



Australian
Competition &
Consumer
Commission

Draft Determination

Applications for authorisation

lodged by

Retail Energy Market Company Ltd

in respect of

the Retail Market Rules

Date: 15 July 2009

Authorisation no.: A91136,
A91137 & A91138

Public Register no.: C2009/894

Commissioners: Samuel
Kell
Schaper
Court
Dimasi
Willett

Summary

The ACCC proposes to grant authorisation for chapters 5 and 6 of the Retail Market Rules, under which the Retail Energy Market Company Ltd operates.

The Retail Energy Market Company Ltd (REMCo) is responsible for developing and operating market arrangements to facilitate full retail contestability in the South Australian and Western Australian retail gas markets. REMCo publishes the Retail Market Rules (RMR) which govern the conduct and operations of these retail gas markets.

REMCo has applied for authorisation of two chapters of the RMR – Chapter 5 (which sets out rules for dealing with imbalances in the gas network) and Chapter 6 (which sets out procedures for ensuring compliance with the RMR).

The ACCC considers that the proposed conduct contained within these chapters is likely to result in public benefit by contributing to an efficient retail gas market and facilitating full retail contestability.

The ACCC considers that any public detriments likely to result from the proposed arrangements are minimal.

On balance, the ACCC considers the likely public benefits that will result from the proposed arrangements will outweigh any public detriments.

The ACCC proposes to grant authorisation to the proposed arrangements as they operate in Western Australia, for 10 years. As they operate in South Australia, the ACCC proposes to grant authorisation to the proposed arrangements for a period of 10 years or when the Australian Energy Market Operator takes over REMCo's operations (whichever of the two occurs first).

On 27 May 2009 the ACCC decided to grant interim authorisation to the arrangements.

The ACCC now seeks 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.

Contents

1. THE APPLICATION FOR AUTHORISATION.....	1
INTERIM AUTHORISATION	1
2. BACKGROUND TO THE APPLICATION	2
THE GAS MARKET IN SOUTH AUSTRALIA AND WESTERN AUSTRALIA	2
REMC0 AND THE RMR	2
CHAPTER 5 – SWING SERVICE.....	2
CHAPTER 6 – COMPLIANCE	3
RMR PARTICIPANTS	4
AUTHORISATIONS A40090-A40092	4
3. SUBMISSIONS RECEIVED BY THE ACCC	6
4. ACCC EVALUATION	7
THE MARKET.....	7
THE ‘FUTURE-WITH-AND-WITHOUT TEST’ OR COUNTERFACTUAL	8
PUBLIC BENEFIT.....	9
ACCC conclusion on public benefits	13
PUBLIC DETRIMENT.....	13
ACCC conclusion on public detriments.....	15
BALANCE OF PUBLIC BENEFIT AND DETRIMENT	15
LENGTH OF AUTHORISATION.....	15
5. DRAFT DETERMINATION.....	17
THE APPLICATIONS	17
THE NET PUBLIC BENEFIT TEST.....	17
CONDUCT FOR WHICH THE ACCC PROPOSES TO GRANT AUTHORISATION.....	17
CONDUCT NOT PROPOSED TO BE AUTHORISED	18
INTERIM AUTHORISATION	18
FURTHER SUBMISSIONS	18
ATTACHMENT A – THE AUTHORISATION PROCESS.....	19
ATTACHMENT B – CHRONOLOGY OF ACCC ASSESSMENT FOR APPLICATIONS A91136, A91137 AND A91138.....	20
ATTACHMENT C – THE TESTS FOR AUTHORISATION AND OTHER RELEVANT PROVISIONS OF THE ACT.....	21

List of abbreviations

AEMO	Australian Energy Market Operator
ERA	Economic Regulatory Authority
ESCOSA	Essential Services Commission of South Australia
MSOR	Market and System Operations Rules
REMC _o	Retail Energy Market Company
RMR	Retail Market Rules
SSP	Swing Service Provider
SSPUD	Swing Service Provision Umbrella Deed
SSPOLR	Swing Service Provider of Last Resort
SSPOLRUD	Swing Service Provision of Last Resort Umbrella Deed

1. The application for authorisation

- 1.1. On 1 May 2009 the Retail Energy Market Company (REMCo) lodged applications for authorisation A91136-A91138 with the ACCC.
- 1.2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Trade Practices Act 1974* (the Act). 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. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Further information about the authorisation process is contained in [Attachment A](#). A chronology of the significant dates in the ACCC's consideration of these applications is contained in [Attachment B](#).
- 1.3. Application A91136 was made 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.
- 1.4. Application A91137 was made under section 88(1) of the Act to make and give effect to a contract, arrangement or 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.
- 1.5. Application A91138 was made under section 88(8) of the Act to engage in conduct that constitutes or may constitute exclusive dealing.
- 1.6. In particular, REMCo applied for authorisation of Chapters 5 and 6 of the Retail Market Rules (RMR). In South Australia, REMCo seeks authorisation for period of 10 years, or until REMCo's South Australian functions are transferred to the Australian Energy Market Operator (AEMO), which is scheduled to occur on 1 October 2009. In relation to Western Australia, REMCo is requesting an authorisation for a period of 10 years.

