



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

**Woodside Energy Limited and Benaris International Pty
Ltd**

in respect of

the joint marketing of LPG from the Otway Gas Project

Date: 5 August 2009

Authorisation no.: A91157

Public Register no.: C2009/801

Commissioners: Samuel
Kell
Schaper
Court
Dimasi
Willett

Summary

The ACCC proposes to grant authorisation under section 88(1A) of the *Trade Practices Act 1974* for an agreement between Woodside Energy Limited (Woodside) and Benaris International Pty Ltd (Benaris) on the common terms and conditions (including price) upon which LPG produced by the Otway Gas Project for and on behalf of Woodside and Benaris will be jointly marketed and sold.

The ACCC proposes to grant authorisation until 31 December 2012.

Woodside and Benaris (the applicants) have sought authorisation under section 88(1A) of the *Trade Practices Act 1974* (the Act) to jointly market and sell their shares of liquefied petroleum gas (LPG) produced by the Otway Gas Project.

Application A91157 is to take account of amendments introduced by the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* which commenced on 24 July 2009. This application relates to and is in the same terms as application A91135 lodged with the ACCC on 16 April 2009 under section 88(1) of the Act. On 6 May 2009 the ACCC granted interim authorisation to A91135 to allow Woodside and Benaris to engage in the proposed arrangements. On 1 July 2009 the ACCC issued a draft determination for application A91135 proposing to grant authorisation for three years. The practical effect of application A91157 is to seek protection from the new cartel provisions for the joint marketing arrangements engaged in by Woodside and Benaris.

The applicants have been jointly marketing their shares of LPG produced by the Otway project since 2008 under an authorisation previously granted by the ACCC. This authorisation expired on 20 April 2009.

If Benaris did not enter into joint-marketing arrangements with Woodside it would be likely to sell its share of LPG produced by the project to one of the other joint-venture partners. The ACCC considers that Benaris jointly marketing its share of LPG produced by the project with Woodside, rather than selling its share to one of the project partners, will result in some, small, transaction-cost savings for Benaris.

The ACCC considers that the proposed arrangements will generate little, if any, anti-competitive detriment and are unlikely to affect the wholesale price of LPG. The combined volume of LPG to be jointly marketed by Woodside and Benaris represents less than three per cent of total Victorian and South Australian 'naturally occurring' (non-refinery) production and, absent the joint-marketing arrangements, Benaris would be likely to sell its share to one of the other joint-venture participants in any event.

The ACCC considers that the public benefit will outweigh the anti-competitive detriment and proposes to grant authorisation until 31 December 2012, as requested.

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

On 29 July 2009 the ACCC granted interim authorisation to A91157 to allow Woodside and Benaris to engage in the proposed arrangements. 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.

1. The application for authorisation

- 1.1 On 24 July 2009 Woodside Energy Limited (Woodside) and Benaris International Pty Ltd (Benaris) lodged application A91157 with the ACCC for authorisation to market liquefied petroleum gas (LPG) from the Otway Gas Project jointly.
- 1.2 Authorisation is a transparent process in which 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 that is likely to result from the conduct outweighs the detriment to the public constituted by any lessening of competition that may be likely to result. The ACCC conducts a public consultation process in respect of an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not.
- 1.3 Application A91157 was made under section 88(1A) of the Act to make and give effect to a contract, arrangement or understanding, a provision of which is or may be a cartel provision.
- 1.4 In particular, Woodside and Benaris applied for authorisation to continue to make and give effect to all contracts, arrangements or understandings relating to the common terms and conditions (including price) on which Liquefied Petroleum Gas (LPG) produced by the Otway Gas Project for and on behalf of Woodside and Benaris will be offered for sale and to jointly market and sell that LPG to a common customer or customers. The applicants seek authorisation until 31 December 2012.
- 1.5 In effect, Woodside will market and sell Benaris' share of LPG produced by the Otway project jointly with its own share.
- 1.6 The Otway Gas Project involves the development of the Thylacine and Geographe gas fields off the south-west coast of Victoria, near Port Campbell. The project is an unincorporated joint venture between Woodside, Benaris, Origin Energy Resources Pty Ltd (Origin) and CalEnergy Gas (Australia) Pty Ltd (CalEnergy). The participants' project shares are as follows
 - Woodside - 51.55 per cent
 - Origin – 30.75 per cent
 - Benaris – 12.7 per cent
 - CalEnergy – five per cent
- 1.7 The applicants state that contracts for the sale of LPG in Victoria are negotiated each year in October to December and are typically for one year starting on 1 January of the following year. Therefore, the applicants state that they need to start negotiating terms and conditions, including price, for project gas delivered in 2010 in mid October 2009.

