



Australian  
Competition &  
Consumer  
Commission

# Determination

## Applications for authorisation

**lodged by**

**Municipal Association of Victoria**

**in respect of**

*collective tender by Melbourne Councils for the installation and maintenance  
of bus shelters on Melbourne Metropolitan bus routes (Bus Shelter Agreement)*

**Date:** 14 February 2007

**Authorisation no.:** A30244  
A30245

**Commissioners:**

Samuel  
Sylvan  
McNeill  
Smith  
Willett  
King

**Public Register no.:** C2006/1839

# Summary

The ACCC grants authorisation to MAV for the proposed Bus Shelter Agreement until 31 July 2017.

## 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, the Municipal Association of Victoria (MAV) lodged applications for authorisation A30244 and A30245 with the ACCC.

MAV applied for authorisation on behalf of certain Victorian Councils to participate in a tender process conducted by the Director of Public Transport (Director). The tender is for the provision of bus shelter installation and maintenance services on the Melbourne Metropolitan Bus Network. Councils wanting to participate in this tender process would agree to do so by execution of a Memorandum of Understanding (MoU) with the Director. Under the proposed MoU, the Director will be solely responsible for conducting the tender process and will issue an exclusive contract, including an advertising licence to contract for the supply of advertising on bus shelters for 10 years, to the successful tenderer.

Authorisation is sought for 16 years. The MAV advise that it is most likely that a contract will be entered into for 10 years with an option to extend it for a further 6 years but that ultimately the duration of the contract will be determined through the tender process.

## Background

MAV is the peak representative and lobbying body for Victoria's 79 Councils. Its main roles include representing and advocating the interests of local governments in Victoria, raising the sector's profile, ensuring its long-term security and providing policy advice, strategic advice, capacity building programs and insurance services to local government.

The Department of Infrastructure (**DoI**) is the lead provider of essential infrastructure in Victoria, with responsibility for transport, ports and marine, freight, information and communication technology, major development, energy and security. It has the responsibility for integrating transport planning.

## Public detriment

While the proposed arrangements have the potential to impact competition in the provision of street furniture and outdoor advertising, the extent of such detriment is significantly mitigated by a number of features and in particular:

- the number of councils currently participating in the proposed arrangements is 8 constituting only 25 per cent of Victorian councils

- while unclear, there may exist an opportunity for these councils to opt out of the arrangements prior to the completion of the tender process should competing providers offer more attractive terms to individual councils
- while further councils may choose to participate at a later time, this would be an individual decision of the council influenced by the terms offered by competing providers
- moreover, the proportion of the supply and maintenance of street furniture and outdoor advertising potentially affected by the proposed arrangements is low with competition existing from the remainder of the market and
- competition arising
  - at the time of the initial tender,
  - throughout the life of the contract, as Councils not entering into the arrangements in the first instance have the option of becoming parties to the collective arrangements as their existing individual contracts expire, and
  - at the conclusion of any contract period,

will provide competitive restraint throughout the life of the contract.

### **Public benefit**

The ACCC considers the proposed arrangements will generate some public benefit in the form of:

- transaction cost savings for Councils in negotiating with prospective street furniture suppliers and
- the possibility that the services may be provided at a lower price than would otherwise be the case with savings benefiting councils and their ratepayers.

### **Balance of public benefit and detriment**

Overall, the ACCC considers that in all the circumstances, the public benefits likely to result from the proposed collective tender arrangements are likely to outweigh the anti-competitive 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 grants authorisation to the Bus Shelter Agreement until 10 years after the date that the Bus Shelter Agreement is likely to take effect. That is, until 31 July 2017.

### **Interim authorisation**

MAV sought interim authorisation to allow it to facilitate discussions between participating Councils as to the terms of the proposed MoU and to ultimately enter into and give effect to the MoU. The effect of this would be to enable the Director to issue the request for tender and allow the subsequent tender process to commence.

On 1 November 2006, the ACCC granted interim authorisation to allow Councils to give effect to the MoU and participate in the tender process, but not extending to awarding of the final tender.

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.

# Contents

<b>1. INTRODUCTION.....</b>	<b>1</b>
AUTHORISATION .....	1
THE APPLICATION FOR AUTHORISATION .....	1
DRAFT DETERMINATION AND INTERIM AUTHORISATION.....	2
CHRONOLOGY .....	2
<b>2. BACKGROUND TO THE APPLICATIONS.....</b>	<b>4</b>
MUNICIPAL ASSOCIATION OF VICTORIA.....	4
THE INDUSTRY .....	5
<b>3. THE APPLICATIONS FOR AUTHORISATION .....</b>	<b>9</b>
<b>4. SUBMISSIONS RECEIVED BY THE ACCC.....</b>	<b>10</b>
<b>5. THE NET PUBLIC BENEFIT TEST .....</b>	<b>11</b>
<b>6. ACCC EVALUATION .....</b>	<b>14</b>
THE MARKET .....	14
THE COUNTERFACTUAL.....	15
PUBLIC DETRIMENT .....	16
ACCC conclusion on public detriments.....	19
PUBLIC BENEFIT .....	19
Increased public transport patronage .....	21
Better co-ordination between Local and State governments.....	22
ACCC conclusion on public benefits .....	23
BALANCE OF PUBLIC BENEFIT AND DETRIMENT .....	23
LENGTH OF AUTHORISATION .....	24
<b>7. DETERMINATION.....</b>	<b>27</b>
THE APPLICATION.....	27
THE NET PUBLIC BENEFIT TEST .....	27
CONDUCT FOR WHICH THE ACCC PROPOSES TO GRANT AUTHORISATION.....	27
INTERIM AUTHORISATION.....	27
DETERMINATION .....	28
DATE AUTHORISATION COMES INTO EFFECT .....	28

## List of abbreviations

ACCC	Australian Competition and Consumer Commission
Act	<i>Trade Practices Act 1974 (Cth)</i>
Code	The Code of Practice for Operational Responsibility for Public Roads
Director	Director of Public Transport
DoI	Department of Infrastructure
MAV	Municipal Association of Victoria
MoU	Memorandum of Understanding
RMA	<i>Road Management Act 2004 (Vic)</i>
Transport Act	<i>Transport Act 1983 (Vic)</i>
Tribunal	Australian Competition Tribunal

# 1. Introduction

## Authorisation

- 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, resulting in a greater choice for consumers in price, quality and service.
- 1.2 The Act, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.
- 1.3 The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.4 The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.5 After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.
- 1.6 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.
- 1.7 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.

