral Fund. This is discussed in more detail in Chapter 3.

The funeral service industry

- 2.7 Historically, the funeral service industry was characterised by family owned businesses that operated funeral home(s) and/or shop fronts, usually in nearby localities. In recent years, however, the industry has become increasingly concentrated with a number of

⁴ The information in this section is sourced primarily from RWA's submission in support of its application for re-authorisation.

larger multi-firm businesses entering the industry, generally through the purchase and amalgamation of existing businesses.

- 2.8 In an *Issues Paper* released in July 2006, the WA Department of Consumer and Employment Protection (DOCEP) noted that the trend towards market concentration in the funeral industry has been particularly apparent in the eastern states of Australia. It was also noted that a number of international funeral businesses now operate within Australia.⁵
- 2.9 The largest ‘funeral services’ entity in Australia is a company named Ivocare. This is the Australian-branch of the Texas based company called Service Corporation International. Ivocare’s Australian network consists of 124 funeral locations, 12 cemeteries and crematoria, across a number of different states and brand names in Australia.⁶ According to its website, Ivocare accounts for 20 per cent of funerals in Australia.⁷
- 2.10 Generally speaking, larger multi-firm operations tend to have a considerable advantage over single premise businesses in that they are able to centralise operations and minimise expenses by pooling labour, hearses, mortuary facilities, funeral chapels, crematoria and administration. These businesses also have the advantage of developing brand recognition; which can be a significant advantage given the circumstances under which funeral services are often purchased.
- 2.11 Funeral directors generally organise all aspects of the funeral and burial or cremation of the deceased, including the collection of the deceased, storage of the body pending burial or cremation, preparation of the body, viewing facilities and chapel services. Funeral directors may also offer a range of additional services. For this reason, the cost of a funeral service can vary widely depending on services requested by a client, and their pre-existing arrangements regarding burial or crematory plots.
- 2.12 Depending on the nature and scope of their business, in providing these services funeral directors generally deal with third parties; for instance when obtaining the coffin or casket from the manufacturer, negotiating with the cemetery or crematorium, making arrangements with florists or newspapers, arranging for the services of clergy and in some instances dealing with monument masons.
- 2.13 Funeral directors also typically offer the opportunity for customers to enter into pre-paid funeral arrangements. A pre-paid funeral is one where the family and funeral director establish the funeral requisites and services that they wish to contract and pay for now, for provision at a future date. Typically, the price of the funeral service agreed under a pre-paid contract is indexed to general inflation levels.

⁵ Department of Consumer and Employment Protection (Government of Western Australia), *Issues Paper*, July 2006, p. 5.

⁶ The funeral home brand names include Blackwell, George Hartnett, Le Pine, Purslowe as well as the national brands of Simplicity and White Lady. The Cemetery / Crematoria business includes sites such as Northern Suburbs Memorial Gardens and Crematorium, Rookwood Memorial Gardens and Crematorium, Pinegrove Memorial Park, Albany Creek Memorial Park and Mt Thompson Memorial Gardens.

⁷ See Ivocare website at <<http://www.invocare.com.au/driver.asp?page=/about+us/invocare+-+investment+in+australia>>

The Western Australian market

- 2.14 WAFDA represents the largest providers of funeral services in WA. It has six metropolitan members (who operate 35 separate businesses throughout Perth and its suburbs) and four country members (who operate 9 separate businesses throughout country WA).⁸
- 2.15 Ivocare operates 12 local businesses in WA, and these are all members of WADFA.
- 2.16 WAFDA rules require that new members have been engaged in conducting a funeral director business for at least five years and have a certain level of investment in, for example, hearses and premises. There is no entry fee to the WAFDA and its members are also members of the WA Division of the Australian Funeral Directors Association (AFDA).
- 2.17 Australian Bureau of Statistics records indicate that there were 11,293 deaths in WA in 2005. WAFDA has advised that their members conducted 9,124 funerals in the 2005/06 reporting period. This represents approximately 80 per cent of funerals in WA.
- 2.18 There are also numerous non-WAFDA funeral directors in WA, located in the Perth metropolitan area and throughout country WA. Many of these funeral directors conduct their businesses using more than one business name. Some of these funeral directors are small operations which use the funeral service facilities of other directors or facilities available at hospitals.
- 2.19 RWA estimates that Independent Funeral Directors perform approximately 20 per cent of funerals in WA, and that this proportion is growing.

Previous decisions by the Trade Practices Commission

- 2.20 The Trade Practices Commission⁹ (TPC) has issued two previous determinations, dated 19 December 1986 (A70007) and 23 March 1990 (A70009) regarding applications for authorisation with respect to conduct which included an agreement for the provision of funeral services to the RWA funeral fund at a fixed price ('funeral agreements'). Both applications were lodged by WAFDA.
- 2.21 The 'funeral agreements' were between WAFDA, the RWA and the Civilian Maimed and Limbless Association of WA operating as the Metropolitan Pensioners Funeral Fund (MPFF). Under the agreements WAFDA directors provided basic funerals to members of the RWA and MPFF funds at a set, concessional price. This price was set by the WAFDA annually with the funds choosing to renew the agreements if they considered the price a worthwhile concession.
- 2.22 In its 1986 determination, the TPC accepted that the 'funeral agreements' provided a public benefit in that they brought about a concessional funeral rate for certain pensioners in WA. The TPC considered that this public benefit would be outweighed by

⁸ RWA supporting submission at paragraph 1.13. This information suggests that there has been consolidation in the number of independent funeral directors in WA since authorisation was considered in 2001. At that time, WAFDA had 12 Perth metropolitan members who operated 27 separate businesses throughout Perth and its suburbs and 16 country members who operated 24 separate businesses throughout country WA.

