



Australian  
Competition &  
Consumer  
Commission

# Determination

## Applications for authorisation

**lodged by**

**Rio Tinto Aluminium Limited & Ors**

**in respect of**

**amendments to agreements in relation to electricity generated by the Gladstone Power Station and supplied to the Boyne Island Smelter and the National Electricity Market**

**Date: 2 June 2010**

**Authorisation no.:** A91205–A91207

**Public Register no.:** C2010/40

**Commissioners:** Samuel  
Kell  
Schaper  
Court  
Dimasi  
Walker  
Willett

## Summary

The ACCC grants conditional authorisation to Gladstone Power Station Joint Venture Participants for amendments to agreements in relation to electricity generated by the Gladstone Power Station and supplied to the Boyne Island Smelter and the National Electricity Market. The ACCC grants authorisation until 29 March 2029.

On 24 December 2009, Rio Tinto Aluminium Limited (**Rio Tinto Aluminium**) lodged applications for authorisation A91205–A91207 with the ACCC.

Rio Tinto Aluminium seeks authorisation on behalf of itself and the participants in the Gladstone Power Station (**GPS**) Joint Venture for amendments to agreements in relation to electricity generated by the GPS and supplied to the Boyne Island Smelter and the National Electricity Market (**NEM**) (the amended GPS Agreements).

The ACCC considers that the amendments to the GPS Agreements provide a mechanism through which the parties can continue to obtain a secure, reliable and cost effective supply of power to the Boyne Island Smelter, which in turn would be likely to deliver public benefits by contributing to the value of exports and the development of the Australian economy. The ACCC also considers that the amendments are likely to deliver benefits by providing for a mechanism that facilitates the supply of electricity into the NEM and enhances the flexibility of Stanwell's use of the GPS to participate in the NEM.

The ACCC considers that the amendments to the GPS agreements are unlikely to give rise to any significant competition detriments in the market for the supply and acquisition of wholesale electricity in Queensland, and the relevant markets for the supply of primary aluminium. In particular, the ACCC has taken into account that the GPS represents a relatively small proportion of power supplied in the Queensland electricity market, especially after the supply of electricity dedicated to the Smelter, and the existence of other aluminium producers across Australia.

On balance, the ACCC is satisfied that the public benefits likely to result from the amendments to the GPS Agreements will outweigh the likely public detriments.

The ACCC grants authorisation for the term of the Interconnection and Power Pooling Agreement, that is, until 29 March 2029, and not any extended period.

If no application for review of the determination is made to the Australian Competition Tribunal, the determination will come into effect on 24 June 2010.

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## List of abbreviations

ACCC	Australian Competition and Consumer Commission
The Act	<i>The Trade Practices Act 1974</i>
GPS	Gladstone Power Station
The GPS Agreements	IPPA Interconnection and Power Pooling Agreement
	JVA Joint Venture Agreement for the Gladstone Power Station Joint Venture
	CPAs Capacity Purchase Agreements – one for each of the seven Gladstone Power Station Joint Venture Participants
	PPAs Power Purchase Agreements – the Master Power Purchase Agreement, the Block A Power Purchase Agreement and the Block B Power Purchase Agreement
	OMA Operation and Maintenance Agreement
	PSAAs Power Sales Administration Agreements - one for each of the seven Gladstone Power Station Joint Venture Participants
The amended GPS Agreements	The GPS Agreements restated/amended to reflect primarily the introduction of the National Electricity Market
Joint Venture or GPS Joint Venture	Gladstone Power Station Joint Venture
Joint Venture Participants	The participants in the Gladstone Power Station Joint Venture: <ul style="list-style-type: none"><li>▪ GPS Energy Pty Limited</li><li>▪ GPS Power Pty. Limited</li><li>▪ Sunshine State Power B.V.</li><li>▪ Sunshine State Power (No.2) B.V.</li><li>▪ SLMA. GPS Pty Ltd</li><li>▪ Ryowa II GPS Pty Ltd</li><li>▪ YKK GPS (Queensland) Pty Limited</li></ul>
NEM	National Electricity Market
Rio Tinto Aluminium	Rio Tinto Aluminium Limited
The Smelter	Boyne Island Smelter