Interim authorisation

- 1.7. REMCo requested interim authorisation for the proposed arrangements due to the pending expiration of the previous authorisation.
- 1.8. On 27 May 2009 interim authorisation was granted to REMCo for applications A91136-A91138. The ACCC considered that allowing the interim authorisation would maintain the status quo and that there were no objections to the interim authorisation by interested parties.

2. Background to the application

The gas market in South Australia and Western Australia

- 2.1. In South Australia, there are two main pipelines, the Moomba-Adelaide pipeline, which also diverts into Whyalla and Port Pirrie, and the SEAGas pipeline from Port Campbell, Victoria to Adelaide. There are 14 separate sub-networks in South Australia which rely on supply of gas from these pipelines.
- 2.2. In Western Australia, there are two main relevant pipelines - the Dampier to Bunbury Natural Gas Pipeline and the Parmelia Pipeline. There are 16 separate sub-networks in Western Australia which rely on supply of gas from these pipelines.
- 2.3. Both the South Australian and Western Australian gas markets are ‘contract carriage’ regimes, unlike the Victorian gas market which is a ‘market carriage system’. Gas retailers in each of South Australia and Western Australia must therefore have contractual arrangements in place for purchase, transmission and distribution of gas.

REMCo and the RMR

- 2.4. REMCo is the retail market administrator for the South Australian and Western Australian retail gas markets. It is a non-profit making company, governed by an Independent Board of Directors, and funded by industry participants on a cost recovery basis.
- 2.5. Its purpose is to develop and operate efficient and cost-effective retail market arrangements to facilitate full retail contestability in these markets. In South Australia and Western Australia, network operators and users participating in the retail gas markets may become REMCo members.
- 2.6. REMCo is licensed by the Essential Services Commission of South Australia (ESCOSA) and is subject to their review and oversight for its South Australian operations. In Western Australia, REMCo is subject to the review and oversight of the Economic Regulatory Authority (ERA).
- 2.7. REMCo is required by legislation to publish rules that govern the conduct and operations of the retail gas markets in Western Australia and South Australia. To comply with these obligations, REMCo published the RMR, which are, in effect, an enforceable contract between REMCo and its members.
- 2.8. Chapters 5 and 6, and the associated deeds, are the subject of the authorisation applications.

Chapter 5 – Swing service

- 2.9. Chapter 5 of the RMR will give effect to the swing service provisions that are conducted by REMCo. The swing service provisions provide compensation where retailers’ injections of gas into South Australian and Western Australian gas sub-networks are unbalanced. When too much gas is injected by a wholesaler, at the request of a retailer, there will be excessive gas within the sub-network and this may cause problems with the integrity of the network. When too little gas is injected into the sub-network, there will be

insufficient gas to supply to consumers. Chapter 5 provides procedures for REMCo to allocate retailers a 'swing service' for any day on which pipeline injections differ from the retailers' deemed withdrawals from a particular pipeline, and mechanisms to determine fair market value for the provision of that swing service.

- 2.10. A Swing Service Provider (SSP) is a person with a transmission contract on a pipeline, or a pipeline operator who has offered to provide the swing service through the submission of a bid to REMCo, or under an off market swing service supply contract with a particular retailer.
- 2.11. Retailers will pay for swing service in one of the following ways. First, any retailer is free to make an off-market bilateral arrangement with a shipper to obtain swing service. Retailers that procure all or part of their swing service off-market from one or more SSPs must advise REMCo of these arrangements via a 'procurement instruction'. If a retailer requires additional swing service to meet its obligations, this is procured from the REMCo bid stack process.
- 2.12. REMCo operates the bid stack process, which is provided for under the Swing Service Provider Umbrella Deed (SSPUD) contained within appendix 7 of the RMR. The process involves SSP's submitting bids to REMCo setting out the price and volume of the swing service they are prepared to offer. REMCo uses these bids to calculate the marginal clearing price for the swing service.
- 2.13. In the event that all swing service volumes in the bid stack are purchased and a retailer still requires additional swing service, this is supplied by the Swing Service Provider of Last Resort (SSPOLR) as permitted by the Swing Service Provider of Last Resort Deed (SSPOLRUD) contained within appendix 8 of the RMR. The SSPOLR is selected by REMCo via competitive tender.
- 2.14. Chapter 5 of the RMR also establishes a swing service compensation regime. This will be utilised if REMCo considers that a retailer acted in a manner that contributed materially to the causation of a swing service. This system provides a deterrent to 'gaming' the swing service payments and aims to compensate users who are required to pay for the swing service as a consequence of another user profiteering at their expense.

Chapter 6 – Compliance

- 2.15. Chapter 6 of the RMR sets out procedures for REMCo to manage and enforce compliance with the RMR. The REMCo board will refer to an independent compliance panel any alleged breaches or requests for rule interpretations that the board considers to be material, or any appeals by members. The panel is capable of requesting a member of REMCo to provide information relevant to a matter being considered and is capable of making a determination regarding a matter being considered. The panel also has the ability to appoint persons to assist it in carrying out its investigation and other functions, and may seek advice and assistance from external experts and advisers.

RMR participants

2.16. 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.