⁹ Prior to 1995, the Trade Practices Commission considered these applications.

anti-competitive detriment arising from the arrangements where funeral directors outside the arrangements were precluded from offering their funeral services to members of the RWA and MPFF. However, the TPC noted that funeral directors who were not members of WAFDA were still able to access this segment of the market and freedom of choice was preserved. Accordingly, the TPC granted authorisation to the WAFDA for the funeral agreements until 31 March 1989, when it proposed to review the matter.

- 2.23 The TPC's determination of 23 March 1990 was based on this review. In its 1990 determination, the TPC did not consider that the arrangements raised any competition issues between funeral directors in WA. However, the TPC did not consider that there was a material public benefit in the arrangements. Specifically, the TPC did not consider that the concessional rate being offered under the scheme represented a 'significant' concession off the standard cost of a funeral. Consequently, the TPC denied authorisation of the arrangements.

3. Previous ACCC authorisation (2001)

- 3.1 On 10 January 2001, the Australian Pensioners League of Western Australia (since renamed Retirees WA or 'RWA') lodged an application for authorisation (A70012) with the ACCC.
- 3.2 Specifically, the RWA sought authorisation for agreements between itself and the Western Australian Funeral Directors Association (WAFDA) and certain individual Independent Funeral Directors (the '**Nominated Funeral Agreements**') for the provision of funeral directors services to eligible RWA members at a fixed price under a prepaid funeral scheme (Funeral Fund).

The Funeral Fund

- 3.3 RWA administers the Funeral Fund. Any person who is in receipt of an aged, invalid or widowed pension, and superannuants, in WA is eligible to join RWA, which in turn makes them eligible to join the Funeral Fund, provided that they are over the age of 55. However, a superannuant must have been retired 12 months from employment prior to joining the Funeral Fund. Under the Funeral Fund, eligible RWA members are able to enter into a contract to pay a stipulated fee for a 'standard' low-cost funeral service.
- 3.4 At the time of authorisation, the Nominated Funeral Agreements stipulated that for funerals provided by WAFDA members, the fixed fee was \$1,790.00 plus a one-off \$55 administration fee (plus optional extras). For funerals provided by Independent Funeral Directors, the fixed fee was \$1,677.50 plus a \$55 administration fee. The stipulated fee and level of service contained in these agreements are reviewed annually.
- 3.5 Under the Funeral Fund, the stipulated fee can be paid by eligible RWA members either as a lump sum or, more often, for the benefit of those members unable to make such payments, by instalments. For those members choosing to pay by instalment, there are no restrictions set regarding payment amounts or terms, other than a minimum deposit of \$75. Members are free to contribute any amount they wish at any time they wish.
- 3.6 The funeral contracts provide that for each funeral conducted for a member of the Funeral Fund, the funeral director will be paid by the RWA a fee in accordance with that specified in the schedule to the agreements. Any costs for services not covered by the Funeral Fund are negotiable between the funeral director and the member's next of kin. Such costs do not attract any concession rate.
- 3.7 Upon the death of a Funeral Fund member, if the next-of-kin retains a funeral director who has entered into a fixed agreement with RWA, that funeral director arranges the funeral. Thereafter the funeral director renders an account to the RWA for the amount agreed to be the fixed price for the fund members applicable at the time that the relevant funeral occurs. If the member of the fund who has passed away is fully paid up then the RWA forwards to the funeral director concerned the amount of the agreed fee. If the member is not fully paid up then the RWA will still pay to the funeral director concerned the full amount of the agreed fee and will bill the estate or next-of-kin of the deceased member the difference between the monies held in the funeral fund and the cost of the funeral previously agreed.

- 3.8 There is no requirement that the estate or next-of-kin of a deceased member of the fund use either a funeral director who is a WAFDA member or is a non-WAFDA funeral director who has entered into an agreement with the RWA. The estate or next-of-kin are free to have a funeral director who has not agreed to a fixed fee with the RWA perform the funeral. In such cases, the RWA will forward to the funeral director concerned the amount of money held by the member in the fund, the balance of any charge rendered by the funeral director being paid by the estate or next-of-kin directly to that funeral director.

ACCC decision in 2001

- 3.9 On 24 October 2001, authorisation A70012 was granted to RWA for the relevant parties to enter into the Nominated Funeral Agreements.
- 3.10 The ACCC considered that there were public benefits arising from the arrangements. In particular, the ACCC considered that there was a public benefit in the provision of funeral directors services to a financially disadvantaged section of the community at a price significantly lower than the market price.
- 3.11 The ACCC also considered that the conduct provided some public benefit in the reduction of administrative costs to both the fund and the provider of the service. Moreover, the ACCC considered that given the nature of the fund and the fund provider, without these cost savings the viability of the fund would be compromised.
- 3.12 The ACCC considered that although the proposed arrangements had the potential to result in a lessening of price competition between WAFDA members, they only covered a small subset of funerals in WA (i.e. around 5 per cent at the 'lower price end'). The ACCC also considered that the arrangements would be likely to result in a lower end price to RWA Funeral Fund members than could otherwise be negotiated in the absence of the arrangements.
- 3.13 That said, the ACCC was cognisant that the arrangements for which authorisation was sought contained no provisions for ensuring that the price negotiated would remain significantly lower than that which may be arrived at through individual negotiation in a competitive market. At the time, the ACCC indicated that it would be concerned if, having authorised these arrangements, the consequent immunity from legal proceedings was exploited to arrive at a price less favourable to fund members than would be the case if each individual funeral director determined its own price.
- 3.14 For this reason the ACCC required a condition of authorisation that RWA would (when so required by the ACCC) furnish to the ACCC any contract executed by RWA and WAFDA or between RWA and certain non-WAFDA funeral directors under the arrangements for which authorisation was granted. The ACCC noted that a failure to comply with this condition could form the basis for the ACCC to conduct a review as to whether authorisation should be revoked under section 91B of the Act.
- 3.15 On balance, the ACCC considered that, with the imposition of a reporting requirement, the proposed arrangements were likely to result in a net public benefit and granted conditional authorisation for a period of five years.