## The application for authorisation

- 1.8 On 29 September 2006, the Municipal Association of Victoria (MAV) lodged applications for authorisation A30244 and A30245 with the ACCC.
- 1.9 MAV applied for authorisation on behalf of certain Victorian Councils to participate in a tender process conducted by the Director of Public Transport (Director). The tender is for the provision of bus shelter installation and maintenance services on the Melbourne Metropolitan Bus Network. Councils wanting to participate in this tender process would agree to do so by execution of a Memorandum of Understanding (MoU) with the Director. Under the proposed MoU, the Director will be solely responsible for

conducting the tender process and will issue an exclusive contract including an advertising licence (Bus Shelter Agreement) to the successful tenderer (the Contractor).

1.10 MAV has sought authorisation for a period of 16 years.

## **Draft determination and interim authorisation**

1.11 MAV sought interim authorisation to allow it to facilitate discussions between participating Councils as to the terms of the proposed MoU and to ultimately enter into and give effect to the MoU. The effect of this would be to enable the Director to issue the request for tender and allow the subsequent tender process to commence.

1.12 On 1 November 2006, the ACCC granted interim authorisation to allow Councils to give effect to the MoU and participate in the tender process, but not extending to awarding of the final tender.

1.13 On 21 December 2006 the ACCC issued a draft determination proposing to grant authorisation for 10 years from 31 July 2007.

## **Chronology**

1.14 Table 1.1 provides a chronology of significant dates in the consideration of this application.

**Table 1.1: Chronology of applications for authorisation A30244 and A30245**

<b>DATE</b>	<b>ACTION</b>
29 September 2006	Applications for authorisation lodged with the ACCC, including an application for interim authorisation.
18 October 2006	Closing date for submissions from interested parties in relation to the request for interim authorisation (an extension for submissions on interim authorisation was provided until 24 October 2006).
1 November 2006	The ACCC granted interim authorisation allowing Councils to negotiate terms of, and enter into, the MoU with the Director. The effect of this was to allow the Director to issue a request for tender and begin the tender process.
3 November 2006	Closing date for submissions from interested parties in relation to the substantive applications for authorisation.
27 November 2006	Submission received from MAV in response to interested party submissions.
1 December 2006	ACCC request for further information from MAV
19 & 20 December 2006	Submissions received from MAV in response to issues raised by the ACCC
21 December 2006	Draft determination issued.



19 January 2007	Closing date for submissions from interested parties in relation to the draft determination.
24 January 2007	Further information provided from the MAV
14 February 2007	Final determination issued.

## 2. Background to the applications

### Municipal Association of Victoria

- 2.1 MAV is the peak representative and lobbying body for Victoria's 79 Councils. It was formed in 1879 and incorporated by the *Municipal Association Act 1907 (Vic)*. Its main roles include representing and advocating the interests of local governments in Victoria, raising the sector's profile, ensuring its long-term security and providing policy advice, strategic advice, capacity building programs and insurance services to local government.

### Department of Infrastructure (DoI)

- 2.2 DoI is the lead provider of essential infrastructure in Victoria, with responsibility for transport, ports and marine, freight, information and communication technology, major development, energy and security. It has the responsibility for integrating transport planning.
- 2.3 The objects of the DoI under the *Transport Act 1983 (Vic)* (Transport Act) include:
- to improve the efficiency and effectiveness of transport facilities and networks to meet the needs of the community; and
  - to ensure a public transport system in Victoria that is efficient, effective, safe and reliable and has due recognition for the needs and interests of the users of that system and the tax payers.
- 2.4 The Director and Secretary of DoI are appointed pursuant to the provisions of the Transport Act. The Director's objective is to provide safe, necessary and high quality amenity for public transport users and Councils. Specifically, in relation to the current applications, the Director seeks to enhance the bus amenity for public transport users by installing new bus shelters and improving safety through better lighting at bus stops.

### Victorian Metropolitan Councils

- 2.5 The ACCC is advised that there are 33 Councils in metropolitan Melbourne. Of these, 8 Councils have agreed to participate in the proposed tender process:
- Boorondara City Council
  - Bayside City Council
  - Brimbank City Council
  - Casey City Council
  - Darebin City Council
  - Knox City Council
  - Maroondah City Council
  - Wyndham City Council
- 2.6 The MAV originally lodged its application for authorisation for itself and on behalf of 12 participating Councils. On 6 November 2006 the MAV advised that one of these

Councils had decided not to participate in the proposed arrangements. On 17 January the MAV advised that as of that date the 8 Councils listed above had informed the DoI that they agreed to participate in the proposed arrangements, being 4 of the initial 12 and a further 4 Councils.

- 2.7 MAV submits that since about 1999, eight Councils have entered into separate agreements with JCDecaux Pty Ltd (JC Decaux) or Adshel Street Furniture Pty Ltd (Adshel) for the installation and maintenance of bus shelters.
- 2.8 The ACCC is advised that the following Councils have separate agreements with JCDecaux:
- Monash City Council
  - City of Port Phillip
  - Banyule City Council
  - Moreland City Council
- 2.9 The ACCC is advised that the following Councils have separate arrangements with Adshel:
- Manningham Council
  - City of Glen Eira
  - City of Moonee Valley
  - City of Greater Dandenong

### **The industry**

- 2.10 There are 3 main areas of competition affected by the proposed conduct for which authorisation is sought:
- street furniture suppliers
  - suppliers of advertising time and space
  - acquirers of advertising time and space

#### *Supply and maintenance of street furniture*

- 2.11 Street furniture companies are involved in designing, installing and maintaining street furniture for authorities and private organisations. The products they supply typically include shelters such as bus shelters, walkways, ticket booths, news stands, rest shelters, awnings, kiosks, seats and bike racks.
- 2.12 Street furniture suppliers are also involved in the sale of advertising time and space on their furniture. These suppliers often supply and maintain bus shelters at no cost as part of advertising funded street furniture programs. The maintenance of these items of furniture is funded through a revenue sharing arrangement based on the advertising panels in bus shelters, phone boxes and other furniture. The acquiring party will permit the street furniture supplier to sell advertising space on the furniture in exchange for the installation and maintenance of the furniture. There are some variations whereby the

supplier may get a percentage of total advertising revenue or where the acquirer must pay on top of the advertising revenue received.

2.13 Acquirers of street furniture include Councils, governments, developers, universities, schools, hospitals, transport interchanges, shopping centres, sports grounds, leisure centres, parks and gardens, wharves, residential estates and racing clubs.