# 1. The applications for authorisation

- 1.1. On 24 December 2009, Rio Tinto Aluminium Limited (**Rio Tinto Aluminium**) lodged applications for authorisation A91205–A91207 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 A91205 was made under sections 88(1A) and 88(1) of the Act to make and give effect to a provision of a contract, arrangement or understanding, a provision of which is, or may be, a cartel provision and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act.
- 1.4. Application A91206 was made under sections 88(1A) and 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 be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
  - 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.
- 1.5. Application A91207 was made under section 88(8) of the Act to engage in conduct that constitutes or may constitute exclusive dealing.
- 1.6. In particular, Rio Tinto Aluminium is seeking authorisation on behalf of itself and the participants in the Gladstone Power Station (**GPS**) Joint Venture for amendments to agreements in relation to electricity generated by the GPS and supplied to the Boyne Island Smelter and the National Electricity Market (the amended GPS Agreements). The ACCC notes some inconsistency in the applicants’ application and submission with regard to whether authorisation is sought for the amendments only or for the amended agreements in their entirety. As discussed with the applicants, the ACCC has taken the view that it is appropriate to consider authorisation solely for the amendments, taking into account that the applicants have not applied for revocation and substitution of the 1994 authorisation in relation to the agreements in unamended form. The relevant amendments are described in further detail below.
- 1.7. The GPS Joint Venture seeks authorisation for a period of:
  - 45 years; or

- the term of the Interconnection and Power Pooling Agreement (**IPPA**) (which extends to 29 March 2029) and any extended term pursuant to the exercise of the option under the terms of the IPPA,

whichever is the earlier.

## Other parties

- 1.8. The applicants have requested that any authorisation granted by the ACCC be expressed to apply to a person who becomes a party to the amended GPS Agreements after they are amended or after authorisation is granted, as permitted in section 88(10) of the Act.

## Amendments to the GPS Agreements

- 1.9. In the early 1990's the owners of the Boyne Island Smelter (**the Smelter**) decided to increase the plant size and thus production output of the smelter. The Smelter's expansion was conditional on the acquisition of the GPS because of the importance of maintaining a secure and cost effective supply of electricity. Because of the substantial investment involved a joint venture was formed to acquire and operate the GPS (**the GPS Joint Venture**), which comprised of related parties of many of the joint venture owners of the Smelter.
- 1.10. In 1979 the consortium agreements relating to the construction and operation of the existing Smelter were granted authorisation<sup>1</sup> and in 1994, authorisation was granted in relation to the contractual arrangements which supported the proposed expansion and operation of the Smelter and the proposed acquisition and operation of the GPS.<sup>2</sup>
- 1.11. Since the introduction of the National Electricity Market (**NEM**), some of the agreements the subject of the 1994 authorisation have been amended to incorporate certain provisions so as to comply with the National Electricity Law and the National Electricity Rules, including Queensland-specific exemptions to the National Electricity Rules.
- 1.12. A description of the amendments to the GPS Agreements the subject of the application under consideration by the ACCC is set out below. Further information regarding the history of the GPS, the Smelter and the associated agreements is set out in Chapter 2.

## Joint Venture Agreement

- 1.13. The Joint Venture Agreement (**JVA**) sets out the GPS Joint Venture Participants agreement to form an unincorporated joint venture for the acquisition, operation and maintenance of the GPS. Under the amended JVA, the Joint Venture Participants have entered into arrangements or understandings regarding their participation having the following purpose or effect:

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<sup>1</sup> Trade Practices Commission, *Determination - Comalco Limited (A90265-A90271)*, 21 August 1979.

<sup>2</sup> Trade Practices Commission, *Determination - Comalco Limited and Comalco Aluminium Limited (A40062-A40070)*, 3 March 1994.

- the electricity generated by the GPS will be offered by the Nominated Generator on behalf of each Joint Venture participant at the same (or similar) prices; and
- all of the GPS generated electricity supplied to the NEM will be through the Nominated Generator.

### **Interconnection and Power Pooling Agreement**

1.14. The IPPA establishes arrangements whereby the GPS and the Smelter are interconnected with the Power System (as defined in the National Electricity Rules) and arrangements to ensure security of power supply to the Smelter.

1.15. The IPPA has been amended to take into account the introduction of the NEM in December 1998, and the commencement of the National Electricity Law and the National Electricity Code. The National Electricity Rules replaced the National Electricity Code in July 2005, also requiring amendments to the IPPA.