- 1.8 On 29 March 2006 the ACCC authorised Woodside, Benaris and CalEnergy under sections 88(1) of the Act to undertake for three years similar joint-marketing and sales arrangements to those the subject of the current application (authorisation A90990). On 7 November 2006 the ACCC was informed that CalEnergy had decided to market its share of Otway LPG separately.
- 1.9 The Otway project began supplying LPG in May 2008 and to date Woodside and Benaris have jointly marketed and sold their shares to the gas distributor-retailer Elgas. Elgas sells both traditional-use/bottled gas and automotive gas (under the Unigas banner).
- 1.10 The 2006 authorisation expired on 20 April 2009.
- 1.11 This application, A91157, relates to and is in the same terms as application A91135 lodged with the ACCC on 16 April 2009 under sections 88(1) of the Act. On 6 May 2009 the ACCC granted interim authorisation to A91135 to allow Woodside and Benaris to engage in the proposed arrangements. On 1 July 2009 the ACCC issued a draft determination for application A91135 proposing to grant authorisation for three years. A copy of this draft determination is at Attachment 1 of this draft determination and forms part of this determination.

Interim authorisation

- 1.12 On 24 July 2009 the applicants requested that the ACCC grant interim authorisation to A91157.
- 1.13 On 29 July 2009 the ACCC granted interim authorisation. In granting interim authorisation, the ACCC stated that it considered the protection provided by interim authorisation would allow Woodside and Benaris to continue to jointly market LPG while the ACCC considered the substantive application.
- 1.14 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.

2. ACCC evaluation of A91157

2.1 The ACCC's evaluation of the proposed arrangements is in accordance with tests found in sections 90(5A) and 90(5B) of the Act. Section 90(5A) in particular provides that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel 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, or the proposed understanding were arrived at and the provision concerned was given effect to.

2.2 In the context of applying the net public benefit test at section 90(8)¹ of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.²

2.3 For the reasons set out in Attachment 1 of this draft determination, the ACCC considers the public benefits likely to result from the proposed joint-marketing arrangements, in comparison with the likely alternative situation of Benaris selling its entitlement to another project partner such as Woodside or Origin, although small, will be more than negligible. In particular, the proposed arrangements are likely to result in some transaction-cost savings for Benaris.

2.4 For the reasons set out in Attachment 1 of this draft determination, the ACCC considers that the proposed arrangements will generate little, if any, anti-competitive detriment and are unlikely to affect the wholesale price of LPG given that:

- the combined volume of LPG to be jointly marketed by Woodside and Benaris represents less than three per cent of total Victorian and South Australian naturally occurring production and
- absent the joint-marketing arrangements, Benaris would be likely to sell its share of LPG produced by the Otway basin to another partner in the joint venture in any event.

¹ 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.

² Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.

2.5 Accordingly, the ACCC considers that the public benefit likely to result from the arrangements would outweigh the detriment to the public constituted by any lessening of competition that may be likely to result.

Length of authorisation

2.6 The Act allows the ACCC to grant authorisation for a limited period of time.³ 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.

2.7 As stated above, on 1 July 2009 the ACCC issued a draft determination for application A91135 proposing to grant authorisation with regards to that application for three years.

2.8 In responding to the 1 July draft determination, the applicants requested authorisation for both the 1 July application and the current A91157 application until 31 December 2012. They submitted that contracts for the sale of LPG in Victoria are typically for a one-year term starting 1 January and are negotiated from October to December each year. The applicants state they seek authorisation until 31 December 2012 to allow them to participate in negotiations

- for contracts commencing 1 January 2012, knowing that an authorisation would be valid until the end of the contracts negotiated, being 31 December 2012 and
- during October to December 2012 for contracts commencing 1 January 2013, for which the applicants expect to seek authorisation.

2.9 The ACCC proposes to grant authorisation until 31 December 2012.

2.10 In doing so the ACCC notes the applicants' submissions that LPG sales arrangements in south eastern Australia are negotiated annually and that they have only been jointly marketing since 2008. Given this, if the applicants were to seek reauthorisation at the expiration of the proposed authorisation, the ACCC expects that they would be in a position at that time to provide data demonstrating the cost savings that may have flowed from the proposed arrangements.

³ Section 91(1).

3. Draft determination

The application

- 3.1 On 24 July 2009 Woodside Energy Limited (Woodside) and Benaris International Pty Ltd (Benaris) lodged application for authorisation A91157 with the Australian Competition and Consumer Commission (the ACCC).
- 3.2 Application A91157 was made using Form B, Schedule 1 of the Trade Practices Regulations 1974. The application was made under subsection 88(1A) of the Act to:
- make a contract or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act) or
 - give effect to a provision of a contract, arrangement or understanding that is, or may be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act).
- 3.3 In particular, the applicants seek authorisation to continue to make and give effect to all contracts, arrangements or understandings relating to the common terms and conditions (including price) on which Liquefied Petroleum Gas (LPG) produced by the Otway Gas Project for and on behalf of Woodside and Benaris will be offered for sale and to jointly market and sell that LPG to a common customer or common customers. The applicants seek authorisation until 31 December 2012.

The net public benefit test

- 3.4 For the reasons outlined in [Attachment 1](#) 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 that may be likely to result.
- 3.5 The ACCC therefore proposes to grant authorisation to application A91157.

Conduct for which the ACCC proposes to grant authorisation

- 3.6 The ACCC proposes to grant authorisation to Woodside and Benaris to continue to make and give effect to all contracts, arrangements or understandings relating to the common terms and conditions (including price) on which Liquefied Petroleum Gas (LPG) produced by the Otway Gas Project for and on behalf of Woodside and Benaris will be offered for sale and to jointly market and sell that LPG to a common customer or common customers until 31 December 2012.
- 3.7 This draft determination is made on 5 August 2009.
- 3.8 The attachment to this determination forms part of the draft determination.