2.14 In Victoria there are approximately fourteen suppliers of street furniture, including

- JCDecaux
- Adshel
- Commercial Systems Australia Pty Ltd
- Horizon Hammond Sailmakers
- Repeat Plastics Australia Pty Ltd
- Rotundas Of Australia
- Urban Design Manufacturing Pty Ltd
- Yarra Shade
- Amtrade International Pty Ltd
- Ifco Hire & Sales
- JCE Engineering
- Metalat Industries Pty Ltd
- Omnitech Pty Ltd
- Wild Terrain Designs

*Suppliers of advertising time and space*

2.15 Suppliers of advertising time and space provide advertising space for a specified duration to advertisers, mainly through advertising agencies or media buying houses. Such suppliers include commercial media, owners of advertising sites and street furniture suppliers.

2.16 Advertising time and space is displayed through a variety of commercial media, namely:

- electronic media such as radio, television (both free to air and pay TV) and internet and mobile telephony
- print media such as daily and local newspapers, weekly publications and specialist publications and magazines
- cinema and outdoor advertising, such as signs and billboards

2.17 Outdoor advertising includes the following:

- large format – static and mobile billboards, twenty four sheet posters, spectaculars, corporate sky signs and supersites
- transit – buses, trams, taxis and airports

- street furniture – including bus and tram shelters, kiosks, telephone booths, internal displays in shopping centres, at shopping centre entries, rail foyers and rail platforms

### *Acquirers of advertising time and space*

- 2.18 Acquirers of advertising time and space are largely advertisers who require time and space for advertising campaigns. According to MAV, acquirers of outdoor advertising include industries such as fashion, telecommunications, fast moving consumer goods and motor vehicles.

### **Responsibility for bus shelters**

- 2.19 The ACCC is advised that under s28 of the *Road Management Act 2004* (Vic) the Victorian Minister for Transport can provide practical guidance to road authorities, works and infrastructure managers by making codes of practice. The Code of Practice for Operational Responsibility for Public Roads (Code) provides guidance on the allocation of responsibility among road authorities for parts of the road reserve and how boundaries between roadways, pathways or shoulders are determined.

- 2.20 In particular, clause 18 of the Code states that the Roads Corporation (**VicRoads**) is not responsible for bus shelters and associated passenger facilities. These shelters and facilities are the responsibility of the relevant municipal Council, public transport operators, DoI or a private company.

### **Existing agreement**

- 2.21 The impetus for the present bus shelter proposal arises from the expiry of an agreement made in 1991 between the Public Transport Corporation (a predecessor to the Secretary of DoI) and Australian Posters Pty Ltd (a predecessor to Adshel) for the manufacture, supply, installation and maintenance of tram and bus shelters in metropolitan Melbourne, consequent to a tender process (PTC Agreement). The PTC Agreement was to expire in July 2006 but has been extended for 12 months to July 2007.

### **Number of Bus Shelters**

- 2.22 The ACCC is advised that there are currently about 4,500 bus shelters in metropolitan Melbourne which fit into three categories:

- approximately 1600 DoI-owned bus shelters, installed by Adshel under the current PTC Agreement
- approximately 1700 Council-owned bus shelters and
- approximately 1200 bus shelters installed by JC Decaux or Adshel under agreements with individual Councils

The number of bus shelters is expected to grow. The DoI has committed to purchasing 400 shelters over the first one to two years, and expects to roll out up to 1,300 shelters over the first 4 years of the contract term. MAV submits that around 900 shelters are

expected to be installed as replacement shelters, while an additional 400 shelters are expected to be used to increase the ratio of council bus shelters to bus stops.<sup>1</sup>

### **The Road Management Act**

- 2.23 MAV advises that Councils may be able to transfer their statutory functions with regard to bus shelters to the Director without the need for the proposed MoU.
- 2.24 The ACCC is advised that an amendment to the *Road Management Act 2004 (Vic)* (RMA) was passed by the Victorian Parliament and given royal assent on 10 October 2006. The amended legislation took effect on 11 October 2006. In particular, section 15 of the RMA has been amended to provide that a road authority may transfer a road management function to a 'utility' as well as to another road authority.
- 2.25 Each Council is defined as a 'responsible road authority' under the RMA. The functions of responsible road authorities include the provision, installation, maintenance and operation of non-road infrastructure they own or install, including bus shelters.
- 2.26 'Utility' is defined by the RMA to include 'a provider of public transport'. Therefore, if the Director were a 'provider of public transport' within the meaning of the RMA, the new provisions could enable Councils to transfer their functions with respect to the maintenance and installation of bus shelters to the Director.
- 2.27 MAV advises that the Director is likely to be a provider of public transport for the purposes of the RMA. However, this is not free from doubt. Given this uncertainty and as this new process will not necessarily remove the need for co-ordination or agreements between Councils to utilise such a power, MAV has sought authorisation of the Councils' conduct.

### **Metropolitan Transport Congestion**

- 2.28 The ACCC is advised that the DoI developed a Metropolitan Plan in 2004 to address transport congestion in inner and established suburbs in Melbourne. MAV submits that part of that plan included the provision of better facilities at bus stops to make existing public transport systems more user friendly.
- 2.29 In 2005, a review was conducted by the Victorian Competition and Efficiency Commission in relation to the management of traffic congestion in Victoria. The review was commissioned by the Victorian Government to explore ways to reduce traffic congestion with a focus on improving the public transport system. A final report from the VCEC on traffic congestion is expected in the near future.

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<sup>1</sup> MAV submission 19 December 2006

### **3. The applications for authorisation**

- 3.1 For the purposes of this application for authorisation, MAV represents a number of Victorian Councils that do not have an exclusive installation and maintenance contract for bus shelters. MAV has sought authorisation on behalf of these Councils to participate in a tender process conducted by the Director. Councils wanting to participate would agree to do so by execution of a MoU with the Director. The Director will be solely responsible for conducting the tender process and will enter into the exclusive Bus Shelter Agreement with the successful tenderer (the Contractor). The Bus Shelter Agreement will also include an exclusive license for the successful tender to contract for the supply of advertising space on bus shelters covered by the agreement.
- 3.2 The Bus Shelter Agreement potentially raises concerns under the competition provisions of the Act. Consequently, MAV has lodged the applications for authorisation with the ACCC.
- 3.3 Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party or proposed party to the conduct. As other Melbourne Councils who choose to participate in the arrangements in the future are named as proposed future parties to the arrangements in the MAV's application, this means that any authorisation granted will extend to cover these Councils.
- 3.4 It is expected that the Bus Shelter Agreement will cover:
- (i) the maintenance (including replacement) of the existing 1600 DoI-owned Adshel installed shelters on the Melbourne Metropolitan Bus Network
  - (ii) the supply, installation and maintenance of additional bus shelters on the Melbourne Metropolitan Bus Network and
  - (iii) the replacement of Council-owned shelters (subject to ACCC granting authorisation)
- 3.5 The Bus Shelter Agreement will not deal with any other shelters installed in municipalities that are covered by existing agreements between a Council and a supplier of shelters. However, upon any such arrangements terminating, these bus shelters may also be included under the terms of the Bus Shelter Agreement if the relevant Council chooses.
- 3.6 By entering into the Bus Shelter Agreement, Councils agree not to:
- (i) procure or install bus shelters in their municipality
  - (ii) issue any tender for the supply, installation or maintenance of bus shelters within their municipality and
  - (iii) permit advertising on bus shelters in their municipality
- by any person other than the successful tenderer for the contract for the supply, installation and maintenance of metropolitan bus shelters.