4 The current application

- 4.1 On 29 September 2006, RWA lodged an application seeking revocation of authorisation A70012 and replacement by substitute authorisation A91015. Authorisation 70012 was due to expire on 23 October 2006.
- 4.2 RWA is seeking a substitute authorisation in the same terms as those contained in A70012, for a period of five years.

Current prices and services

- 4.3 The current Nominated Funeral Agreements between RWA and WAFDA and between RWA and certain individual Independent Funeral Directors cover the period 1 March 2006 to 28 February 2007 (2006-07). The 2006-07 current agreement between RWA and WADFA stipulates that for funerals provided by WAFDA members the fee is \$2,288 plus a one-off \$55 administration fee (plus optional extras). The 2006-07 agreement between RWA and certain individual Independent Funeral Directors stipulates that for funerals provided by non-WAFDA members the fee is \$2,030 plus a \$55 administration fee.
- 4.4 According to information supplied by RWA as part of its latest application, the following expenses (termed the 'Funeral Director's Professional Service fee') are covered by the Funeral Fund:
- a private presentable vehicle for removal of deceased from the place of death to the Funeral Director's Parlour in normal working hours
 - preparation of deceased for burial or cremation
 - a standard size coffin of good material and good workmanship
 - use of the Funeral Director's chapel for 'viewing'
 - use of Funeral Director's chapel for funeral service
 - a hearse to carry the deceased member's remains to the cemetery and
 - procurement of the Death Certificate.
- 4.5 Based on information provided by the RWA, the ACCC understands that certain expenses are not covered by the standard fee in the Funeral Fund; including, the cost of the death certificate and burial or cremation expenses. Additional expenses or services which are not covered by the standard Funeral Fund are negotiated between the Funeral Fund member (or their next-of-kin) and the relevant funeral director (or third party).
- 4.6 As at 19 December 2006, the Funeral Fund had 4,868 members. This represents approximately 58 per cent of RWA members. As at 30 June 2006, the amount held in the Funeral Fund was \$10,250,068. The number of members who have joined the Funeral Fund since 2001 is shown in the table below.

Table 4.1: Number of members to join Funeral Fund since 2001

Calendar Year	Number of new members
2001	493
2002	393
2003	260
2004	216
2005	137
Total	1,499

The Applicant's supporting submission

- 4.7 The detailed views expressed in RWA's submission are outlined in the ACCC's evaluation of the funeral fund in Chapter 6 of this draft determination. A copy of the submission is available from the ACCC website (www.accc.gov.au) by following the 'Public Registers' and 'Authorisations Public Registers' links.

Interested party consultation

- 4.8 The ACCC sought submissions from 29 interested parties potentially affected by the application, including funeral directors and relevant government departments. The ACCC received no submissions.

5. The net public benefit test

- 5.1 Under section 91C of the Act, the ACCC may revoke an existing authorisation and grant another authorisation in substitution for the one revoked, at the request of the person to whom the authorisation was granted or another person on behalf of such a person.
- 5.2 In order for the ACCC to grant an application to revoke an existing authorisation and grant a substitute authorisation, the ACCC must consider the substitute authorisation in the same manner as the standard authorisation process (as outlined in Chapter 1).
- 5.3 Under section 91C(7) the ACCC must not make a determination revoking an authorisation and substituting another authorisation unless the ACCC is satisfied that the relevant statutory tests are met.

Application A91015

- 5.4 Application for reauthorisation A91015 was made to make and give effect to a contract 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 the Act. The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.
- 5.5 In respect of the making of and giving effect to the arrangements, sections 90(6) and 90(7) of the Act state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
- the provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision concerned was given effect to.

Application of the tests

- 5.6 The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition.
- 5.7 However, the Tribunal has previously stated that regarding the test under section 90(6):
- [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.¹⁰

- 5.8 Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7).
- 5.9 Consequently, when applying either test, the ACCC can take most, if not 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.

Definition of public benefit and public detriment

- 5.10 Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.¹¹

- 5.11 Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...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.¹²

Future with-and-without test

- 5.12 The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.¹³
- 5.13 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

¹⁰ Re Association of Consulting Engineers, Australia (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

¹¹ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677. See also Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242.

¹² Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

¹³ 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; Re Media Council of Australia (No.2) (1987) ATPR 40-774 at 48,419.

Length of authorisation

5.14 The ACCC can grant authorisation for a limited period of time.¹⁴ This allows the ACCC at the end of the period of authorisation to evaluate whether the public benefits upon which its decision is made actually eventuated in practice and the appropriateness of the authorisation in the current market environment.