Interim authorisation

- 3.9 At the time of lodging this application, the applicants requested interim authorisation to make and give effect to all contracts, arrangements or understandings relating to the common terms and conditions (including price) on which Liquefied Petroleum Gas (LPG) produced by the Otway Gas Project for and on behalf of Woodside and Benaris will be offered for sale and to jointly market and sell that LPG to a common customer or common customers. The ACCC granted interim authorisation sought on 29 July 2009.
- 3.10 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

- 3.11 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.



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Summary

The ACCC proposes to grant authorisation for an agreement between Woodside Energy Limited (Woodside) and Benaris International Pty Ltd (Benaris) on the common terms and conditions (including price) upon which LPG produced by the Otway Gas Project for and on behalf of Woodside and Benaris will be jointly marketed and sold.

Woodside and Benaris (the applicants) have sought authorisation to jointly market and sell their shares of LPG produced by the Otway Gas Project.

The applicants are two of the four joint-venture partners in the Otway Gas Project, which involves the development of gas fields off the south-west coast of Victoria, near Port Campbell. The Otway project supplies approximately four per cent of LPG produced in the Victorian and South Australian LPG production basins.

Woodside has an approximately 52 per cent share in the Otway joint venture project and Benaris an approximately 13 per cent share, meaning that the volume of LPG the applicants propose to jointly market and sell represents around three per cent of total LPG produced in the Victorian and South Australian LPG production basins.

The applicants have been jointly marketing their shares of LPG produced by the Otway project since 2008 under an authorisation previously granted by the ACCC. This authorisation expired on 20 April 2009.

Benaris does not currently have any Australian-based marketing, administration, operations or logistics capacity, making it difficult for it to separately market its share of LPG produced by the Otway project. If Benaris did not enter into joint-marketing arrangements with Woodside it would be likely to sell its share of LPG produced by the project to one of the other joint-venture partners.

The ACCC considers that jointly marketing its share of LPG produced by the project with Woodside, rather than selling its share to one of the project partners, will result in some, small, transaction-cost savings for Benaris.

The ACCC considers that the proposed arrangements will generate little, if any, anti-competitive detriment and are unlikely to affect the wholesale price of LPG. The combined volume of LPG to be jointly marketed by Woodside and Benaris represents less than three per cent of total Victorian and South Australian 'naturally occurring' (non-refinery) production and, absent the joint-marketing arrangements, Benaris would be likely to sell its share to one of the other joint-venture participants in any event.

The ACCC considers that the public benefit will outweigh the public detriment and proposes to grant authorisation for three years.

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

On 6 May 2009 the ACCC granted interim authorisation to the proposed arrangements. 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.

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1. The application for authorisation

- 1.1 On 16 April 2009 Woodside Energy Limited (Woodside) and Benaris International Pty Ltd (Benaris) jointly lodged application for authorisation A91135 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 this application is contained in Attachment B.
- 1.3 Application A91135 was made 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.
- 1.4 In particular, Woodside and Benaris applied for authorisation to continue to make and give effect to all contracts, arrangements or understandings relating to the common terms and conditions (including price) on which Liquefied Petroleum Gas (LPG) produced by the Otway Gas Project for and on behalf of Woodside and Benaris will be offered for sale and to jointly market and sell that LPG to a common customer or customers. The applicants seek authorisation for three years.
- 1.5 In effect, Woodside will market and sell Benaris' share of LPG produced by the Otway project jointly with its own share.
- 1.6 The Otway Gas Project involves the development of the Thylacine and Geographe gas fields off the south-west coast of Victoria, near Port Campbell. The project is an unincorporated joint venture between Woodside, Benaris, Origin Energy Resources Pty Ltd (Origin) and CalEnergy Gas (Australia) Pty Ltd (CalEnergy). The participants' project shares are as follows
- Woodside - 51.55 per cent
 - Origin – 30.75 per cent
 - Benaris – 12.7 per cent
 - CalEnergy – five per cent
- 1.7 The applicants state that contracts for the sale of LPG in Victoria are negotiated each year in October to December and are typically for one-year starting on 1 January of the following year. Therefore, the applicants state that they need to start negotiating terms and conditions, including price, for project gas delivered in 2010 in mid October 2009.
- 1.8 On 29 March 2006 the ACCC authorised Woodside, Benaris and CalEnergy to undertake for three years similar joint-marketing and sales arrangements to those the subject of the current application (authorisation A90990). On 7 November 2006 the

ACCC was informed that CalEnergy had decided to market its share of Otway LPG separately.

- 1.9 The Otway project began supplying LPG in May 2008 and to date Woodside and Benaris have jointly marketed and sold their shares to the gas distributor-retailer Elgas. Elgas sells both traditional-use/bottled gas and automotive gas (under the Unigas banner).
- 1.10 The 2006 authorisation expired on 20 April 2009.