## 4. Submissions received by the ACCC

4.1 MAV provided a supporting submission with its application for authorisation and has since provided a number of further submissions to clarify issues raised by the ACCC and interested parties.

4.2 The ACCC also sought submissions from around 45 interested parties potentially affected by the applications, including local Councils, advertising agencies, street furniture suppliers and sellers of advertising space. The ACCC received public submissions on the interim application from:

- Bus Association Victoria
- City of Whittlesea
- City of Boroondara
- Maribyrnong City Council
- Greater Dandenong City Council
- JCDecaux
- Australian Association of National Advertisers (AANA)
- Outdoor Media Association (OMA)
- Manningham City Council

Many of these submissions also commented on the substantive applications.

4.3 The ACCC received public submissions on the substantive application from:

- Hume City Council

The ACCC also received one submission from a Council which was excluded from the public register at the request of the Council.

4.4 The ACCC sought submissions from around 30 interested parties in relation to the draft determination issued on 21 December 2006. Two submissions were received from the applicant in relation to the draft determination.

4.5 Two interested party submissions were received in response to the draft determination from the Manningham City Council and the Australian Association of National Advertisers.

4.6 Copies of public submissions are available from the ACCC website ([www.accc.gov.au](http://www.accc.gov.au)) by following the 'Public Registers' and 'Authorisations Public Registers' links. Submissions are summarised in the ACCC's evaluation of the proposed arrangements in Chapter 6.



## **5. The net public benefit test**

- 5.1 The ACCC may only grant authorisation where the relevant test in section 90 of the Act is satisfied.

### **Application A30244**

- 5.2 MAV lodged application for authorisation A30244 under section 88(1) of the Act to make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
- 5.3 The relevant test is found in section 90(8) of the Act.
- 5.4 Section 90(8) states that the ACCC shall not authorise a proposed exclusionary provision of a contract, arrangement or understanding, unless it is satisfied in all the circumstances that the proposed provision would result or be likely to result in such a benefit to the public that the proposed contract, arrangement or understanding should be authorised.

### **Application A30245**

- 5.5 MAV lodged application for authorisation A30245 under section 88(1) 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. The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.
- 5.6 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

- 5.7 The Australian Competition Tribunal (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.<sup>2</sup>
- 5.8 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.<sup>3</sup>
- 5.9 Consequently, given the similarity of wording between section 90(6) and (90(7), when applying these tests the ACCC can take most, if not all, 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.<sup>4</sup>
- 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.<sup>5</sup>

## 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.<sup>6</sup>

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<sup>2</sup> *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers’ Boycott Authorisation* [2006] AcompT9 at paragraph 67.

<sup>3</sup> *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.

<sup>4</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Cooperative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

<sup>5</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

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’.

## **Length of authorisation**

5.14 The ACCC can grant authorisation for a limited period of time.<sup>7</sup>

## **Conditions**

5.15 The Act also allows the ACCC to grant authorisation subject to conditions which the ACCC considers necessary in order to satisfy the net public benefit test.<sup>8</sup>

## **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<sup>9</sup>
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>10</sup>

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<sup>6</sup> 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.

<sup>7</sup> Section 91(1).

<sup>8</sup> Section 91(3).

<sup>9</sup> Section 88(10).

<sup>10</sup> Section 88(6).

## 6. ACCC evaluation

6.1 The ACCC's evaluation of the Bus Shelter Agreement is in accordance with the net public benefit test outlined in Chapter 5 of this draft determination. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments flowing from the Bus Shelter Agreement.

### The market

6.2 The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.

6.3 MAV submits the relevant markets are:

- (i) a national market for the supply and maintenance of street furniture and
- (ii) a national market for advertising services, or alternatively the national outdoor advertising market

6.4 The ACCC has not received any interested party submissions commenting on the relevant markets.

6.5 The ACCC understands that there are currently approximately 14 companies supplying street furniture in Victoria a number of whom construct bus shelters and most of whom are involved in more general street furniture, including shelter, construction with the ability to construct bus shelters. Of these, the two major suppliers of bus shelters in Australia are Adshel and JCDecaux. Information provided by the applicants suggests that it is also possible for other manufacturers such as metal workers to manufacture street furniture such as bus shelters once they are given a design and specifications.

6.6 Recent developments in technology such as accessing mobile content from interactive bus shelter ads,<sup>11</sup> accessing games, ringtones, music and the latest news from certain bus shelters<sup>12</sup> have meant that bus shelters are becoming more interactive and providing more services for consumers. This demonstrates that bus shelters, at least in some circumstances, are being developed which are more complex to produce than has traditionally been the case.

6.7 However, the principal function of bus shelters is to provide protection from the weather and seating whilst waiting for bus services. In this respect, bus shelters are not particularly complex or specialists products. As such the ACCC considers the market for the provision of bus shelters, at its narrowest, to be part of the broader market for the supply and maintenance of street furniture.

6.8 In considering the geographical scope of this market, the ACCC notes that both major manufacturers of street furniture operate nationally. Within Victoria many other manufacturers do, or are able to, manufacture street furniture. However, with respect to

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<sup>11</sup> *Your bus stop wants to chat*: New Zealand Herald, 3 August 2006

<sup>12</sup> *Interactive media first for T-mobile brings t-zones to bus stops across the UK*: JC Decaux Media Release, 22 April 2003

the current arrangement the ACCC considers that its assessment will not be overly affected by the possible variation in precise definition of the geographical scope of the market.

- 6.9 Advertising space and time comes in the form of magazines, television, radio, newspapers and the internet. More specifically, outdoor advertising can include large format (static and mobile billboards, spectaculars and supersites), transit (buses, trams and taxis) and street furniture (bus/tram shelters, kiosks, telephone booths and rail foyers).
- 6.10 The ACCC has recently highlighted current issues in relation to defining the media market in its report titled Media Mergers (August 2006). In particular, the convergence of technology and capabilities of new media have blurred traditional media boundaries.
- 6.11 While the ACCC notes these features and issues, in its consideration of these applications for authorisation, the ACCC has formed the view that it is not necessary to comprehensively define a market for advertising space and time. In this respect, it is the ACCC's view that its assessment will not be overly affected by the possible variation in precise market definition. Specially, the ACCC notes that whether broadly or narrowly defined, the proportion of any market for advertising services affected by the proposed arrangements is very limited.