Conditions

5.15 The Act permits the ACCC to grant authorisation subject to conditions which the ACCC considers necessary in order to satisfy the net public benefit test.¹⁵

Future and other parties

5.16 Applications 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 future and¹⁶
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.¹⁷

¹⁴ Section 91(1).

¹⁵ Section 91(3).

¹⁶ Section 88(10).

¹⁷ Section 88(6).

6. ACCC evaluation

- 6.1 The ACCC's evaluation of the proposed arrangements is in accordance with the net public benefit test outlined in Chapter 5. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments flowing from the proposed arrangements.
- 6.2 Prior to this assessment, the ACCC will identify the relevant market(s) for consideration and the likely counterfactual in the absence of authorisation.

Market definition

- 6.3 One of the first steps in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct. The purpose of considering 'market definition' is to assist the ACCC to determine whether the Funeral Fund Agreements would, or is likely to, lead to a lessening of competition in any market(s).
- 6.4 In establishing the market boundaries, the ACCC considers the various dimensions of the market. In this particular matter, the geographical dimension of the market warrants further discussion. The ACCC also considers both the demand and supply side of the market within which goods/services are supplied.
- 6.5 Depending on the circumstances, the ACCC may not need to comprehensively define the scope of the relevant market(s). This is because it may be apparent that the anti-competitive detriment would or would not arise regardless of the scope of the market.

The Applicant's view

- 6.6 RWA submits that a market encompassing WA exists for the provision of funeral director services. RWA submits that a number of funeral businesses operate throughout most or all of WA, and presumably react on a state-wide basis to changes in prices.
- 6.7 That said, RWA notes that many funeral directors do not operate throughout the state of WA and are localised in the supply of their services. RWA therefore submits that, arguably, the existence of those smaller operations illustrates the existence of a number of sub-markets made up of the Perth metropolitan area and various country regions of WA.¹⁸

ACCC's view

- 6.8 The ACCC notes that when selecting a funeral director, customers (who are typically family members or in the case of pre-arranged funerals, the actual person for whom the funeral will be held) are likely to take into account a number of price and non-price factors. Relevant non-price factors may include recommendations by family/close friends, proximity of the funeral director and the level of service required.

¹⁸ RWA supporting submission, p. 18.

- 6.9 The ACCC notes that it is possible, given the circumstances under which funerals are typically purchased, that certain non-price factors will limit the extent to which a customer would substitute to another funeral director based on price. For example, the proximity of the funeral director to a particular location may limit the extent to which consumers would willingly substitute towards a funeral director in another location, even in the event of a material price difference. This may be particularly the case in country areas where customers tend to use the local funeral director in their town.
- 6.10 Such factors suggest that non-price factors are an important element of competition in the relevant markets. They also suggest that demand-side substitution possibilities may, in certain cases, occur over an area much narrower than the entire state of WA.
- 6.11 On the supply-side, the ACCC notes information that funeral operators in WA operate multiple businesses. For example, six WADFA members operate 35 separate businesses throughout Perth and its suburbs, while four WADFA members operate 9 separate businesses throughout country WA. Further, the ACCC notes information (see paragraphs 2.14 and 2.15) that certain businesses within the funeral services industry operate multiple sites across different states in Australia.
- 6.12 Moreover, the ACCC has not received any information which would suggest that existing, or de novo, funeral directors would face any barriers in opening a new premises in a particular location in WA should there be an economic incentive.
- 6.13 That said, based on the available information, the ACCC considers that the appropriate markets in which to assess the arrangements are that for the provision of funeral directors services in the Perth metropolitan region, and those for the provision of funeral director services in localised regional areas of WA.

The counterfactual

- 6.14 As noted in Chapter 5 of this draft determination, in order to identify and measure the public benefit and public detriment generated by conduct, the ACCC applies the ‘future with-and-without test’.
- 6.15 Under this test, the ACCC considers the public benefits and anti-competitive detriments that are likely to arise from a proposed set of arrangements if authorisation was granted (the **factual**) compared to those which would occur if authorisation was *not* granted (the **counterfactual**).
- 6.16 Often the counterfactual simply involves the future without the proposed arrangements. However, this is not always the case as there may be elements of the arrangements for which authorisation is sought, that parties may pursue even in the absence of authorisation.

The Applicant’s view

- 6.17 RWA submits that it does not have the resources to negotiate directly with every WADFA member and Independent Funeral Director. For this reason, RWA submits that if it were forced to negotiate separate contracts with WADFA members and

certain individual Independent Funeral Directors, it is unlikely that the Funeral Fund would be able to continue.¹⁹

- 6.18 RWA submits that the 'fixed price' system reduces its administrative costs in that it knows how much it needs to collect from members for a standard funeral. Unless there is a fixed price negotiated with WAFDA, RWA submits that it would be unable to offer a fixed price for a standard funeral to its members. Further, RWA submits that without a fixed price system, it is unlikely that RWA members would enter into the Funeral Fund.
- 6.19 RWA submits that if individual negotiation with WAFDA and certain individual Independent Funeral Directors was required, any failure to negotiate an agreement with large funeral directors or unwillingness for a funeral director to negotiate would severely detract from the attractiveness of the Funeral Fund.