1.16. Key amendments to the IPPA include:

- the designation of Stanwell as the Nominated Generator in the NEM for the GPS;
- provision for Stanwell to bid the capacity of the GPS into the NEM;
- requirements for the Joint Venture Participants to dispatch the GPS in accordance with dispatch instructions received from the Australian Energy Market Operator;
- provisions for ancillary services provided to the NEM;
- amendments to reflect current names of each of the parties and to remove certain redundant terms and clauses;
- replacing what were previously the system control obligations with provisions that reflect the operation of the GPS in the NEM and the role of Powerlink;<sup>3</sup>
- amendments to deal with the reimbursement or indemnification of liabilities incurred by Stanwell in respect of the Smelter base load (810 MW) in its role as Nominated Generator in the NEM for the GPS under the *Renewable Energy (Electricity) Act 2000* (Cth);
- amendments to include dispatch incentives for the GPS to proactively maximise the available capacity of the GPS consistent with Stanwell's market interests;
- amendments in relation to the use of the GPS Combustion Turbine.

1.17. Specifically, the amendments to the IPPA have the effect that:

- Stanwell, as the Nominated Generator, will make dispatch offers in the NEM in respect of the GPS capacity;

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<sup>3</sup> Powerlink is a government-owned corporation that owns, develops, operates and maintains Queensland's high-voltage electricity transmission network (Powerlink website: [www.powerlink.com.au](http://www.powerlink.com.au), accessed 9 April 2010)

- Stanwell will compensate the Joint Venture Participants on the same terms for having the GPS available for sales of electricity in the NEM, excess generation, and in the event of Stanwell's wilful default; and
- The Joint Venture Participants will continue to supply Boyne Smelter Limited on the same terms, pay and receive a common price for capacity support and economy interchange energy, and (only in the case of financial default by Stanwell) may direct Stanwell as to how the GPS capacity (not paid for by Stanwell) should be bid.

### Capacity Purchase Agreements

- 1.18. The Capacity Purchase Agreements (**CPAs**) provide for the balance of capacity of the GPS to be made available to Stanwell by the Joint Venture Participants. There are seven separate CPAs between Stanwell and each of the Joint Venture Participants on the same or similar terms.
- 1.19. Each Joint Venture participant will make 'contract capacity' available to Stanwell, which is the GPS capacity remaining after dedication of capacity to supply power to the Smelter.
- 1.20. The CPA has generally been amended to reflect the amendments to the IPPA.

### Power Purchase Agreements

- 1.21. The Master Power Purchase Agreement defines the general conditions under which electricity is purchased by Boyne Smelter Limited for the purpose of supplying electricity to the Smelter. There are two long term take-or-pay power purchase agreements between the Joint Venture Participants and Boyne Smelter Limited:
- the Block A Power Purchase Agreement records the arrangements by which power is purchased by Boyne Smelter Limited for the purpose of supplying electricity to the first two potlines of the original Smelter; and
  - the Block B Power Purchase Agreement records the arrangements by which power is purchased by Boyne Smelter Limited for the purpose of supplying electricity to the third potline<sup>4</sup> expansion.
- 1.22. The Power Purchase Agreements (**PPAs**) have generally been amended, on a back to back basis, with the amendments to the IPPA.
- 1.23. Significant amendments to the PPAs include those related to those IPPA changes concerning:

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<sup>4</sup> Potlines consist of reduction cells (or 'pots') in which alumina is converted into aluminium. Reduction cells are large, steel, carbon lined furnaces into which electricity is introduced. The reduction cells are connected in a series by an aluminium busbar, which carries electrical current to the cells. (IBISworld, *C2722 – Aluminium Smelting in Australia – Industry Report*, 30 November 2009, pg. 13.) (Rio Tinto Alcan, viewed 8 April 2010, [http://www.riotintoalcan.com/ENG/whatweproduce/360\\_making\\_aluminium.asp](http://www.riotintoalcan.com/ENG/whatweproduce/360_making_aluminium.asp)).



- the basis for calculating capacity support payments in certain circumstances; and
- the security of supply provisions.

### **Operation and Maintenance Agreement**

- 1.24. The Operation and Maintenance Agreement (**OMA**) provides for the appointment of NRG Gladstone Operating Services Pty Limited, a wholly owned subsidiary of NRG Energy Inc., to operate and maintain the GPS on a day to day basis.
- 1.25. The OMA has been modified to reflect the changes made to the IPPA.

### **Power Sales Administration Agreements**

- 1.26. The Power Sales Administration Agreements (**PSAA**) establish arrangements for the administration of the sale of each Joint Venture Participant's share of power from the GPS. This has the effect of appointing NRG Gladstone Operating Services Pty Limited to administer the IPPA, CPAs and PPAs on behalf of each Joint Venture Participant.
- 1.27. The applicants submit that the only amendments to the PSAAs are those necessary to reflect changes in the IPPA and related GPS Agreements.