2.17. In its application, REMCo lists the following organisations as parties to the authorisation, or 'RMR participants':

<i>Western Australia</i>	<i>South Australia</i>
<ul style="list-style-type: none">▪ WA Gas Networks Pty Ltd▪ DBNGP Transmission Pty Ltd▪ APA Group▪ Alinta Sales Pty Ltd▪ Electricity Retail Corporation▪ Premier Power Sales	<ul style="list-style-type: none">▪ Envestra Ltd▪ Epic Energy South Australia Pty Ltd▪ South East Australia Gas Pty Ltd▪ TRUenergy Pty Ltd▪ Origin Energy Retail Ltd▪ International Power (Energy) Pty Ltd▪ AGL Energy Pty Ltd▪ Simply Energy▪ Santos Direct Pty Ltd

2.18. In its application, REMCo states that the identity of future RMR participants is not known. Section 88(14) (b) provides that, if an authorisation is granted in respect of a proposed contract the names of the parties to which were not known to the applicant, the authorisation is deemed to be expressed to be subject to a condition that any party to the contract will, when so required by the Commission, furnish to the Commission the names of all the parties to the contract.

Authorisations A40090-A40092

2.19. On 28 July 2004, the ACCC granted authorisations A40090-A40092 to REMCo to operate chapters 5 and 6 of the RMR until 31 May 2009.

2.20. At the time of granting these authorisations, the ACCC stated that chapters 5 and 6 of the RMR and the associated ancillary deeds were likely to result in:

- a benefit to the public which outweighs the detriment from any lessening of competition that is likely to result from the operation of these parts of the RMR
- such a benefit to the public that these parts of the RMR should be allowed.

2.21. In its assessment, the ACCC considered both chapters 5 and 6 to be integral elements of the RMR and therefore considered the RMR as a whole. The ACCC considered the swing service arrangements were likely to result in the following public benefits:

- implementation of full retail contestability, including the creation of an open and competitive environment for the retailing of gas

- a means of allocating the cost of providing swing service to the parties responsible for the need for these services. This would create an incentive for users to improve the accuracy of their forecasting of retail gas requirements, leading to improved operational efficiency of the pipelines and gas sub-networks
- support to system integrity and increased efficiency in the provision of gas carriage services and, as a consequence, ultimately improve the services provided to users and customers
- general benefits to the South Australian and Western Australian economies by improved and more competitive retail gas services.

2.22. Similarly, the creation of a compliance panel and alternative dispute resolution processes in the RMR were considered to provide a mechanism for the enforcement of the RMR, which is necessary for the RMR to be effective and produce the benefits of the implementation of full retail contestability in South Australia and Western Australia.

2.23. The potential detriments perceived by the ACCC were focussed on the additional costs due to REMCo charges, swing service charges, and dispute resolution charges passed on to RMR participants. The ACCC did, however, consider that significant effort had been made to minimise the costs of operating the RMR.

3. Submissions received by the ACCC

- 3.1. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. To this end the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application. A summary of the submissions received by the ACCC from the applicants and interested parties follows.
- 3.2. Broadly, REMCo submits that the public benefits resulting from the RMR can be summarised as:
 - facilitating full retail contestability in the Western Australian and South Australian retail gas markets, including the creation of an open and competitive environment for gas retailing as well as contribute to the reduction of barriers when entering into the Western Australian and South Australian retail gas markets
 - promoting economic efficiency and passing through the benefits of reform and competition to consumers, resulting in benefits to the South Australian and Western Australian economies by improved and more competitive retail gas services.
- 3.3. The ACCC sought submissions from a number of interested parties potentially affected by the application, including RMR participants, industry groups and government bodies. The ACCC received 3 submissions.
- 3.4. Envestra Ltd supports the application, saying that REMCo has been providing excellent services to market participants for a number of years and that there is no reason why the current authorisation shouldn't continue.
- 3.5. TRUenergy Pty Ltd (TRUenergy) also supports the application. TRUenergy submits that in 12 months the short term trading market will replace REMCo's arrangements in South Australia. TRUenergy supports the authorisation on the basis that it will allow the continued operation of the gas market in South Australia through a transition period until the new trading arrangements supersede the current arrangements.
- 3.6. DBNGP Transmission Pty Ltd (DBP), the operator of the Dampier to Bunbury Natural Gas Pipeline, submits that that it has experienced operational difficulties caused by the RMR. DBP's concerns are outlined below in Chapter 4.
- 3.7. The views of REMCo and interested parties are outlined in the ACCC's evaluation of the RMR in Chapter 4 of this draft determination. Copies of public submissions are available from the ACCC website (www.accc.gov.au) by following the 'Public Registers' and 'Authorisations Public Registers' links.

4. ACCC evaluation

- 4.1. The ACCC's evaluation of the RMR is in accordance with test(s) found in the following sections of the Act:
- section 90(8) of the Act which 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.
 - sections 90(6) and 90(7) of the Act which 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.
 - section 90(8) of the Act which states that the ACCC shall not authorise the proposed exclusive dealing conduct unless it is satisfied in all the circumstances that such conduct would result or be likely to result in such a benefit to the public that the proposed conduct should be authorised.
- 4.2. For more information about the tests for authorisation and relevant provisions of the Act, please see [Attachment C](#).