ACCC's view

- 6.20 The ACCC notes that the factual scenario will be the continuation of RWA's Funeral Fund whereby eligible RWA members will be able to purchase a pre-paid funeral at a fixed concessional price.
- 6.21 In the absence of authorisation, the ACCC considers that the agreement between RWA and WAFDA members in particular (as representing 80 per cent of the market), is likely to raise concerns under the price fixing provisions of the Act. On this basis, the ACCC considers that if authorisation was not granted in this case, RWA is unlikely to continue to enter into a single arrangement with WAFDA members to provide standard funerals to RWA members at an agreed fixed price.
- 6.22 A further issue for consideration is whether RWA's Funeral Fund would likely continue to operate in the absence of authorisation.
- 6.23 The ACCC notes that RWA is a non-profit, charitable organisation established to promote the interests of pensioners in WA. The RWA Funeral Fund is managed solely in the interest of fund members, rather than for any commercial purpose; and many RWA staff (including those involved in the management of the Funeral Fund) are volunteers.
- 6.24 The ACCC accepts that the arrangements for WAFDA members and certain individual Independent Funeral Directors to provide services to the RWA Funeral Fund at a common fixed price results in administrative cost savings to both RWA and the relevant funeral director.
- 6.25 Further, the ACCC accepts that RWA does not have the resources to manage a conventional, commercial pre-paid funeral plan whereby arrangements would be negotiated with individual funeral directors. Beyond the additional cost and resources involved in entering into such negotiations, RWA would be faced with significant additional administrative costs in managing a fund whereby members were required to contribute different amounts and have different arrangements organised depending on their funeral director of choice and level of service required. This additional cost

¹⁹ RWA supporting submission, paragraph 6.10(b).

burden would ultimately have to be borne by members of the Funeral Fund, and may significantly compromise the viability of the fund.

- 6.26 For these reasons, the ACCC considers that, in the absence of authorisation, there is a strong possibility that RWA would be likely to cease operation of the Funeral Fund.
- 6.27 That said, irrespective of whether the Funeral Fund was to continue or not in the absence of authorisation, there are (and will continue to be) a number of other pre-payment funeral schemes available in the market. An issues paper released by the Department of Consumers and Employment Protection (DOCEP) in WA (July 2006) noted that there are over 100 funeral businesses in WA, many of whom advertise prepaid funeral services. The DOCEP also noted that funeral benefit funds may market prepaid funeral plans to consumers directly, and that the Metropolitan Cemeteries Board (a statutory authority of the WA Government) offers a range of prepaid funeral packages.²⁰
- 6.28 Based on this information, the ACCC considers that without the Funeral Fund, RWA members will continue to have a number of options in purchasing pre-paid funeral arrangements.
- 6.29 There is, however, a further question as to whether there is anything specific to the pre-paid funeral packages offered by RWA that results in a public benefit to these consumers. In particular, a key consideration is whether the Funeral Fund offers substantially lower prices for standard funeral services compared to what eligible RWA members (or their next-of-kin) could otherwise secure from the market – either via an alternative pre-payment funeral scheme or otherwise. This issue is discussed in paragraph 6.43 to 6.46.

Public detriment

RWA submission

- 6.30 RWA submits that the Nominated Funeral Agreements will not have a substantial effect upon competition in the relevant markets, whether or not that market is defined as being the whole of WA or localised regions in the state.
- 6.31 RWA submits that the number of funerals funded by RWA under the Funeral Fund represents a small percentage of the annual total. Statistics collected by the Australian Bureau of Statistics on the number of deaths in WA in each year since 2001 as versus the number of funerals funded by the Funeral Fund are show below.

²⁰ Department of Consumer and Employment Protection (Government of Western Australia), Issues Paper, July 2006.

Table 6.1: Funeral Fund members as a percentage of WA funerals

Calendar year	No. of funerals funded by Funeral Fund	No. of deaths in WA	% of WA funerals	No. of deaths in WA of persons aged 55 or over	% of '55 or over' WA funerals
2001	527	10,920	4.8	9,198	5.7
2002	600	11,216	5.3	9,786	6.1
2003	612	11,319	5.4	9,777	6.2
2004	475	11,153	4.2	9,648	4.9
2005	460	11,293	4.1	Na	Na

Source: RWA supporting submission, page 19.
Na = Not yet available

- 6.32 RWA notes that the Nominated Funeral Agreements do not preclude WAFDA and individual Independent Funeral Directors from individually competing for the supply of funeral services to members of the Funeral Fund; or negotiating lower fees for any aspect of the funeral service to any RWA member.
- 6.33 RWA also notes that Funeral Fund members (or their next-of-kin) have freedom of choice, both as to the selection of a funeral director, and as to whether or not they remain in the scheme. In the event that a member leaves the scheme, they will receive a reimbursement of all contributions made (excluding allowed bonuses). In this regard, the Nominated Funeral Agreements include a procedure to pay funeral fees to funeral directors from the Funeral Fund even if the funeral director used has not entered into any fixed concessional rate with RWA.
- 6.34 RWA advise that they will maintain its previous policy of ensuring that member and next-of-kin are not encouraged to use or not to use any particular funeral director, whether or not that funeral director is a member of the WAFDA, save for the fact that the concessional rates charged under the Funeral Fund are identified.
- 6.35 In this regard, RWA submits that, based upon information provided to it by WAFDA, a saving of approximately \$1,000 to \$2,000 per funeral is passed on to members by virtue of the concessional rate charged by WAFDA to Funeral Fund members for their funerals.