## **The counterfactual**

- 6.12 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'.
- 6.13 The applicant submits that the likely counterfactual is that Councils will continue to individually negotiate with bus shelter providers for the acquisition and maintenance of bus shelters.
- 6.14 As discussed in Chapter 2, there is some possibility that Councils may be able to transfer their powers to the DoI under the recent changes to the RMA and hence participate in a similar tender process to that proposed under the current arrangements without raising competition concerns under the Act.
- 6.15 However, as noted, there is some uncertainty as to whether the recent amendments to the RMA will in fact be able to facilitate this. In addition, arrangements facilitated under the RMA will not necessarily remove the need for co-ordination or arrangements between the Councils which may raise concerns under the Act.
- 6.16 Consequently, while there is some possibility that arrangement similar to those contemplated under the proposed arrangements may be entered into absent authorisation, the ACCC considers that the appropriate counterfactual against which to assess the proposed arrangements is one where each Council will continue to individually negotiate agreements with street furniture suppliers for the installation and maintenance of bus shelters.

## **Public detriment**

- 6.17 The proposed arrangements prevent participating Councils from procuring or installing bus shelters, organising maintenance of bus shelters or permitting advertising on bus shelters in their municipality by any person other than the Contractor.
- 6.18 MAV submits the Bus Shelter Agreement may generate some public detriment including providing competitive insulation for the Contractor in relation to:
- innovation and quality of bus shelters
  - revenue to be derived from installation and maintenance of shelters
  - revenue to be derived from sub-licensing of advertising space
- 6.19 An assessment of the public detriment generated by the Bus Shelter Agreement follows.

## **Increase concentration in the market for supply and maintenance of street furniture**

- 6.20 The proposed arrangements, by granting exclusive rights to supply and maintain bus shelters for those Councils party to the arrangements to a single Contractor, effectively foreclose this segment of the market from other suppliers for the life of the contract.
- 6.21 However, the proportion of the market for the supply and maintenance of street furniture affected by the arrangements is such that it is unlikely to affect other suppliers ability to compete in this market more generally, or their ability to tender for the provision of supply and maintenance services to participating Councils at the expiration of any agreement entered into.
- 6.22 In its draft determination the ACCC further noted, based on advice provided by the MAV, that individual Councils would remain free to opt out of the proposed arrangements and negotiate directly with any street furniture provider at the completion of the tender process if they were not satisfied with the proposed terms and conditions offered by the successful tenderer. Accordingly, the ACCC considered that the arrangements were unlikely to prevent efficient street furniture providers from competing to supply participating Councils both through the tender process and in direct competition with the successful tenderer prior to contracts being entered into with the successful Contractor.
- 6.23 Based on information provided by MAV since the release of the draft determination, it is not entirely clear whether this will be the case for all Councils. Specifically, it is not clear to what extent any Councils who may have already entered into arrangements with the Director will be able to withdraw from the arrangements.
- 6.24 However, the MAV have also advised that some Councils may choose not to make a decision concerning their participation in the process until the outcome of the tender process is known. In addition to competition provided through the tender process, this will continue to provide direct competition with the successful tenderer prior to contracts being entered into.

## **Exclusive installation and maintenance rights**

- 6.25 MAV contends that the Bus Shelter Agreement could result in competitive insulation for the Contractor in relation to revenue to be derived from the installation, maintenance and cleaning of advertising bus shelters for the term of the contract.
- 6.26 However, MAV submits that the tender for the contract will be open and the competitive tender process will create competition for the opportunity to supply the services. Therefore, competitive outcomes could arise from the bidding process rather than through the operation of market forces during the term of the contract.
- 6.27 One Council, not currently a party to the proposed arrangements, raised concerns in a confidential submission that Councils would lose control over the installation and maintenance of bus shelters under the Bus Shelter Agreement.

### *ACCC's view*

- 6.28 The proposed arrangements, by selecting a single contractor to provide and maintain bus shelters for Councils who choose to engage the successful tenderer for the life of the contract, will effectively eliminate competition for the provision of these services to participating Councils over the life of the contract. However this ongoing competition is replaced by competition at a particular point in time (i.e. when the tender process is run). Indeed, given that the cost of any restriction on competition generated by the arrangements will ultimately be borne by the Councils and/or their ratepayers, it is unlikely that the Councils will chose to enter into the arrangements unless the tender process produces bids for the provision of these services on terms at least as competitive as those under which they are currently, and could otherwise be expected over the life of the contract to be, provided.
- 6.29 Similarly, with respect to concerns that Councils may lose some degree of control over installation and maintenance of bus shelters in their areas, while this may be the case, it would be expected that each Council would weigh this concern against the anticipated benefits of the collective tendering arrangement in deciding whether to participate in the arrangements. As noted at paragraph 6.20 Councils will have the option of entering into a contract with the successful tenderer or negotiating their own individual arrangements with any supplier once the terms on which the successful tenderer proposes to offer its services are known.

## **Innovation and Quality of Bus Shelters**

- 6.30 MAV submits that there may be some public detriment as a result of the Bus Shelter Agreement in terms of limiting innovation on the part of the Contractor. However, MAV submits that bus shelters are not necessarily complex products and hence considers this to be a largely insignificant risk.

### *ACCC's view*

- 6.31 The ACCC notes new developments in technology which have meant that bus shelters are becoming more interactive and providing more services for consumers. As noted, recent developments include accessing mobile content from interactive bus shelter ads and also accessing games, ringtones, music and the latest news from certain bus

shelters. This demonstrates that bus shelters, at least in some circumstances, are being developed which are more complex to produce than has traditionally been the case.

- 6.32 However, the ACCC accepts that the principal function of bus shelters is to provide protection from the weather and seating whilst waiting for bus services. In this respect, bus shelters are not particularly complex products and/or subject to significant levels of ongoing technological development or innovation.
- 6.33 In addition, to the extent that the proposed arrangements, by guaranteeing a single contractor the exclusive right to provide and maintain the bus shelters, do reduce the Contractors incentives re innovation and maintaining the quality of bus shelters, this is mitigated by a number of factors.
- 6.34 Specifically, the request for tender provides for provisions to be built into any contracts entered into to ensure quality of service is maintained. In addition, as well as supplying Councils entering into the arrangements in the first instance the successful tenderer will continue to compete to supply other Councils, both individually, and through those Councils having the option to become parties to the collective arrangements at a later date. The level of ongoing service provided to Councils already party to the arrangements is likely to be a significant factor in any decision by other Councils to engage the Contractor. Furthermore, the Contractor chances of successfully re-tendering at the expiration of the initial agreement will also be heavily influence by the quality of service offered during the life of the contract.
- 6.35 Finally, the Contractor will continue to compete with other providers of advertising services throughout the life of the proposed arrangements which will necessitate maintaining the quality and standard of bus shelters as well as keeping up with the latest innovations in bus shelter advertising such as those alluded to above.