The market

- 4.3. The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant markets affected by that conduct.
- 4.4. REMCo submits that the markets relevant to the assessment of the applications for authorisation remain the same as those adopted by the ACCC in authorisations A40090-A40092:
- Product market: Gas
 - Geographical markets: South Australia (including the town of Mildura in the state of Victoria) and Western Australia
 - Functional market: Retail sale of gas
- 4.5. No submissions received indicated there have been any substantial changes in the relevant markets.
- 4.6. For the purpose of assessing this application, the ACCC still considers the relevant area of competition affected by the proposed conduct is the market for the supply and sale of retail gas in Western Australia and South Australia.

The ‘future-with-and-without test’ or counterfactual

- 4.7. 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.¹
- 4.8. 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’.
- 4.9. REMCo considers that the governments of Western Australia and South Australia would be unlikely to seek to remove full retail contestability if the relevant portions of the RMR were not authorised. As a result, REMCo submits the most likely counterfactual is a less efficient gas market and a more limited form of retail competition in South Australia and Western Australia, in particular:
- Balancing, allocation, and reconciliation would still be needed to maintain system integrity, but the swing service volumes would not be quantified or allocated between users
 - As a result, users would no longer have the incentive to make accurate daily forecasts. This would result in a less efficient gas system and less efficient use of limited pipeline capacity
 - Access to pipeline capacity is a key requirement for an efficient retail gas market operation. As a result, less available pipeline capacity could discourage new retailers from entering the retail gas market, thereby further limiting the development of full retail contestability
 - Alternative mechanisms for enforcing the RMR and for ensuring that the retail markets continue to operate so as to facilitate full retail contestability would need to be developed. REMCo considers that it is unlikely that such mechanisms, if they could be developed, would be as efficient as the current arrangements.
- 4.10. REMCo notes that swing service was considered essential by pipeline operators to the introduction of full retail contestability and that the governments of South Australia and Western Australia would have been unlikely to introduce full retail contestability without them.
- 4.11. The ACCC considers that there are alternative arrangements available that may be as efficient as the current RMR arrangements.
- 4.12. In particular, the ACCC notes that the Australian Energy Market Operator (AEMO) commenced operation on 1 July 2009.² The AEMO assumed the existing roles and responsibilities of organisations such as National Electricity Market Management Company (NEMMCO) and Victorian Energy Networks Corporation (VENCorp), and will

¹ 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.

² www.aemo.com.au

assume the role and responsibility of REMCo in South Australia. AEMO will have multiple new functions such as the establishment of a short term trading market for gas in NSW and South Australia.

- 4.13. South Australian retail gas operations will transition from REMCo to AEMO on 1 October 2009.³ Upon the transition, the RMR as they apply to South Australia will be converted into procedures made under the National Gas Rules and the National Gas Law, which are administered by the Australian Energy Market Commission.
- 4.14. In its application, REMCo indicated that it is likely there will be substantial energy reform in the Western Australian market in the medium term. This is expected to result in a transformation of the roles of REMCo and the Independent Market Operator in the gas and electricity markets, and the possible introduction of a short term trading market similar to that designed for the eastern States.
- 4.15. When authorisation was first granted in 2004, the ACCC noted that the swing service was deemed to be essential by pipeline operators for the purpose of full retail contestability. The ACCC considered that if the authorisation was not granted, it would prevent the implementation of full retail contestability. This was due to swing service being the prevailing option available at the time.
- 4.16. The AEMO arrangements that are to operate in South Australia and the possible establishment of a short term trading market in Western Australia have similar objectives to REMCo's arrangements, in that they are designed to establish markets with full retail contestability. The ACCC considers that the RMR arrangements are vital to the achievement of full retail contestability until such time that alternative arrangements are able to be put in place.
- 4.17. On this basis, the ACCC considers the relevant counterfactual in South Australia is a less efficient retail gas market (which is likely to impact on full retail contestability) until 1 October 2009 or when the AEMO replaces REMCo's operations. The ACCC considers the relevant counterfactual in Western Australia is a less efficient retail gas market (which is likely to impact on full retail contestability) in the medium term, unless an alternative arrangement such as a short term trading market is implemented.

Public benefit

- 4.18. 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.⁴

- 4.19. REMCo submits the RMR will deliver public benefits, including:

- The facilitation of full retail contestability in the Western Australian and South Australian retail gas markets

³ <http://www.aemo.com.au/retailops/retailops.html>

⁴ 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.

- Efficiency of the Western Australian and South Australian retail gas markets, through the use of the swing service provisions
- A mechanism for enforcing the RMR (compliance procedures).

4.20. In considering public benefits - particularly cost savings from increases in productive efficiency from conduct proposed for authorisation - the ACCC applies a public benefit standard when determining the weight to be given to productive efficiency savings. That is, the ACCC will consider how much weight society considers should be attached to a public benefit. Of particular interest will be the number and identity of the proposed beneficiaries.

4.21. The ACCC's assessment of the likely public benefits from the proposed arrangements follows.

Full Retail Contestability

4.22. REMCo submits that following the introduction of the RMR in 2004, full retail contestability was introduced in both South Australia and Western Australia.

4.23. The RMR were specifically designed to facilitate the implementation of full retail contestability by providing a structure for the balancing, allocation and reconciliation of gas and swing service. In particular, the RMR allowed the extension of full retail contestability to small commercial and all domestic customers in both South Australia and Western Australia. This includes providing for:

- allocation and management of delivery point identifiers
- metering of delivery points
- transfer of delivery points between retailers

4.24. REMCo submits that the introduction of full retail contestability has brought considerable benefits for customers, with significant numbers of people choosing to switch to a different retailer or to a different contract with the same retailer.