ACCC's view

- 6.36 The specific conduct in relation to the application which is of concern to the ACCC is the arrangement between WAFDA members to provide funeral directors services to RWA Funeral Fund at an agreed fixed price. While individual Independent Funeral Directors will also provide funeral services to Funeral Fund members at a fixed price,

- the ACCC understands that each funeral director participating in the arrangements will agree to sign the RWA standard contract unilaterally, rather than as a result of any common agreement between competitors.
- 6.37 The ACCC understands that many funeral directors offer pre-paid funeral services, and that these involve a customer paying monies into a funeral fund in view of a fixed price. Generally speaking, such arrangements do not raise competition concerns. However, there is a clear distinction between offering a fixed price service and a price fixing arrangement between competitors.
- 6.38 In general terms, agreements between competitors to provide a service at a common fixed price are likely to lessen competition relative to a situation where service providers individually determine their own price. However the impact on competition, and the extent of any detriment, will depend on the specific circumstances involved.
- 6.39 In this particular case, the ACCC notes that the proposed arrangements relate to a very small segment of funerals in WA. Statistics collected by the ABS suggest that, since authorisation was granted in 2001, funerals funded under the RWA Funeral Fund scheme have tended to account for 4-5 per cent of total funerals conducted in WA in a given year. Any potential anti-competitive effect arising from these arrangements must be considered in this context.
- 6.40 These arrangements also need to be considered in the context that Funeral Fund members (or their next-of-kin) retain the ultimate choice over their preferred funeral director, and are free to opt out of the scheme should they be able to negotiate a better deal individually. In these circumstances, monies paid into the Funeral Fund will be reimbursed. Further, the proposed arrangements do not preclude WAFDA members or certain Independent Funeral Directors from individually competing for these customers, both in respect of price and the quality of service offered. That said, if authorisation is granted, the ACCC considers it unlikely that funeral directors would negotiate a price lower than those stipulated in the Nominal Funeral Agreements.
- 6.41 In this context, the ACCC would be concerned if the Nominated Funeral Agreements were being used as a mechanism for competitors to set a price floor in the relevant markets at a level above the competitive rate. In these circumstances, the arrangements would lead to allocative inefficiencies as consumers would be forced to pay higher prices than they could otherwise negotiate in a competitive market. The ACCC considers that such an outcome is unlikely to be in the interests of the public and would constitute a public detriment.
- 6.42 However, there are a number of reasons which suggest that the Nominated Funeral Agreements do not result in such an outcome. In the first instance, and as noted in paragraphs 6.8 to 6.10, the ACCC considers that there is likely to be a high-degree of non-price competition between funeral directors due at least partly to the circumstances under which funeral services are purchased. For example, factors such as geographic location, recommendations from family and friends and the quality of services offered appear to be very important factors in influencing the choice made by consumers in this market. These aspects of non-price competition are likely to continue either with or without authorisation.

6.43 Moreover, the information received by the ACCC and its own market enquiries suggest that the prices contained in the Nominated Funeral Agreements are *below* rather than above the market prices which could otherwise be negotiated by individual consumers. As noted previously, the current prices offered by WAFDA/non-WADFA members under the Nominated Funeral Agreements are \$2,288 and \$2,030 respectively, plus a \$55 one-off administration fee. The Applicant has argued that the Nominated Funeral Agreements result in \$1,000 to \$2,000 cost saving for RWA members who enter into a Funeral Fund contract to acquire a standard funeral.

6.44 The ACCC's own market inquiries indicate that these prices are less than those offered to individual customers for an equivalent standard funeral. Moreover, the quantum of difference between these prices and those that can be obtained in the market would appear to represent some saving for RWA members, even once additional expenses (not included under the Funeral Fund) are taken account of.

6.45 The ACCC also notes information that the prices contained in the Nominated Funeral Agreements are less than the average cost of a funeral in Australia. Specifically:

- Drew Cottle and Angela Keys (2004) estimated that the average cost of a funeral is approximately \$3,500²¹
- the Australian Consumers Association (ACA) reported (2005) that the average cost of a funeral was around \$4,000 to \$7,000. It found no consistent differences between different states in Australia²²
- information contained in the *Sydney Morning Herald* (2005)²³ suggests that an average funeral in Sydney costs in the order of \$6,000 and
- information contained in the *Herald Sun* (2006)²⁴ suggests that an average funeral in Victoria costs around \$5,000.

6.46 This information is consistent with the proposition that prices offered under the Funeral Fund represent some saving for the relatively small group of consumers which the arrangements cover (i.e. around 5 per cent of funerals in WA). It is also consistent with the proposition that the prices offered by the WAFDA and certain individual Independent Funeral Directors under the Nominated Funeral Agreements is designed, at least in part, as a community service to certain financially disadvantaged persons, rather than an attempt to ratchet up prices at the lower end of the market beyond competitive levels. Indeed, there is likely to be some promotional benefit accruing to funeral directors from being seen to offer low-priced funerals to certain financially disadvantaged persons.

²¹ Drew Cottle and Angela Keys, *The Monopolisation of the Australian Funeral Industry?*, Journal of Australian Political Economy, December 2004, p. 38.

²² The ACA found no consistent differences in the price of funerals between the states in Australia. Australian Consumers Association, *What's involved in a funeral. and how can you avoid paying too much?*, November 2005 at

²³ <<http://www.choice.com.au/viewArticle.aspx?id=104939&catId=100563&tid=100008&p=1&title=Funerals>> *Sydney Morning Herald*, 15 June 2005.

²⁴ *Herald Sun*, 19 May 2006, p. 17.