Interim authorisation

- 1.11 On 16 April 2009 the applicants sought interim authorisation from 20 April 2009 for the proposed arrangements.
- 1.12 On 6 May 2009 the ACCC granted interim authorisation. In granting interim authorisation, the ACCC stated that it considered the protection provided by interim authorisation would allow Woodside and Benaris to continue to jointly market LPG while the ACCC considered the substantive application.
- 1.13 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.

2. Background to the application

LPG

- 2.1 LPG is an internationally traded and globally significant energy and transport fuel and can be considered reasonably homogeneous in its basic nature across the world. LPG is effectively a shorthand name for liquefied forms of the gases propane and butane or a mix of the two. LPG is used in Australia in or as:
- automotive LPG or ‘Autogas’ – the largest use in Australia, including south-eastern Australia (in Victoria and South Australia, the automotive LPG market is predominately supplied with a half propane-half butane mix)
 - ‘traditional’ uses (essentially propane only), such as
 - for industrial equipment and vehicles, including forklifts
 - in commercial/industrial applications such as pottery kilns and commercial ovens
 - in homes and businesses for such uses as cooking, heating and hot water systems (often taken from 45 kg cylinders)
 - for leisure activities such as for barbeques and camping stoves
 - a feedstock for the petrochemical industry
- 2.2 LPG is derived from two sources. ‘Naturally occurring’ LPG (about 80 per cent of Australian LPG production) is extracted with other hydrocarbons, such as natural gas and ‘condensate’, from offshore and onshore fields and separated out at gas-processing facilities. Depending on an individual project’s characteristics and intentions, the extraction of LPG may be a secondary priority to or by-product of extracting natural gas. ‘Refined LPG’ is produced as a by-product of the process for refining hydrocarbons into such distinct fuels as petrol and diesel.

LPG in Victoria and South Australia

- 2.3 Australia’s main LPG production basins are found in Western Australia (including the Carnarvon Basin and smaller Perth Basin) and Victoria/South Australia (being the Gippsland, Bass, Otway and Cooper basins).
- 2.4 Australia is a net exporter of LPG, with the majority of exports produced in the North West Shelf of Western Australia. Victoria is the nation’s second-largest LPG exporter by state. The applicants submit that almost 40 per cent of LPG now produced in Victoria is exported.
- 2.5 Victoria’s has three main natural-gas/LPG production-field areas, or ‘basins’. They are the Gippsland Basin (where Esso-BHP Billiton’s fields lie), the Bass Basin (where the Origin-operated BassGas or Yolla development is found) and the Otway Basin (site of

the Otway Gas Project). Some of the field areas are in Tasmanian waters but all production is piped back to Victoria.

- 2.6 There are two refineries in Victoria producing LPG as a by-product, Shell's refinery at Lara near Geelong and ExxonMobil's refinery at Altona in Melbourne.
- 2.7 LPG is produced in South Australia from the Santos-operated Cooper Basin fields (separated from the field's natural gas at Port Bonython). Production from these fields is considered to be declining. Exxon-Mobil's Port Stanvac refinery previously supplied a large part of South Australia's LPG but it is now mothballed and there are no other refineries operating in South Australia. Some LPG is at times trucked in from interstate.¹
- 2.8 The applicants state that, based on Australian LPG Association figures, South Australia now has a small surplus of LPG but is expected to become a net importer in 2011.
- 2.9 While Australia is a net exporter of LPG, it also imports propane in the Eastern states of Australia. Shipping and infrastructure factors make it more economical to import propane directly from the Middle East. The main importing facility in the Eastern states is the Elgas-operated Sydney Cavern. Domestic sales of propane are also supplemented by production from local fields and refineries.
- 2.10 Victoria is Australia's largest LPG consumer. Victorian retail automotive LPG sales represent about 40 per cent of total Australian retail automotive LPG sales. Around 64 per cent of all LPG consumed in Victoria is Automotive LPG. In South Australia around 60 per cent of LPG consumed is automotive LPG.

LPG Pricing

- 2.11 With respect to wholesale LPG prices the applicants submit the following:

In Australia virtually all LPG sold at the wholesale level is priced on the basis of the monthly Saudi CP for propane or butane plus a premium.

The CP is the price for LPG delivered FOB at Ras Tanura, Saudi Arabia. Producers in Australia add to the CP a premium to reflect the notional cost of transporting LPG from Saudi Arabia to Australia and the cost of an import terminal. The premium is known as the 'Import Parity Price' (IPP).

The buyer is generally responsible for transporting LPG and most wholesale LPG is sold on a 'Free Carriage' (FCA) or 'Free on Board' (FOB) basis at the terminal. The CP and the premium are in US dollars. For domestic LPG, the CP and premium are usually converted to Australian dollars by using the average US dollar/Australian dollar exchange rate (ER) over the previous month. In addition, a terminal fee is usually charged. The pricing formula is:

$$\text{Domestic LPG Price} = (\text{CP} + \text{premium}) / \text{ER} + \text{terminal fee}$$

All domestic LPG is currently sold on this basis, the only difference between producers is the premium price and terminal fee.