4.25. REMCo submits the following table which shows the level of churn (customers switching retailer) that has occurred in each jurisdiction since the introduction of full retail contestability.

Western Australia		South Australia	
Sub-network	Churns	Sub-network	Churns
Perth	244	Adelaide	28,2158
Rest of WA	24	Rest of SA	284
		Mildura	0
Total	268		28,2442

4.26. The table shows that there has been, and continues to be significant customer churn and competition in the small customer segment of the market in South Australia.

4.27. REMCo notes that while full retail contestability has had less of an impact on competition for small retail customers in Western Australia than in South Australia, the RMR:

- have facilitated significant competition between 3 retailers in relation to customers that consume more than 0.18 TJ/a and
- will continue to provide a framework for the development of competition in respect of small use customers, especially once the restriction on Synergy selling gas to customers that consume less than 0.18 TJ/a has been removed.

4.28. REMCo submits that the RMR will continue to facilitate full retail contestability in Western Australian and South Australian retail gas markets, including the creation of an open and competitive environment for gas retailing and the reduction of barriers to entry into South Australian and Western Australian retail gas markets.

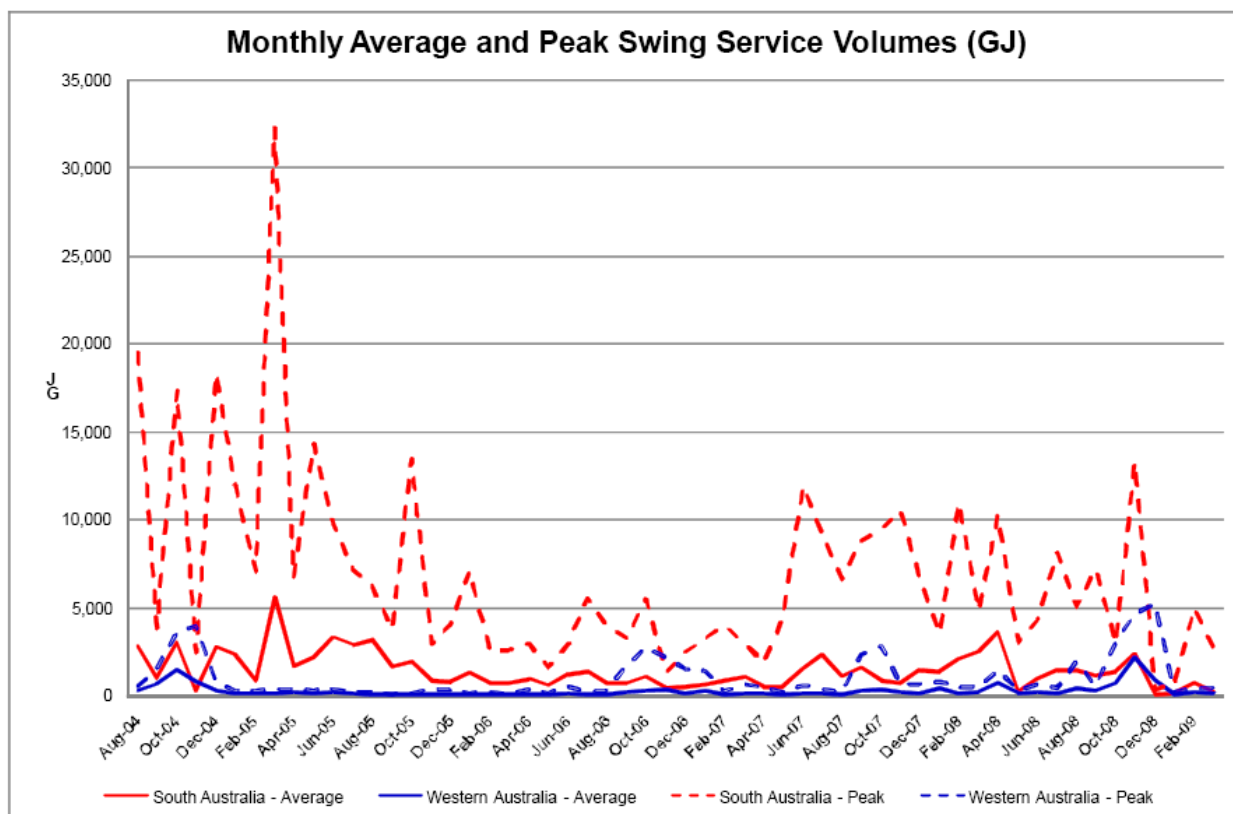
4.29. The ACCC considers the swing service provisions will continue to facilitate full retail contestability, resulting in benefits to the South Australian and Western Australian economies by providing improved and more competitive retail gas services. The ACCC also considers the benefits of increased efficiency and competition will likely be passed onto consumers.

Gas efficiency

4.30. REMCo submits that the swing service provisions of the RMR will continue to contribute to promoting efficiency in the Western Australian and South Australian retail gas markets by:

- providing a formal mechanism for recovering the cost of swing service
- allocating the cost of swing service to the parties responsible for the need for swing service, thereby creating incentives for users to improve the accuracy of their gas forecasting, leading to improved operational efficiency of the pipelines and gas sub-networks and more efficient utilisation of pipeline capacity
- supporting system integrity and increased efficiency in the provision of gas carriage services, which has ultimately resulted in improved services provided to users and customers.