- 6.47 The ACCC is aware that the arrangements for which authorisation is sought contain no provisions for ensuring that the prices negotiated in the Nominated Funeral Arrangements will remain lower than that which may be arrived at through individual negotiation in a competitive market. The ACCC would be concerned if, having authorised these arrangements, the immunity from legal proceedings under the Act for funeral directors to agree to a common fixed price for services provided to the Funeral Fundal fund was exploited to arrive at a price less favourable to fund members than would be the case if each individual funeral director determined its own price.
- 6.48 However, there are two main reasons as to why the ACCC's concerns are mitigated in this regard.
- 6.49 First, the ACCC notes that the arrangements have been authorised since 2001. Over this period, while the prices offered by WADFA and certain individual Independent Funeral Directors have increased (by 27 per cent and 21 per cent respectively which is greater than Consumer Price Index (CPI) increase of 14 per cent over the equivalent period) these prices still appear below those otherwise available in the market.
- 6.50 Second, if authorisation was granted, it would be open to the ACCC to request that RWA furnish to the ACCC any contract executed by the RWA and WAFDA, or by the RWA and non-WAFDA parties under the arrangements for which authorisation is sought.
- 6.51 As such, should concerns arise as to the quantum of the discount offered under the arrangements, the ACCC would be able to readily determine this. If such concerns were apparent, this would jeopardise any future re-authorisation of the arrangements and/or, if circumstances warrant, cause the ACCC to reconsider whether ongoing authorisation is in the public interest prior to the expiration of any authorisation.
- 6.52 In considering arrangements which involve agreements between competitors on price in the past, the ACCC has noted concern that the arrangements may increase the potential for collusive anti-competitive conduct.
- 6.53 Such increased potential arises where competitors are encouraged to meet, share information and discuss pricing. The ACCC has noted its concern that in this environment, there may be an increased likelihood of anti-competitive conduct, beyond that which is authorised, occurring.
- 6.54 The ACCC notes that the likelihood of collusive activity beyond that authorised is reduced where participants are made aware of their obligations under the Act, as is generally the case in the ACCC's consideration of applications for authorisation.
- 6.55 In this instance, the ACCC notes that there is no evidence to suggest that any conduct that raises concerns under the Act, other than that for which authorisation is sought, is intended to be discussed by the parties to these arrangements. Any discussion as to prices or services offered outside these arrangements would not be protected by authorisation.

ACCC conclusion on public detriment

- 6.56 The ACCC considers that any agreement between funeral directors to provide services to a segment of the market at a common fixed price has the potential to result in some

lessening of competition. However, for the reasons outlined above, the ACCC considers that the arrangements are not likely to result in any significant anti-competitive detriment. Rather, the arrangements appear to result in a lower end price to Funeral Fund members than they could otherwise negotiate in the absence of the arrangements, without jeopardising non-price competition among funeral directors.

Public benefits

6.57 The Applicant claims that the following public benefits arise directly from the conduct for which authorisation is being sought:

- a considerable cost saving for RWA members who enter into a Funeral Fund contract (in the order of \$1,000 to \$2,000)
- the existence of the ‘fixed-price arrangement’ itself as RWA does not have the resources to negotiate directly with every WADFA member and every Independent Funeral Director; and therefore, the Funeral Fund is unlikely to continue without authorisation
- if individual negotiation was required in this regard, any failure to negotiate an agreement with large funeral directors or unwillingness for a funeral director to negotiate, would severely detract from the attractiveness of the Funeral Fund
- without a fixed-price arrangement, it is unlikely that member would enter in the Funeral Fund
- with a fixed-price system there is also a public benefit in terms of a reduced administrative cost to the Funeral Fund
- generally WADFA members and some Independent Funeral Directors are willing to provide a discount to financially disadvantage persons. By dealing with RWA there is an administrative saving for funeral directors in accessing financially disadvantaged persons.

ACCC’s view

6.58 The ACCC notes that it is not the RWA Funeral Fund itself for which authorisation is sought, but rather the potentially anti-competitive agreements between RWA and WAFDA members where they agree on a common fixed price; and between RWA and individual funeral directors who enter into a standard contract.

6.59 The ACCC notes the Applicants’ claim that if RWA were forced to negotiate separate contracts with WADFA members and individual Independent Funeral Directors, it is unlikely that the Funeral Fund would continue to be offered to eligible RWA members. The ACCC considers that in the absence of authorisation, the RWA would be likely to cease operation of the Funeral Fund in its current form. Having said this, irrespective of whether the Funeral Fund continues, any number of other commercially available pre paid funeral plans provide these same services, and would continue be available to RWA members. As a result, an assessment of whether the proposed arrangements generate public benefits hinges on an assessment as to whether there is anything specific to the Funeral Fund which benefits eligible RWA members (and/or society more broadly), above and beyond those benefits offered by other providers.