¹ South Australia Parliament, 23 July 2008, *Report of the Select Committee on Pricing, Refining, Storage and Supply of Fuel in South Australia*, p5

- 2.12 The ACCC's inquiries similarly suggest that Australian wholesale prices for LPG are based on the Saudi Contract Prices (Saudi CPs) for propane and butane, which are the internationally recognised reference prices for LPG. Saudi Arabia is the world's largest net exporter of LPG while Japan is the most significant importer of propane and butane in the Asia-Pacific region. There is a separate price for propane and butane published under the Saudi CP but for ease of reference this draft determination refers to a single Saudi CP level. The Saudi CP is set at the start of each month and is valid for a month.
- 2.13 The ACCC notes that Australia is both an LPG importer (of propane in the Eastern states) and LPG exporter (of propane and butane from Western Australia, South Australia and Victoria) and that the setting and level of wholesale or upstream LPG prices may vary across Australia.
- 2.14 The import parity price for LPG, which includes the Saudi CP, the cost of international freight, local terminal fees and a premium, normally provides a ceiling price for domestic LPG. Domestic wholesale prices are set in reference to the import parity price, but can be marginally lower in locations where there is excess domestic supply of LPG. Seasonal factors and changes in production can also impact on the pricing of domestic LPG. However, the main factors influencing domestic LPG prices are the movements in the international benchmark price (the Saudi CP) and the Australian/US dollar exchange rate.

The applicants and the Otway Gas Project

- 2.15 The Otway project is an unincorporated joint venture between Woodside, Benaris, Origin and CalEnergy.
- 2.16 Joint ventures are common in the global energy industry, typically from the conception of a project and the initial exploration phase. As the Australian Energy Regulator has stated:

The [oil and gas] exploration process is characterised by large sunk costs and relatively low probability of success...Given the cost and risk characteristics, exploration tends to be undertaken through joint venture arrangements to enable costs to be shared. If exploration is successful, the joint venture parties may proceed to the production phase or sell their interest to other parties.²

- 2.17 Woodside is part of an oil and gas exploration/production group headquartered in Perth, Western Australia and listed on the Australian Securities Exchange. The Woodside group states that is one of the world's leading producers of liquefied natural gas³ (LNG - principally methane, largely for export) and has energy production, development-project or exploration assets/interests in areas other than Victoria including:

- off Western Australia (including the Carnarvon Basin's North West Shelf venture; and Browse Basin, off the Kimberley region)
- in the Timor Sea between Darwin and East Timor (Greater Sunrise)
- Algeria and Libya

² AER *State of the Energy Market 2008* p222

³ www.woodside.com.au, viewed on 19 May 2009

- The Gulf of Mexico and Brazil
- 2.18 The applicants state that the North West Shelf Venture, which Woodside operates, supplies most of Western Australia's domestic gas requirements (although it is overwhelmingly focused on exporting liquefied natural gas). The applicants state that participation in the Otway project in Victoria provides Woodside with the opportunity to supply gas to Victoria and South Australia. Woodside has no other LPG interests in south-eastern Australia.⁴ Woodside's part owner, Shell, produces LPG at its refinery at Altona in Victoria.
- 2.19 Benaris is an affiliate of Pexco NV, a Netherlands Antilles-incorporated company. Pexco NV is affiliated with the Malaysian industrial group Usaha Tegas. The applicants state that Benaris' principal activity is oil and gas exploration, that it has other exploration interests in Australia and interests in Asia and Africa, and that its participation in the Otway project gives it the opportunity as a commercial enterprise to supply pipeline gas, condensate (another source or form of hydrocarbon) and LPG to Victoria and South Australia.
- 2.20 Benaris has appointed Woodside to represent Benaris in selling Benaris' share of LPG from the Otway project.
- 2.21 Around four per cent of 'naturally occurring' LPG production in the Victorian and South Australian basins is from the Otway project. Woodside's approximately 52 per cent share in the project equals about two per cent of Victorian and South Australian naturally occurring production and Benaris' approximately 13 per cent share is less than one per cent of total Victorian and South Australian naturally occurring production.⁵

Previous authorisations

- 2.22 As noted, the ACCC first authorised Woodside, Benaris and CalEnergy to jointly market their shares of Otway project LPG on 29 March 2006. That authorisation expired on 20 April 2009.
- 2.23 CalEnergy subsequently advised that it would market its share of Otway project LPG independently of Woodside and Benaris.

⁴ Woodside sold its interest in the Kipper field in Bass Strait to Santos in 2006.

⁵ The data on shares of naturally occurring LPG production have been obtained from production reports available from company websites. Conversion rates from tonne to litres vary according to the actual content of the LPG supplied (propane or butane or a mix of the two). Note that LPG specific production data was not available for the Gippsland basin. Note also that while Bass basin lies in Tasmanian waters, the LPG produced is sent via pipeline to Victoria for processing at Lang Lang.