4.31. REMCo submits the following chart, which shows retailers have become more efficient in their forecasting, with levels of swing service declining significantly since the introduction of the RMR in 2004.



4.32. The chart shows that the swing service provisions have provided an incentive for users to nominate effectively, which has led to more efficient use of the limited pipeline capacity.

4.33. The ACCC therefore accepts that the swing service provisions of the RMR will continue to contribute to efficiency in the Western Australian and South Australian retail gas markets.

Compliance

4.34. REMCo submits that the compliance procedures of the RMR will create:

- an independent, industry-funded, low cost, fast track dispute resolution mechanism to deal with alleged breaches of the RMR, interpretation of the RMR and any other matters in relation to breaches of the RMR
- a mechanism for the enforcement of the RMR, which is essential to the operation of the RMR, the swing service and the benefits of full retail contestability.

4.35. REMCo submits that the Panel has recently made a determination on a matter relating to the interpretation of the RMR in Western Australia. Briefly, following a period of higher than usual volumes of swing service in the Perth Metro North Sub-Network, it was discovered that a contractual obligation was restricting the volume of gas that could be withdrawn from a particular gate of the Parmelia pipeline. The situation was quickly rectified once this contractual restriction was discovered. The relevant parties referred a rule interpretation issue in relation to this incident to REMCo, which in turn, referred the matter to the Panel.

4.36. The ACCC accepts REMCo's submission that the compliance provisions of the RMR will provide an effective dispute resolution procedure and mechanism for enforcing the RMR.

Interested parties

4.37. Submissions received from interested parties have shown general support for the applications and there appears to be an acceptance by interested parties that the RMR have delivered significant public benefits.

ACCC conclusion on public benefits

4.38. The ACCC accepts that the RMR are likely to deliver significant public benefits by continuing to contribute to full retail contestability in Western Australia and South Australia, as well as continuing to contribute to an efficient retail gas market through the use of the RMR's swing service provisions. The compliance procedures within the RMR are also likely to result in public benefits by providing low cost dispute resolution procedures and a means of enforcing of the RMR.

Public detriment

4.39. Public detriment is 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.⁵

4.40. REMCo submits that the RMR will give rise to minimal potential detriments. Potential public detriments that may result from the RMR include additional costs to consumers of gas as a result of the following costs which may be passed onto them:

- REMCo charges
- Swing service charges
- Dispute resolution charges

4.41. To become a REMCo member, an industry participant needs to pay the associated charges set by REMCo. REMCo is a not for profit company, and submits the costs associated with obtaining membership and the ongoing annual costs are designed only to cover its operational costs.

4.42. In authorisations A40090-A40092, the ACCC considered that significant effort had been made to minimise the costs of operating the RMR. This was because one organisation administered the RMR in two jurisdictions and also that REMCo's charges were required to be approved by independent regulators in each jurisdiction. Although REMCo will soon be only operational in one of these jurisdictions, the ACCC has not received any information that suggests that REMCo will not continue to endeavour to maintain the lowest possible operational costs.

4.43. The ACCC also considers that any detriments associated with REMCo's charges are negligible relative to the efficiency and competition gains which are likely to be achieved by Chapter 5 and 6 of the RMR.

⁵ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

Concerns raised by DBNGP (WA) Transmission Pty Ltd

4.44. The ACCC received a submission from DBP expressing two concerns with the RMR:

- 1) the RMR requires REMCo to provide daily allocations of actual deliveries of gas to each shipper at a distribution gate point to the pipeline operator by 1230 hours on the following gas day. This obligation conflicts with DBP's obligations to shippers to provide allocations and Accumulated Imbalance Notices before 1100 hours.
- 2) when an error in a daily allocation provided by REMCo is identified, that error is corrected over the ensuing 28 days. This leads to inconsistencies between actual daily gas deliveries to shippers and the allocations to those shippers. This causes differences between physical imbalances in the pipeline and contractual imbalances based on allocated gas quantities.

4.45. DBP suggest that the RMR should be amended to recognise the prior contractual obligations of parties and that REMCo's systems be modified to permit parties to meet their contractual obligations.

4.46. REMCo submits that DBP has raised contractual concerns that do not affect REMCo's application. REMCo considers that this issue is capable of being resolved through the amendment procedures contained in Chapter 9 of the RMR.

4.47. Chapter 9 of the RMR specifies a rule change process. Any user, network operator, or person considered to be an 'interested person' by the ESCOSA or the ERA can propose changes to the RMR. Proposed changes are submitted to the REMCo Rule Change Committee, which is made up of representatives of network operators and users from each jurisdiction. Any change to the RMR by REMCo requires regulatory approval from the ESCOSA and/or the ERA.

4.48. REMCo also notes that when the RMR was developed, it was expected that DBP would amend its shipper contracts where necessary to enable it to comply with the RMR.

4.49. Additionally, the matter was dismissed by the ERA after DBP raised it during a review of the REMCo Gas Retail Market Scheme in 2008. The ERA noted the contractual nature of the issue and the availability of rule change procedures.