### **Exclusive advertising rights**

- 6.36 The proposed arrangements will prevent suppliers of advertising time and space from acquiring access to the advertising bus shelters under the contract other than through the Contractor.
- 6.37 The AANA, while noting that outdoor advertising is a relatively small component of the Australian marketing communications industry, contends that it is nonetheless an important and expanding channel of communication between their members and their customers.
- 6.38 The AANA considers that any action that reduces competition in this channel must be to the disadvantage of consumers as well as the commercial interests seeking to afford them the maximum amount of product and service choice. For these reasons the AANA opposes the granting of authorisation.

### *ACCC's view*

- 6.39 The ACCC notes that the number of bus shelters affected by the agreement is not substantial in relation to the number of possible outdoor media advertising sites. Consequently, the Contractor will be constrained in the price and other terms and conditions on which advertising space is offered by the availability of alternative outdoor sites including tram shelters, public transport vehicles, kiosks, telephone



booths and rail foyers as well as by other more general forms of advertising available. Accordingly the ACCC does not consider that the proposed arrangements will have a material impact on competition for outdoor media advertising sites.

### **ACCC conclusion on public detriments**

6.40 Having regard to the forgoing, while the proposed arrangements have the potential to impact competition in the provision of street furniture and outdoor advertising, the extent of such detriment is significantly mitigated by a number of features and in particular:

- the number of councils currently participating in the proposed arrangements is 8 constituting only 25 per cent of Victorian councils
- while unclear, there may exist an opportunity for these councils to opt out of the arrangements prior to the completion of the tender process should competing providers offer more attractive terms to individual councils
- while further councils may choose to participate at a later time, this would be an individual decision of the council influenced by the terms offered by competing providers
- moreover, the proportion of the supply and maintenance of street furniture and outdoor advertising potentially affected by the proposed arrangements is low with competition existing from the remainder of the market and
- competition arising
  - at the time of the initial tender,
  - throughout the life of the contract, as Councils not entering into the arrangements in the first instance have the option of becoming parties to the collective arrangements as their existing individual contracts expire, and
  - at the conclusion of any contract period,

will provide competitive restraint throughout the life of the contract

### **Public benefit**

6.41 MAV submits the Bus Shelter Agreement will deliver public benefits, including:

- better co-ordination and integration in the roles and priorities of Local and State governments in road and transport management, land use and transportation objectives
- the Director will have greater bargaining power than individual Councils and therefore will be able to negotiate a lower fee and better levels of service, by being able to offer greater access to advertising bus shelter sites
- Councils will avoid the transaction costs and administrative costs they currently incur in acquiring and co-ordinating these goods and services

6.42 An assessment of the public benefits claimed by MAV follows.

**Lower fees and better levels of service through increased bargaining power**

6.43 MAV submits that the ability of the DoI to offer a large number of advertising bus shelters under the Bus Shelter Agreement will increase its negotiating power and result in lower fees and better service.

6.44 MAV submits that the benefit of any such cost savings, including any increased advertising revenue, would be passed onto bus commuters in increased amenity and to rate payers through avoiding the requirement for Councils to fund these assets and their up-keep (to the extent that any such funding requirements exceed advertising revenues).

*ACCC's view*

6.45 Arguments based on improved bargaining power essentially relate to a change in the power relativities of the parties to a proposed agreement. An increase in bargaining power, raised in the authorisation context, typically involves a group of smaller businesses attempting to improve its bargaining position relative to another, generally larger, business through a collective arrangement.

6.46 In assessing such arguments the ACCC does not generally focus on whether a mere change in the amount of bargaining power is, in itself, a public benefit. Rather, the ACCC focuses on the likely outcomes resulting from the change in bargaining position flowing from the proposed arrangement for which authorisation is sought.

6.47 In this instance, the MAV have not provided any evidence which would suggest an imbalance in bargaining power between individual Councils and bus shelter providers. Typically such imbalances occur where a small businesses is dealing with a larger supplier and has limited, if any, other supply options, thereby limiting the competitive constraints imposed on the supplier in the terms and conditions of supply offered. However, with respect to bus shelters, there is nothing to suggest that the two main suppliers to Councils, JCDecaux and Adshel are doing so on less than competitive terms.

6.48 This is not to suggest that collective tendering, through allowing suppliers to service a greater range of Councils through a single arrangement, will not produce other cost savings to the Contractor, which may be reflected in lower fees and/or improved levels of service.

6.49 It may be that the number of bus shelters included in the collective tender arrangement will enable the Contractor to achieve economies of scale in the supply and maintenance of these shelters that are not available in respect of the number of bus shelters currently being supplied and maintained. However, no information has been provided to the ACCC at this stage to suggest that this will be the case.

6.50 Further, irrespective of any cost savings to the Contractor which may be achievable through servicing a large number of Councils through a single agreement, prospective tenderers may be willing to pay more (or charge less) under the proposed arrangements in order to guarantee the volume of business that the proposed arrangements provide.

Similarly, guaranteed access to a large number of shelters through a single contract may be more valuable to Contractors in respect of their dealings with advertisers.

### **Transaction cost savings**

- 6.51 MAV submits that the Bus Shelter Agreement will alleviate any administrative and transaction costs otherwise associated with awarding individual Council tenders. Councils are required to publicly tender for all contracts exceeding \$100,000. MAV submits that these resources can then be dedicated to other local government functions resulting in improved public amenity and value to rate payers.
- 6.52 MAV estimates that conducting the procurement process over a period of approximately 9-12 months would cost each individual council in the range of \$0.5 million to \$1 million, depending on the size of the procurement.
- 6.53 MAV also estimates that the total cost saving on day to day contract management and administration would be approximately \$400,000 for each council over a ten year period.