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.
- 3.2 Copies of public submissions are available from the ACCC website (www.accc.gov.au) by following the ‘Public Registers’ and ‘Authorisations Public Registers’ links. A summary of public submissions received from the applicants and interested parties follows.
- 3.3 The applicants submit that:
- Woodside personnel situated in Perth and on-site at the project will attend to marketing, contract administration and scheduling and logistics in respect of the combined shares of Woodside and Benaris in project LPG, which will result in significant savings in administrative and logistical costs to Benaris.
 - It would be commercially impracticable for Benaris to separately market its share of LPG produced by the project at competitive rates as Benaris does not have marketing, contract administration, operations or logistics staff in Australia; there would be logistical difficulties in arranging trucking of Benaris’ small share of LPG; and Benaris might not be able to sell its project share to major customers who require larger quantities of LPG per cargo.
 - If Benaris were to sell its entitlements to either Woodside or Origin, rather than jointly market it with Woodside, prior to doing so Benaris would have to undertake market-testing reviews to determine a fair market price. It is likely that this would need to be done on an annual basis. Benaris would incur fees for those market testing reviews and for legal and commercial advice in relation to the sale. This would add delay and additional costs.
 - Although joint marketing may result in a reduction in the total number of effective competitors and thereby limit the choice of suppliers in the LPG market in Victoria, the applicants submit that the real effect on competition would be minimal given the small market share of Benaris and the uncompetitive cost structure if it were forced to market separately.
- 3.4 The ACCC sought submissions from 21 parties potentially affected by the application or considered able to help in the ACCC’s consideration of it, including producers, distributors, retailers, motorist and consumer advocates and government departments.
- 3.5 Most interested parties that responded to the ACCC’s request for submissions advised either that they had no comment or that they did not consider that the arrangements would impact significantly on competition.

- 3.6 The Royal Automobile Club of Victoria submitted that it supported any project designed to enhance local fuel production and security but such projects should include full consideration of sustainability principles, including environmental impacts.
- 3.7 Shell⁶ submitted that the proposed arrangements would not adversely affect competition but should provide another potential supply point for the South Australian market where there was now one supplier only and provide a supply hub for western Victoria, providing the benefit of reduced freight costs to that market. Shell submitted that if joint marketing facilitated this production being brought to market, then this should make a positive contribution to a competitive market.

⁶ Shell Energy Holdings Australia Ltd owns about 34 per cent of Woodside Energy Ltd's parent company, Woodside Petroleum Ltd: *Woodside Annual Report 2008*, p122; 22 May 2009, Macquarie Research, *Woodside Petroleum*, p5

4. ACCC evaluation

4.1 The ACCC's evaluation of the proposed arrangements is in accordance with the tests found in 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.

4.2 For more information about the tests for authorisation and relevant provisions of the Act, please see [Attachment C](#).

The market

4.3 A 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.

4.4 The applicants submit that the relevant market definition is LPG (propane, butane and mixed) supplied mainly to Victorian and South Australian markets.

ACCC view

4.5 For the purpose of assessing this application, the ACCC considers the relevant area of competition affected by the proposed conduct to be that for the wholesale supply of LPG (including propane, butane and mixtures of the two) in Victoria and South Australia.

4.6 In this respect it is relevant to note that:

- Australia's main LPG production basins are found in Western Australia (including the Carnarvon Basin and smaller Perth Basin) and Victoria/South Australia (being the Gippsland, Bass, Otway and Cooper basins) but LPG is not transferred between the two
- about 40 per cent of Victorian LPG production is exported
- South Australia now produces a small surplus of LPG but is expected to become a net importer by 2011
- Woodside's and Benaris' joint share of production from the Otway basin accounts for about 3 per cent of total naturally occurring LPG production in Victoria
- wholesale prices for Victoria and South Australia are generally set at, or marginally below, import parity prices. The main factors influencing domestic LPG prices are the movements in the international benchmark price (the Saudi CP) and the Australian/US dollar exchange rate.

The 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.⁷
- 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 The applicants state that without joint marketing Benaris may sell its project LPG entitlements to Woodside or Origin. Specifically, the applicants submit that, due to the small volume of Benaris’ share of LPG produced by the joint venture, it would be commercially impractical for Benaris to separately market and sell its share at competitive rates.

ACCC view

- 4.10 Broadly, absent the proposed arrangements, Benaris’ options include choosing to sell its share of LPG from the Otway project to one of the other joint-venture partners, most likely Origin or Woodside, separately marketing its share of production or withdrawing from the joint-venture arrangements.
- 4.11 The ACCC notes that CalEnergy, which has a smaller share of the joint-venture production than Benaris, was originally a participant in the proposed joint-marketing arrangement but subsequently chose to market its share of the joint-venture production separately.
- 4.12 The applicants submit that they understand that CalEnergy has a Victorian office and marketing capacity from that office and that its internal marketing costs are shared between its Otway and BassGas project activities. The applicants submit that these operational synergies mean that CalEnergy is better placed to separately market its share of production from the Otway project than Benaris, which does not have any Australian-based marketing, administration, operations or logistics capacity.
- 4.13 The ACCC notes that the combined volume of LPG production available to CalEnergy through its BassGas and Otway activities is not significantly larger than the volume of LPG available to Benaris through the Otway project alone. However, the fact that CalEnergy has Australian-based administration and marketing operations means that it is more readily able than Benaris to separately market its share of LPG production.
- 4.14 While it would be open to Benaris to establish local marketing and administrative arrangements, the ACCC considers that the cost involved in doing so relative to Benaris’ share of LPG produced by the joint venture means that the most likely counterfactual, should the joint-marketing arrangements not proceed, would be that

⁷ 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.