4.50. In its 2008 review of the RMR, the ERA concluded:

- With regard to DBP's concerns about the provision of daily gas allocation information to a pipeline operator, it is a legislative requirement⁶ that DBP comply with the RMR. In the absence of any particular provisions in the rules to the contrary, DBP would have been expected to amend shipper contracts, where necessary, to conform to the RMR.⁷
- With regard to DBP's concerns about the reconciliation of errors in gas allocations it was again acknowledged that DBP has a legislative requirement to comply with

⁶ Section 11ZOD(1)(a) of the *Energy Coordination Act 1994* (WA).

⁷ Economic Regulation Authority, *Final Report - Review of the REMCo Gas Retail Market Scheme*, Perth, 2008, viewed 22 June 2009, pp 8-9 <http://www.era.wa.gov.au/2/533/42/review_of_the_r.pm>

the RMR and would have been expected to amend any shipper contracts in order to conform with the RMR.⁸

- 4.51. The ACCC has considered DBP's submission and its concerns with the RMR. The ACCC notes DBP's concerns specifically relate to the conflicts between DBP's obligations under the RMR and its commercial obligations to its shippers.
- 4.52. DBP's concerns appear to be private in nature and relate to operational conflicts between private commercial responsibilities and RMR responsibilities, and not competition issues.
- 4.53. The ACCC understands that DBP was expected to alter its commercial obligations due to legislative requirements in order to accommodate the RMR. Additionally, DBP's concerns may potentially be addressed by the amendment procedures contained in Chapter 9 of the RMR.

ACCC conclusion on public detriments

- 4.54. The ACCC is of the view that any detriments associated with REMCo's charges are negligible relative to the efficiency and competition gains which are likely to be achieved by Chapter 5 and 6 of the RMR.

Balance of public benefit and detriment

- 4.55. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the RMR are likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
- 4.56. In the context of applying the net public benefit test at section 90(8)⁹ of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.¹⁰
- 4.57. For the reasons outlined in this chapter the ACCC considers that significant public benefits are likely to result from the proposed arrangements, including full retail contestability, efficiency in the retail gas market and effective compliance procedures. The likely detriments are the various costs associated with REMCo membership, which are minimal.
- 4.58. Accordingly, the ACCC considers the public benefit that is likely to result from the arrangements is likely to outweigh the likely public detriment.

Length of authorisation

- 4.59. The Act allows the ACCC to grant authorisation for a limited period of time.¹¹ The ACCC generally considers it appropriate to grant authorisation for a limited period of

⁸ *ibid.*, pp 9

⁹ The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

¹⁰ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.*

time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

- 4.60. In this instance, REMCo seeks authorisation for 10 years in relation to Western Australia and in relation to South Australia, until REMCo's South Australian functions are transferred to AEMO which is currently scheduled to take place on 1 October 2009. If the transfer does not occur then a period of 10 years is sought in South Australia.
- 4.61. In respect of Western Australia, REMCo submits that the RMR have operated well for the past 5 years and generally have industry support. REMCo submits that:
- granting authorisation for a period of 10 years will allow the RMR to continue to operate effectively and any potential issues with the operation of the RMR that may arise over the course of the 10 years can be addressed through the RMR rule change process
 - a 10 year period will also allow for possible energy market reforms to be developed and implemented during the life of the authorisation. This could assist in avoiding a situation whereby REMCo may be required to seek a new authorisation in 5 years time, knowing that upcoming energy reforms could alter the market so that a particular form of authorisation will become irrelevant
 - it is likely that there will be substantial energy reform in the Western Australian market in the medium term resulting in a transformation of the roles of REMCo and the Independent Market Operator in the gas and electricity markets, and the possible introduction of a short term trading market. The ACCC granted authorisation for a period of 10 years for the VENCORP Market and System Operations Rules. This period was granted because of an upcoming statutory review, which was likely to result in substantial changes to the rules.
- 4.62. On 1 July 2009, gas and electricity market operators across Australia (except Western Australia) merged to form the AEMO. On the transition of REMCo's South Australian operations to the AEMO, the RMR as they apply to South Australia will be converted into procedures made under the National Gas Rules and the National Gas Law, which are administered by the Australian Energy Market Commission.
- 4.63. AEMO is scheduled to take over REMCo's operations in South Australia on 1 October 2009. REMCo is not seeking authorisation for these South Australian procedures for the period after the transition to AEMO.
- 4.64. In its previous applications for authorisation A40090-A40092, REMCo sought authorisation for a period of 10 years. In authorisations A40090-A40092, the ACCC considered that 10 years may be too long, given that the RMR were new and it was an untested market. The ACCC granted authorisation to the RMR for a period of 5 years and stated it would consider a longer period for any subsequent application for reauthorisation.
- 4.65. As such, the ACCC proposes to grant authorisation to the RMR for a period of 10 years in Western Australia. In South Australia, the ACCC proposes to grant authorisation to the RMR for a period of 10 years or when the AEMO takes over REMCo's operations (whichever of the two occurs first).

¹¹ Section 91(1).