### *ACCC's view*

- 6.54 Councils party to the proposed arrangements are likely to experience transaction cost savings as a result of the joint tender process, as opposed to each Council individually entering into arrangements for the supply and maintenance of bus shelters. As noted, MAV estimates these savings, across all participating Councils, to be several million dollars. The extent of these cost savings will depend ultimately on the number of Councils entering into the joint arrangements and the size and complexity of the individual contracts that would otherwise be entered into. However, the ACCC accepts that running a single joint tender process will result in significant transaction cost savings compared to a situation where each Council negotiates individual arrangements.
- 6.55 Specifically, Councils with contracts exceeding \$100,000 will be alleviated of the need to run individual tender processes. Similarly Councils with smaller contracts, whether they would otherwise chose to run a tender process or negotiate arrangements by other means, can also be expected to save on the cost of entering into an arrangement for the supply and maintenance of bus shelters through the collective tender. In addition, ongoing administration and contract management costs may be reduced by entering into a single, collective, arrangement.
- 6.56 Prospective tenderers are also likely to experience transaction cost savings through dealing with a number of Councils collectively rather than individually which, depending on the extent of such savings, may also be reflected in the tender price offered.

### **Increased public transport patronage**

- 6.57 MAV submits that the improved quality and increased number of shelters will encourage the use of public transport and give rise to related environmental benefits through reduced emissions.

6.58 In its draft determination the ACCC accepted that increased use of public transport over, for example, travelling by private car, is likely to produce environmental benefits. However, the ACCC noted that there were a myriad of factors which influence a commuters choice of means of transport and that no evidence has been provided in the course of it's consideration of the current applications that suggests that quality of bus shelters is a significant influence on such choices. Consequently, the ACCC did not place significant weight on the argument that improved quality and number of bus shelters would increase public transport patronage with associated environmental benefits.

#### *MAV response to the draft determination*

6.59 Following the draft determination, the MAV submitted that it did not disagree with the ACCC view that many factors influence a commuter's choice of transport.

6.60 However, MAV submitted that whilst bus stop infrastructure on its own may not result in patronage growth, the inadequate provision of bus stop infrastructure has the potential to substantially negate the expected patronage growth from improved frequency and reliability of bus services,

#### *ACCC consideration*

6.61 The ACCC notes the argument raised by the MAV. However, the ACCC continues to be of the view that there are a myriad of factors which influence a commuters choice of means of transport. While improved quality and number of bus shelters would be likely to improve the amenity of the bus network, very little direct evidence has been provided in the course of the ACCC's consideration of the current applications that suggests that quality of bus shelters is a significant influence on commuters' choice of mode of transport.

### **Better co-ordination between Local and State governments**

6.62 MAV submits that better co-ordination and integration in the roles and priorities of Local and State governments would lead to more efficient and cost effective governance, especially in urban development.

6.63 In its draft determination the ACCC accepted that there is a public benefit in promoting co-operation between Local and State governments in relation to public transport and urban development. However, the ACCC considered that the extent to which a coordinated approach to bus shelters, in itself, contributes significantly to a co-ordinated approach to public transport and urban development was less clear. The ACCC concluded that while the proposed arrangements do compliment such initiatives it did not consider that a coordinated approach to the supply and maintenance of bus shelters in itself provided significant benefits to the public.

#### *MAV response to the draft determination*

6.64 While the MAV accepts that the benefit directly attributable to bus shelters is not immediately quantifiable, they submit that an attempt to split the total benefit to the community of a co-ordinated approach to road management into constituent parts does not pay due regard to the compounding benefits that result from the overall co-ordination and integration of road management policy. The MAV contends that

significant public benefit arises from the co-ordination and integration of bus shelter supply and maintenance as an integral part of the overall co-ordination and integration of road management.

### *ACCC consideration*

6.65 The ACCC notes the argument raised by the MAV. However, the ACCC continues to be of the view that while a co-ordinated approach to bus shelters is consistent, and indeed forms part of, broader initiatives to co-ordinate public transport and urban development, it is unlikely to form a significant part of this strategy.

### **ACCC conclusion on public benefits**

6.66 Having regard to the forgoing, the ACCC considers the proposed arrangements will generate some public benefit in the form of :

- transaction cost savings for Councils in negotiating with prospective street furniture suppliers and
- the possibility that the services may be provided at a lower price than would otherwise be the case with savings benefiting councils and their ratepayers.

### **Balance of public benefit and detriment**

6.67 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the Bus Shelter Agreement is likely to result in a public benefit that will outweigh any public detriment.

6.68 While the proposed arrangements have the potential to impact competition in the provision of street furniture and outdoor advertising, the extent of such detriment is significantly mitigated by a number of features and in particular:

- the number of councils currently participating in the proposed arrangements is 8 constituting only 25 per cent of Victorian councils
- while unclear, there may exist an opportunity for these councils to opt out of the arrangements prior to the completion of the tender process should competing providers offer more attractive terms to individual councils
- while further councils may choose to participate at a later time, this would be an individual decision of the council influenced by the terms offered by competing providers
- moreover, the proportion of the supply and maintenance of street furniture and outdoor advertising potentially affected by the proposed arrangements is low with competition existing from the remainder of the market and
- competition arising
  - at the time of the initial tender,

- throughout the life of the contract, as Councils not entering into the arrangements in the first instance have the option of becoming parties to the collective arrangements as their existing individual contracts expire, and
- at the conclusion of any contract period,

will provide competitive restraint throughout the life of the contract

6.69 The ACCC considers the proposed arrangements will generate some public benefit in the form of :

- transaction cost savings for Councils in negotiating with prospective street furniture suppliers and
- the possibility that the services may be provided at a lower price than would otherwise be the case with savings benefiting councils and their ratepayers.

6.70 Following consideration of MAV's applications for authorisation the ACCC concludes that the public benefits likely to result from the proposed collective tender arrangements are likely to outweigh the anti-competitive detriment.

### **Length of authorisation**

6.71 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.

6.72 In this instance, MAV has sought authorisation for 16 years in order to cover the full term of the contract which is likely to operate for 10 years with an option to extend by a further 6 years. However, MAV advises that ultimately the term of the Contract will depend on the best value outcome for the participants, as determined by the tender process.

6.73 In considering the length of authorisation, the ACCC considered in its draft determination the particular circumstances relevant to the installation and maintenance of bus shelters. In particular, the need for the Bus Shelter Agreement to cover maintenance for the life of the shelters which is approximately 10 to 15 years. The ACCC also noted that similar agreements for the installation and maintenance of Council owned shelters in Victoria currently run for up to 20 years<sup>13</sup>.

6.74 The ACCC also took account of the MAV's submission that it is likely that it will enter into a contract for a period of 10 years with an option to extend for a further 6 years, rather than enter into a 16 year contract in the first instance. The MAV advised that doing so would allow it to evaluate the performance of the successful Contractor and assess how the arrangements have worked in practice before committing to renew the arrangements for a further extended period.

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<sup>13</sup> Mooney Valley City Council and Monash City Council each have exclusive bus shelter agreements with Adshel and JCDecaux respectively which run for 20 years.