### **Draft determination**

- 1.28. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.
- 1.29. On 22 April 2010, the ACCC issued a draft determination proposing to grant authorisation to the specified amendments to the GPS Agreements until 29 March 2029.
- 1.30. The ACCC did not receive any interested party submissions.
- 1.31. The ACCC received submissions from the applicants in response to the draft determination.
- 1.32. A conference was not requested to discuss the draft determination.

## 2. Background to the applications

### The applicants

- 2.1. Rio Tinto Aluminium, previously known as Comalco Aluminium Limited, is the manager of the GPS Joint Venture. Rio Tinto Aluminium supplies bauxite, alumina and primary aluminium to Australia, New Zealand and other export markets. Rio Tinto Aluminium provides about 26% of Australia's total production of bauxite, 14% of its alumina and 26% of its primary aluminium.
- 2.2. Rio Tinto Aluminium is a wholly owned subsidiary of Rio Tinto Limited - a major international mining group headquartered in the UK, combining Rio Tinto plc, a London listed company, and Rio Tinto, which is listed on the Australian Securities Exchange.
- 2.3. In Australia, Rio Tinto Aluminium owns a bauxite mine at Weipa, North Queensland, an aluminium smelter at Bell Bay, Tasmania and an alumina refinery at Yarwun, Queensland.
- 2.4. Rio Tinto Aluminium has a substantial interest in the Boyne Island Smelter and the Queensland Alumina Limited refinery near Gladstone.
- 2.5. The Rio Tinto Group also has an interest in the Tomago Aluminium smelter, one of Australia's leading aluminium smelters and interests in a bauxite mine and alumina refinery at Gove in the Northern Territory.
- 2.6. The following table lists the participants in the GPS Joint Venture, their percentage interest in the joint venture and their parent entities. Rio Tinto Aluminium owns a total interest in the GPS of 42% (22.125 + 20) and NRG Energy owns a total of 37.5% (20 + 17.5).

**Table 1 Gladstone Power Station Joint Venture participant interest (per cent)<sup>5</sup>**

Joint Venture Participant	Parent Entity	Interest
GPS Energy Pty Limited	Rio Tinto Aluminium – owns GPS Nominee Pty Limited which owns GPS Energy Pty Ltd.	22.125%
GPS Power Pty. Limited	Rio Tinto Aluminium	20%
Sunshine State Power B.V.	NRG Energy, Inc	20%
Sunshine State Power (No.2) B.V.	NRG Energy, Inc	17.5%
SLMA. GPS Pty Ltd	<ul style="list-style-type: none"> <li>▪ Marubeni Corporation – owns 47.05% of the shares in SLMA. No.2 Pty Ltd, the holding company of SLMA GPS Pty Ltd.</li> <li>▪ Sumitomo Corporation – owns 47.05% of the shares in SLMA. No.2 Pty Ltd</li> <li>▪ Sumitomo Light Metal Industries Ltd – owns 5.9% of the shares in SLMA. GPS No.2 Pty Ltd.</li> </ul>	8.5%
Ryowa II GPS Pty Ltd	<ul style="list-style-type: none"> <li>▪ Mitsubishi Corporation wholly owns Ryowa Development II Pty Ltd, the holding company of Ryowa II GPS Pty Ltd</li> </ul>	7.125%
YKK GPS (Queensland) Pty Limited	YKK Corporation	4.75%

- 2.7. NRG Energy is a wholesale power generation company registered in the United States. NRG Energy is primarily engaged in the ownership and operation of power generation facilities and the sale of energy, capacity and related products in the United States and internationally. NRG has ownership interest in 44 power generating facilities.
- 2.8. Sumitomo Light Metal Industries Ltd is a Japanese company whose main products include aluminium, aluminium alloy, copper and copper alloy.
- 2.9. Marubeni Corporation is a Japanese company with eight main operating groups, including textiles, metals, machinery, development and construction, energy, chemicals, agri-marine and forest products, and general merchandise.
- 2.10. Sumitomo Corporation is a Japanese company with seven main operating groups including metals, machinery, chemicals and fuels, foodstuffs, textiles, construction and real estate and general products.
- 2.11. Mitsubishi Corporation is one of Japan's largest trading companies with major interest in information systems and services, fuels, metals (including aluminium), machinery, foods, chemicals and textiles.
- 2.12. YKK Corporation's major product lines include slide fasteners, aluminium architectural products, ferrous and nonferrous metal products, cotton, synthetic yard and narrow fabrics, precision machinery and die sets, and personal computer equipment.