- 6.60 The ACCC accepts that the proposed arrangements are likely to result in administrative cost savings to the RWA, WADFA members and certain individual Independent Funeral Directors. Further, the ACCC accepts that these savings contribute to the viability of the Funeral Fund.
- 6.61 In this regard, the ACCC accepts that the RWA does not have the resources to manage a conventional, commercial pre-paid funeral plan under which arrangements are periodically negotiated with individual funeral directors. Beyond the additional cost and resources involved in entering into such negotiations, the RWA would be faced with significant additional administrative costs in managing a fund whereby members were required to contribute different amounts and have different arrangements organised depending on their funeral director of choice.
- 6.62 The ACCC notes that the RWA is a non-profit, charitable organisation established to promote the interests of pensioners in WA; and that many RWA staff (including those involved in the management of the fund) are volunteers. Even if the RWA elected to continue to Funeral Fund in the absence of authorisation, it is likely that the additional cost burden that individual negotiations would place on its administration of the fund would ultimately have to be borne by fund members, and may significantly compromise any public benefits flowing from the arrangements.
- 6.63 The ACCC also accepts that the proposed arrangements result in administrative cost savings to WADFA and certain individual Independent Funeral Directors.
- 6.64 As noted above, the proposed arrangements allow RWA to negotiate the price of a fixed-price funeral for Funeral Fund members with WADFA (on behalf of its members). By dealing with RWA in this way, there may be an administrative cost saving for WADFA members in terms of them being able to identify and offer low-priced funerals to a section of the community in WA, which includes financially disadvantaged persons.
- 6.65 The proposed arrangements also allow RWA to enter into a standardised agreement with individual Independent Funeral Directors to provide funeral services to Funeral Fund members at a standard or common price. By dealing with RWA in this way, each individual funeral director may experience administrative cost savings in terms of them being able to identify and offer low-priced funerals to a section of the community which includes financially disadvantaged persons.
- 6.66 The ACCC considers that these cost savings are likely to contribute to the viability of the Funeral Fund; and specifically, the ability of RWA to offer low-priced funerals to a disadvantaged sector of the community.
- 6.67 The ACCC's own market inquiries have led it to form the view that the fixed prices offered by RWA as part of the Funeral Fund are lower than those which eligible RWA members could otherwise source from the market, and are also lower than the average cost of a funeral in Australia.
- 6.68 The ACCC therefore accepts that public benefits flow from these arrangements. In particular, the ACCC notes that the arrangements provide for funeral services to a section of the community, some of which are financially disadvantaged, at a lower price than they could otherwise obtain from the market.

- 6.69 More broadly, the ACCC considers that the community as a whole benefits from arrangements which improve to any extent the ability of certain financially disadvantaged, yet valued, segment of the community, to have funerals which might otherwise be beyond their financial means. The ACCC accepts the Applicant's argument that this benefit to a needy group in the community is one that is in accordance with an aim pursued by the community as a whole, namely the provision of protection and support to pensioners.

ACCC conclusion on public benefits

- 6.70 For the reasons outlined, the ACCC considers that there are public benefits arising from the proposed arrangements. In particular, the ACCC considers that the arrangements provide a public benefit through allowing funeral services to be provided to a section of the community, some of which are financially disadvantaged, at a lower price than they could otherwise obtain from the market.

Balance of public benefit and detriment

- 6.71 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed agreement between RWA and WADFA, and between RWA and certain individual Independent Funeral Directors, to supply funerals to eligible RWA members at a fixed-price is likely to result in a public benefit that will outweigh any public detriment.
- 6.72 The ACCC considers that the agreements between RWA and WAFDA (and individually with Independent Funeral Directors) to provide funeral director services to eligible RWA members at a common fixed price has the potential to result in some lessening of competition. However, the ACCC considers that the arrangements are not likely to result in any significant anti-competitive detriment.
- 6.73 In particular, the ACCC notes that the arrangements cover a very small segment of funerals in WA (around 5 per cent) and that Funeral Fund members can opt out at any time should they be able to negotiate a better price individually. The ACCC also notes that there appears to be a high-degree of non-price competition in the relevant markets which is likely to continue if the arrangements were authorised. Most significantly, the ACCC has formed the view on the available information that the arrangements are likely to result in a lower end price to fund members than would be negotiated without the arrangements.
- 6.74 Further, it will be open to request that RWA provide the ACCC with a copy of any agreement negotiated between the RWA and WADFA (or with certain individual Independent Funeral Directors).
- 6.75 The ACCC accepts that there are public benefits arising from the arrangements. In particular, there is a public benefit in the provision of funeral directors services to a section of the community, some of which may be financially disadvantaged, at a price lower than if the Funeral Fund in its current form was discontinued.
- 6.76 The ACCC also considers that the conduct provides some public benefit in the reduction of administrative costs to both the fund and the provider of the service. The

ACCC considers that given the nature of the fund and the fund provider, without these cost savings the viability of the fund would be compromised.

6.77 On balance, the ACCC considers the public benefit likely to result from the arrangements will outweigh the anti-competitive detriment.

6.78 The ACCC therefore proposes to grant authorisation for a period of 5 years.

7. Draft determination

The application

- 7.1 On 29 September 2006, Retirees WA (Inc) (RWA) lodged an application seeking revocation of authorisation A70012 and replacement by substitute authorisation A91015.
- 7.2 Application A91015 was made under subsection 88 of the Act to make and give effect to a contract 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 the Act.
- 7.3 Specifically, the RWA is seeking authorisation to enter into agreements with Western Australian Funeral Directors (WADFA) and certain individual Independent Funeral Directors to provide fixed-price funerals to eligible RWA members.

The net public benefit test

- 7.4 For the reasons outlined in Chapter 6 of this draft determination, the ACCC considers that in all the circumstances the arrangements for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.

Conduct for which the ACCC proposes to grant authorisation

- 7.5 The ACCC proposes to grant authorisation to RWA to enter into the proposed arrangements with WAFDA and individual Independent Funeral Directors for five years.
- 7.6 This draft determination is made on 7 February 2007.

Interim authorisation

- 7.7 At the time of lodging the application, RWA requested interim authorisation to continue to enter into these arrangements with WADFA and individual Independent Funeral Directors.
- 7.8 On 18 October 2006, the ACCC suspended the operation of authorisation A70012 and granted interim authorisation to substitute authorisation A91015 on the same terms as A70012.
- 7.9 Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Further submissions

- 7.10 The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.