6.75 Similarly, the ACCC considered it appropriate to grant authorisation for a period of 10 years, so as to allow the ACCC, at the end of the period of authorisation, to evaluate whether the public benefits upon which its decision was made actually eventuated in practice and the appropriateness of the authorisation in the current market environment.

*MAV response to the draft determination*

6.76 Following the draft determination, the MAV submitted that the 10 year authorisation period proposed by the ACCC would be insufficient for the following reasons:

- authorisation for 10 years would only cover the initial contract period, thus requiring the MAV to reapply for authorisation in order to exercise the option of extending the contract for a further 6 years
- uncertainty regarding re-authorisation after the initial 10 years would mean that tenderers would ascribe little commercial value to the option of extending the contract, devaluing the total worth of the contract
- the option to extend the contract without the need for re-authorisation maintains a consistent incentive for performance of the contractual obligations
- the option to extend the contract would align the timing of the retendering with other bus shelter contracts
- while the life of bus shelters has been estimated to be 10-15 years, experts consulted by the DoI have recently estimated that the useful life of such units between 20 and 25 years
- having to seek re-authorisation after 10 years would impose additional costs on Councils

*ACCC consideration*

6.77 The ACCC notes the arguments raised by the MAV. However, the ACCC continues to be of the view that granting authorisation for a period of 10 years is appropriate. As noted, this will allow the ACCC, at the end of the period of authorisation, to evaluate whether the public benefits upon which its decision is made actually eventuate in the current market environment.

6.78 This does not preclude the MAV from tendering for, and entering into arrangements with the successful tenderer, for 10 years with the option to extend the contract for a further 6 years. However, if the MAV wishes to continue to give effect to the arrangements after 10 years it may need to apply for re-authorisation.

6.79 The ACCC does not consider that this will reduce the commercial value of the tender to prospective suppliers, nor should it reduce incentives for performance of the contractual obligations.

6.80 If re-authorisation is sought, whether it is granted will be dependent, at least in part, on the MAV satisfying the ACCC that the public benefits that it is anticipated will flow from the proposed arrangements have in fact been realised.

- 6.81 Consequently, the value of the 6 year option to tenderers is unlikely to be diminished if the tenderer is confident that the benefits identified as flowing from the arrangements are likely to be realised over the initial 10 year contract.
- 6.82 The ACCC also notes that, while MAV has indicated that the contract is likely to run for 10 years with an option to extend to a further 6, ultimately, the term of the Contract will depend on the best value outcome for the participants, as determined by the tender process. As such, it is by no means certain that any contract entered into will align with the period for which authorisation is sought in any event.
- 6.83 Further, as noted, if a 16 year contract (10 plus the option for a further 6) is entered into, MAV will retain the flexibility to re-evaluate whether the arrangements are appropriate after the expiration of the initial 10 year contract
- 6.84 Similarly the ACCC considers it appropriate that, at the end of the initial contract, it evaluates whether the public benefits on which its decision is actually made eventuate, before providing immunity from legal action for the arrangements for a further period.
- 6.85 This is particularly pertinent as, since the release of the draft determination, MAV have advised the ACCC that, in the event that a 16 year contract (10 plus the option for a further 6) is entered in to, any decision to exercise the option of an additional six years will be at the discretion of the Director.
- 6.86 MAV advise that this decision will involve some involvement with Councils. However, ultimately individual participating Councils will have no discretion to opt out of the arrangements after 10 years if the Director decides to exercise the option of the six year extension.
- 6.87 MAV also advises that the Directors decision to exercise the option to extend the contract may also have regard to the adjacent procurement of Melbourne Tram Shelter agreements which have variable termination dates. MAV argues that having flexibility to align the procurements of multiple transport shelter networks creates efficiencies along with greater market interest.
- 6.88 The ACCC considers that both the inability of Councils to unilaterally opt out of the arrangements if the Director exercises any option to extend the contract, and the possibility that future arrangements may be aligned with tram shelter agreements further support limiting the period of any initial authorisation to 10 years.
- 6.89 As such, the ACCC grants authorisation to the Bus Shelter Agreement for 10 years from the date that the Bus Shelter Agreement is likely to take effect. That is, until 31 July 2017.
- 6.90 It is open to the MAV to reapply for authorisation at the expiration of the authorisations. In the event that an application for re-authorisation is received by the ACCC, whether re-authorisation should be granted would be considered based on the circumstances at that time.



## **7. Determination**

### **The application**

- 7.1 On 29 September 2006, MAV lodged applications for authorisation A30244 and A30245 with the ACCC.
- 7.2 Applications A30244 and A30245 were made using Form A and B respectively of the Trade Practices Regulations 1974. The applications were made under subsection 88(1) of the Act for MAV, on behalf of its member Councils that do not have an exclusive installation and maintenance contract for bus shelters, to facilitate arrangements between those Councils concerning the provision of bus shelters within municipalities administered by those member Councils and the Director of Public Transport.
- 7.3 In particular, MAV seeks authorisation for Councils to collectively negotiate and enter into a MoU with the Director and for the Director to enter into an exclusive supply and maintenance arrangement for bus shelters through a collective tender process on their behalf.

### **The net public benefit test**

- 7.4 For the reasons outlined in Chapter 6 of this 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.
- 7.5 The ACCC is satisfied that the arrangements for which authorisation is sought are likely to result in such a benefit to the public that the arrangements should be allowed to take place.
- 7.6 The ACCC therefore grants authorisation to applications A30244 and A30245.

### **Conduct for which the ACCC proposes to grant authorisation**

- 7.7 The authorisation is in respect of the Bus Shelter Agreement as it stands at the time authorisation is granted. Any changes to the Bus Shelter Agreement during the term of the authorisation would not be covered by the authorisation.
- 7.8 This determination is made on 14 February 2007.

### **Interim authorisation**

- 7.9 At the time of lodging the application, MAV sought interim authorisation to allow it to facilitate discussions between participating Councils as to the terms of the proposed MoU and to ultimately enter into and give effect to the MoU. The effect of this would be to enable the Director to issue the request for tender and allow the subsequent tender process to commence.

- 7.10 On 1 November 2006, the ACCC granted interim authorisation to allow Councils to give effect to the MoU and participate in the tender process, but not extending to awarding of the final tender.
- 7.11 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.

## **Determination**

- 7.12 The ACCC **grants** authorisation to applications A30244 and A30245 until 31 July 2017.

## **Date authorisation comes into effect**

- 7.13 This determination is made on 14 February 2007. If no application for review of the determination is made to the Australian Competition Tribunal (**Competition Tribunal**), it will come into force on 8 March 2007.