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<sup>5</sup> Source: *Submission in support of applications for authorisation - Rio Tinto Aluminium Limited, 24 December 2009*

## History of the arrangements

### The Boyle Island Smelter

- 2.13. In 1979 Comalco Limited formed a joint venture for the construction and operation of an aluminium smelter on Boyne Island, near Gladstone in Queensland. The Smelter was constructed and is owned and operated by Boyne Smelter Limited, an incorporated joint venture between Rio Tinto Aluminium (who owns 59.39%), Sumitomo Light Metal Industries Ltd, Marubeni Corporation and Sumitomo Corporation, Mitsubishi Corporation, Mitsubishi Australia, Mitsubishi Materials Corporation, YKK Corporation and Sumitomo Chemical Company Ltd, including related or subsidiary entities.
- 2.14. Alumina supplied to the Smelter by each of the Boyne Smelter Limited joint venturers remains the property of the relevant joint venturer at all times, as does the aluminium produced by Boyne Smelter Limited from conversion of that alumina. The alumina is sourced from Queensland Alumina Limited's refinery, which is 80% owned by Rio Tinto.<sup>6</sup>

### The Gladstone Power Station

- 2.15. In the early 1990s, Comalco Limited and the other members of Boyne Smelter Limited decided to increase plant size to take advantage of economies of scale. The Smelter's expansion was conditional on the acquisition of the GPS because of the importance of maintaining a secure and cost effective supply of electricity.
- 2.16. Because of the substantial investment involved in this expansion and the critical importance of maintaining an adequate and economical supply of electricity, Comalco Limited formed a second joint venture, the GPS Joint Venture, to acquire and operate the GPS.
- 2.17. The unincorporated joint venture comprises related parties of many of the Boyne Smelter Limited joint venturers as well as NRG Energy Inc., a United States power company. The Joint Venture Participants own the GPS as tenants in common in undivided shares which correspond to their respective percentage interest in the project. The Joint Venture Participants have engaged NRG Gladstone Operating Services Pty Limited, a wholly owned subsidiary of NRG Energy Inc., to operate and maintain the GPS.
- 2.18. The GPS is Queensland's largest coal fired power station and is located nine kilometres from Queensland Alumina Limited's refinery and 24 kilometres from the Smelter.

### Authorisation

- 2.19. In 1979, the consortium agreements relating to the construction and operation of the existing Smelter were granted authorisation.<sup>7</sup> The authorisation application included the

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<sup>6</sup> Queensland Alumina Limited's website: [www.qal.com.au](http://www.qal.com.au), accessed 9 April 2010

<sup>7</sup> Trade Practices Commission, *Determination - Comalco Limited - A90265-A90271*, 21 August 1979

arrangements for the establishment of the Boyne Smelter Limited joint venture as well as agreements relating to alumina supply, tolling, conversion services, management and technical services, and long term power supplies.

- 2.20. In 1994, the Trade Practices Commission granted authorisation for the contractual arrangements which supported the proposed expansion and operation of the Smelter and the proposed acquisition and operation of the GPS (and the formation of the GPS Joint Venture).<sup>8</sup>
- 2.21. In 1999, Comalco Limited, on behalf of the GPS Joint Venture Participants, lodged applications for authorisation to amend the previously authorised agreements to accommodate the introduction of the NEM and comply with the National Electricity Code and the Queensland derogations. The ACCC granted the authorisation on condition the applicants provide copies of all signed agreements that were the subject of the determination (on the basis that where any agreement departed materially from the outline provided in the applications, the ACCC may review that aspect of the determination). As the agreements the subject of the 1999 determination were not executed, the applicants have taken the view that the 1999 authorisation is not effective. In order to remove doubt about any continuation of the 1999 determination and as the present application for authorisation supersedes the 1999 determination, the ACCC proposed to grant authorisation to the present applications subject to a condition that the applicants lodge an application with the ACCC for revocation of the 1999 determination in accordance with section 91B of the Act. On 19 May 2010, Rio Tinto Aluminium on behalf of Rio Tinto Aluminium (Holdings) Limited, lodged an application with the ACCC for revocation of the 1999 determination. As the proposed condition has been voluntarily complied with, it is not included in this determination.

## **Australia's electricity industry**

- 2.22. There have been significant changes to the Australian electricity sector since the GPS Agreements were authorised in 1994.