Benaris would be likely to sell its share of the joint venture's production to one of the other joint-venture partners.

Public benefit

4.15 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.⁸

Administrative cost savings

4.16 The applicants submit that, due to the small volumes of LPG available to Benaris through the joint venture, it would be impractical for Benaris to separately market and sell its share of LPG produced. The applicants submit that if Benaris separately marketed its share of production it would incur significant additional costs in engaging its own marketing, administration, and support personnel.

4.17 The applicants also submit that if Benaris was to sell its entitlements to another joint-venture partner it would need to undertake market tests in order to establish market prices on an annual basis, as well as incurring fees for commercial and legal advice in relation to the sale.

ACCC view

4.18 As noted at paragraph 4.14, the ACCC considers that if the joint-marketing arrangements did not continue, Benaris would be likely to sell its share of the joint venture's LPG production to one of the other project partners.

4.19 Given that absent the proposed joint-marketing arrangements Benaris would, as the applicants themselves argue, be likely to sell its share of LPG produced to one of the other joint-venture partners, the ACCC does not consider that the extent of the administrative-cost savings likely to follow from the proposed arrangements to be significant. That is to say, absent the proposed arrangements Benaris would be unlikely to incur the marketing, administration and support personnel costs claimed by the applicants.

4.20 However, the ACCC considers that there is likely to be some benefits to the public arising through transaction-cost savings in Benaris and Woodside jointly marketing their entitlements when compared with the situation of Benaris selling its entitlements to another joint-venture partner.

4.21 While there would be likely to be some transaction costs involved in negotiating an agreement between Woodside and Benaris to jointly market their entitlements, the transaction costs involved are likely to be less than if Benaris was to negotiate the sale of its share. In particular, Benaris would avoid the cost of having to test the market and negotiate a sale price with one of the other joint-venture partners.

⁸ 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.

Transport and logistics cost savings

4.22 The applicants submit that joint marketing has permitted a certain level of truck optimisation as one set of personnel from Woodside is responsible for scheduling logistics, which assists the plant in managing:

- truck logistics to minimise community and driver impacts
- compliance with restrictions on the trucking of LPG
- compliance with mitigation measures for environmental protection.

4.23 The applicants also submit that the joint-marketing arrangements will assist in driver-fatigue management and managing truck queuing during peak times.

ACCC view

4.24 The ACCC considers that co-ordination between joint-venture partners that assists in managing these issues is likely to produce a public benefit. However, for the reasons discussed above, it is not clear that these issues would be any more effectively managed through Woodside and Benaris jointly marketing their LPG entitlements than if Benaris was to sell its entitlement to another joint-venture partner. In either case Woodside or another joint-venture partner would control Benaris' share of LPG production and there would be no need to coordinate with Benaris in relation to issues such as traffic optimisation.

Better management of community issues

4.25 The applicants also submit that because Woodside has a presence in the local community it is better placed to manage community issues, for example, through the operation of a free telephone-call line available to community members to express their concerns about issues such as trucking.

4.26 While the ACCC considers that there is a public benefit in efficiently managing issues of community concern around the joint-venture project, the applicants have provided no information to suggest that these issues will be better managed through Benaris and Woodside jointly marketing their entitlements than if Benaris was to sell its entitlement to another joint-venture partner.

Public detriment

4.27 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.⁹

4.28 The applicants submit the joint-marketing arrangements may result in a reduction in the total number of competitors, thereby limiting the choice of suppliers of LPG. However, the applicants submit that the actual effect on competition of the arrangements would

⁹ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

be minimal, given Benaris' small volume of LPG and its 'uncompetitive' cost structure if it was forced to market its LPG separately.

- 4.29 The two interested parties that commented on this issue, Shell and the Victorian Department of Primary Industries, both also submitted that the proposed arrangements would not substantially lessen competition.

ACCC view

- 4.30 The joint-marketing arrangement for which the applicants are seeking authorisation is intended to establish common terms and conditions (including price) for the sale of their respective shares of LPG produced from the Otway project and to allow the joint marketing and sale of that LPG.
- 4.31 Competition between buyers and sellers ordinarily directs resources to the most productive use. Where buyers or sellers collude on the terms or conditions of acquisition or supply, competition can be distorted and resources directed to less efficient uses. This distortion in competition can often result in increased prices to consumers, less choice, lower quality of product or services and increased costs to producers than would otherwise exist.
- 4.32 However, as discussed in the ACCC's consideration for the public benefits of the proposed arrangement, if the joint-marketing arrangements did not proceed, Benaris would be likely to sell its share of the joint venture's production to one of the other joint-venture partners. As such, the proposed arrangements do not appear to reduce the number of suppliers of LPG produced by the Otway project.
- 4.33 Further, even if the counterfactual was Benaris independently marketing its share of LPG, the ACCC notes that the difference in the amount of LPG Woodside would market under this scenario and under the arrangements presented for authorisation would be small in relation to overall Victorian/South Australian production and sales volumes.
- 4.34 In particular the ACCC notes that the final amount Woodside controls in each case is similarly relatively small: under the proposed arrangements Woodside would control about 3 per cent of LPG produced in the Victorian and South Australia LPG production basins; while if Benaris marketed separately, Woodside would control about 2 per cent.
- 4.35 In addition, LPG prices in Victoria are largely determined by movements in the international benchmark price (the Saudi CP) and the Australian/US dollar exchange rate.
- 4.36 Therefore the ACCC considers that the proposed joint-marketing arrangement is likely to generate little, if any, anti-competitive detriment and in particular, is unlikely to affect the wholesale price of LPG, given:
- absent authorisation, Benaris is likely to sell its share of LPG production from the Otway project to one of the other joint-venture partners
 - the separate marketing of the remaining significant participant in the Otway Project, Origin