5. Draft determination

The applications

- 5.1. On 1 May 2009 REMCo lodged applications for authorisation A91136-A91138 with the Australian Competition and Consumer Commission (the ACCC).
- 5.2. Application A91136 was made using Form A, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 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. Application A91137 was made using Form B, Schedule 1 of the Trade Practices Regulations 1974. The application was made under subsection 88(1) of the Act to:
 - make and give effect to a contract, arrangement or 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.
- 5.4. Application A91138 was made using Form E, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88(8) of the Act to:
 - engage in conduct that constitutes or may constitute exclusive dealing.
- 5.5. In particular, REMCo seeks authorisation for Chapter 5 and 6 of the RMR. Chapter 5 outlines the operation of the swing service provisions of the RMR which are designed to correct imbalances in the Western Australian and South Australian gas sub-networks. Chapter 6 provides for the RMR compliance procedures which will establish cost-effective dispute resolution procedures and a means of enforcing the RMR.

The net public benefit test

- 5.6. For the reasons outlined in Chapter 4 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.
- 5.7. 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.
- 5.8. The ACCC therefore **proposes to grant** authorisation to applications A91136, A91137 and A91138.

Conduct for which the ACCC proposes to grant authorisation

- 5.9. The ACCC proposes to grant authorisation to REMCo to operate Chapters 5 and 6 of the RMR (version 5.8), the SSPUD and the SSPOLRUD for a period of 10 years, in the case of Western Australia, and in the case of South Australia, 10 years or until REMCo's South Australian functions are transferred to the AEMO.

5.10. The proposed authorisation is in respect Chapters 5 and 6 of the RMR, and the associated deeds, the SSPUD and the SSPOLRUD.

5.11. The proposed authorisation is expressed to apply to or in relation to another person who:

- in the case of an authorisation to make or arrive at a contract, arrangement or understanding - becomes a party to the proposed contract, arrangement or understanding at a time after it is made or arrived at
- in the case of an authorisation to give effect to a provision of a contract, arrangement or understanding - becomes a party to the proposed contract, arrangement or understanding at a time after the proposed authorisation would be granted (see s88(10)).

5.12. This proposed authorisation applies in respect of other contracts or proposed contracts that are or will be in similar terms to the contracts or proposed contracts that are the subject of the applications (see s88(13)).

5.13. Pursuant to section 88(14)(b), the proposed authorisation is deemed to be expressed to be subject to a condition that any party to such a contract will, when so required by the ACCC, furnish to the ACCC the names of all parties to the contract.

5.14. This draft determination is made on 15 July 2009.

5.15. The attachments to this determination are part of the draft determination.

Conduct not proposed to be authorised

5.16. The proposed authorisation does not extend to REMCo to engage in any contract, arrangement or understanding that is not constituted by or required under Chapters 5 and 6 of the RMR, the SSPUD and the SSPOLRUD.

Interim authorisation

5.17. At the time of lodging the application REMCo requested interim authorisation to continue the operation of the RMR until the substantive application was assessed. The ACCC granted interim authorisation on 27 May 2009.

5.18. 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

5.19. 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.

Attachment A — the authorisation process

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.

The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.

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.

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.

After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.

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.

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.

Attachment B — chronology of ACCC assessment for applications A91136, A91137 and A91138

The following table provides a chronology of significant dates in the consideration of the application by REMCo.

DATE	ACTION
1 May 2009	Application for authorisation lodged with the ACCC, including an application for interim authorisation.
20 May 2009	Closing date for submissions from interested parties in relation to the request for interim authorisation.
27 May 2009	The ACCC granted interim authorisation.
29 May 2009	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
12 June 2009	Submission received from REMCo in response to interested party submissions.
15 July	Draft determination issued.

Attachment C — the tests for authorisation and other relevant provisions of the Act

Trade Practices Act 1974

Section 90—Determination of applications for authorisations

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

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

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
 - (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
 - (b) the proposed covenant were given, and were complied with; or
 - (c) the proposed conduct were engaged in;as the case may be.
- (7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.
- (8) The Commission shall not:
 - (a) make a determination granting:
 - (i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
 - (ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
 - (iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or

- (iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

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

- (b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.
- (9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.
- (9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):
- (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
 - (i) a significant increase in the real value of exports;
 - (ii) a significant substitution of domestic products for imported goods; and
 - (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

Variation in the language of the tests

There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).

The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. 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 but the test under section 90(8) is not so limited.¹²

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.¹³

¹² *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.

¹³ *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.

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.

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).

Conditions

The Act allows the ACCC to grant authorisation subject to conditions.¹⁴

Future and other parties

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 future¹⁵
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.¹⁶

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation¹⁷. It does not apply to applications for revocation, revocation and substitution, or minor variation. The six-month period can be extended by up to a further six months in certain circumstances.

¹⁴ Section 91(3).

¹⁵ Section 88(10).

¹⁶ Section 88(6).

¹⁷ Section 90(10A)

Minor variation

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation.¹⁸ The Act limits applications for minor variation to applications for:

... a single variation that does not involve a material change in the effect of the authorisation.¹⁹

When assessing applications for minor variation, the ACCC must be satisfied that:

- the proposed variation satisfies the definition of a ‘minor variation’ and
- if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the arrangements.

Revocation; revocation and substitution

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.²⁰ The ACCC may also review an authorisation with a view to revoking it in certain circumstances.²¹

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.²² The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.²³

¹⁸ Subsection 91A(1)
¹⁹ Subsection 87ZD(1).
²⁰ Subsection 91B(1)
²¹ Subsection 91B(3)
²² Subsection 91C(1)
²³ Subsection 91C(3)