- the small market share of LPG produced by the Otway Project and the resulting competitive constraint provided by other LPG producers from other gas fields and refineries.

Balance of public benefit and detriment

- 4.37 In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
- 4.38 In the context of applying the net public benefit test at section 90(8)¹⁰ of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.¹¹
- 4.39 For the reasons outlined in this chapter, the ACCC considers that the likely public benefits resulting from the proposed joint-marketing arrangements, in comparison with the likely alternative situation of Benaris selling its entitlement to another project partner such as Woodside or Origin, although small, will be more than negligible. In particular, the proposed arrangements are likely to result in some transaction-cost savings for Benaris.
- 4.40 The ACCC considers that the proposed arrangements will generate little, if any, anti-competitive detriment and are unlikely to affect the wholesale price of LPG given that:
- the combined volume of LPG to be jointly marketed by Woodside and Benaris represents less than three per cent of total Victorian and South Australian naturally occurring production and
 - absent the joint-marketing arrangements, Benaris would be likely to sell its share of LPG produced by the Otway basin to another partner in the joint venture in any event.
- 4.41 Accordingly, the ACCC considers that the public benefit likely to result from the arrangements will outweigh the public detriment.

Length of authorisation

- 4.42 The Act allows the ACCC to grant authorisation for a limited period of time.¹² 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.
- 4.43 In this instance, the applicants seek authorisation for three years.

¹⁰ 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.

¹¹ Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.

¹² Section 91(1).

4.44 The ACCC proposes to grant authorisation for three years. In doing so the ACCC notes the applicants' submissions that LPG sales arrangements in south eastern Australia are negotiated annually and that they have only been jointly marketing since 2008. Given this, if the applicants were to seek reauthorisation at the expiration of the proposed authorisation, the ACCC expects that they would be in a position at that time to provide data demonstrating the cost savings that may have flowed from the proposed arrangements.

5. Draft determination

The application

- 5.1 On 16 April 2009 Woodside Energy Limited and Benaris International Pty Ltd jointly lodged application for authorisation A91135 with the Australian Competition and Consumer Commission (the ACCC).
- 5.2 Application A91135 was made using Form B, Schedule 1 of the Trade Practices Regulations 1974. The application was made under subsection 88 (1) of the Act for an agreement between Woodside Energy Limited and Benaris International Pty Ltd in relation to all contracts, arrangements or understandings relating to the common terms and conditions (including price) upon which LPG produced by the Otway Gas Project for and on behalf of each of Woodside and Benaris will be offered for sale and jointly marketed to a common customer or customers.

The net public benefit test

- 5.3 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.

Conduct for which the ACCC proposes to grant authorisation

- 5.4 The ACCC proposes to grant authorisation to Woodside and Benaris to jointly market and sell their shares of LPG produced by the Otway Gas Project.
- 5.5 The ACCC proposes to grant authorisation for three years.
- 5.6 This draft determination is made on 1 July 2009.
- 5.7 The attachments to this determination are part of the draft determination.

Interim authorisation

- 5.8 At the time of lodging the application, the applicants requested interim authorisation for the proposed arrangements. The ACCC granted interim authorisation on 6 May 2009.
- 5.9 Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Further submissions

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

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

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

DATE	ACTION
16 April 2009	Application for authorisation lodged with the ACCC, including an application for interim authorisation.
30 April 2009	Closing date for submissions from interested parties in relation to the request for interim authorisation.
6 May 2009	The ACCC stated that it had granted interim authorisation.
15 May 2009	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
20 May 2009	Applicants responded to ACCC request for further information.
1 July 2009	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.¹³

¹³ *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.

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.¹⁴

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.¹⁵

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 future¹⁶
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.¹⁷

Six-month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation¹⁸. 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 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.

¹⁵ Section 91(3).

¹⁶ Section 88(10).

¹⁷ Section 88(6).

¹⁸ 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.¹⁹ 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.²⁰

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.²¹ The ACCC may also review an authorisation with a view to revoking it in certain circumstances.²²

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.²³ The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.²⁴

¹⁹ Subsection 91A(1)
²⁰ Subsection 87ZD(1).
²¹ Subsection 91B(1)
²² Subsection 91B(3)
²³ Subsection 91C(1)
²⁴ Subsection 91C(3)