### *Queensland electricity industry*

- 2.23. At the time the GPS Agreements were entered into, the electricity supply industry in each state and territory was dominated by a single state owned authority (or collection of authorities) responsible for the generation, transmission and distribution of electricity.
- 2.24. In Queensland, the electricity supply industry consisted of the Queensland Electricity Commission, a vertically integrated government organisation, and seven regional Electricity Boards. The Queensland Electricity Commission was responsible for generation and transmission, while the Electricity Boards were responsible for the distribution of electricity to customers within their designated areas.
- 2.25. Electricity generation was based on a cost-based merit order system. Under this system, the Queensland Electricity Commission estimated electricity demand, dispatching the

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<sup>8</sup> Trade Practices Commission, *Determination - Comalco Limited and Comalco Aluminium Limited - A40062-A40070*, 3 March 1994

lowest cost generators first, then moving to higher cost generators, until demand was met.

- 2.26. Between 1995 and 1998, major changes were made to the structure of the Queensland electricity industry. In January 1995, the Queensland Electricity Commission was vertically separated into three government-owned electricity entities: the Queensland Generation Corporation, the Queensland Transmission and Supply Corporation (later known as the Queensland Power Trading Corporation) and the Queensland Electricity Transmission Corporation. The Queensland Generation Corporation operated the state-owned electricity generators throughout Queensland, while the Queensland Transmission and Supply Corporation and its subsidiary, the Queensland Electricity Transmission Corporation, were responsible for electricity transmission, distribution and retail functions.
- 2.27. In 1997, in preparation for the commencement of the NEM, the Queensland Generation Corporation was horizontally separated into three government owned generation companies – Stanwell, Tarong Energy and CS Energy. In early 1998, Queensland formed an interim electricity market in which these three generators and the Queensland Power Trading Corporation submitted dispatch offers and traded electricity. The Queensland Power Trading Corporation operated as a virtual generator, trading the capacity of a number of privately owned generators, including the GPS.

#### *National Electricity Market*

- 2.28. The structural reform of the electricity industry in the mid-1990's was not unique to Queensland. Throughout the eastern and southern states, there was significant structural reform. Potentially competitive generation and retail functions were separated from transmission infrastructure. While the nature of reforms differed from state to state, jurisdictions also generally split up generation and retail sectors into several competing businesses.
- 2.29. This structural reform was a necessary pre-requisite for the formation of the NEM. The NEM is an interconnected wholesale electricity market which now covers all Australian States and Territories, except Western Australia and the Northern Territory. It commenced operations in December 1998.
- 2.30. In the NEM all electricity is traded through a central pool. Generators compete with each other by submitting offers to supply electricity at particular prices (dispatch offers) to a central co-ordinator, the Australian Energy Market Operator. These offers are submitted every five minutes of every day. From all offers submitted, the Australian Energy Market Operator determines the generators required to produce electricity based on the principle of meeting prevailing demand in the most cost-efficient way. The Australian Energy Market Operator then dispatches these generators into production.
- 2.31. A dispatch price is determined every five minutes, and six dispatch prices are averaged every half-hour to determine the spot price for each trading interval for each of the regions of the NEM. The National Electricity Rules set a maximum spot price of \$10,000 per megawatt hour (MWh).<sup>9</sup>

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<sup>9</sup> From 1 July 2010, the maximum spot price will increase from \$10,000/MWh to \$12,500/MWh

- 2.32. The spot price can fluctuate dramatically. Market participants may manage the risk associated with this volatility through the use of financial contracts which ‘firm up’ the price at which electricity is traded.

### *Queensland derogations*

- 2.33. The actual operation of the NEM varies in each state because of jurisdictional derogations. These derogations allow jurisdictions to depart from defined rules governing the operation of the NEM. The derogations were initially designed to facilitate an orderly transition from State and Territory-based arrangements to the NEM, but were also used to preserve pre-existing contractual arrangements.
- 2.34. Included in the Queensland derogations are Exempted Generation Agreements. The Exempted Generation Agreements permit the appointment of a State entity as the nominated generator for certain privately owned electricity generators with pre-existing contractual arrangements, including the GPS. A nominated generator acts as a virtual generator, trading the capacity of the actual generator in the NEM. Its functions include submitting dispatch offers to the Australian Energy Market Operator. The Queensland Minister appointed the Queensland Power Trading Corporation as the nominated generator for the Gladstone Power Station. This role is now performed by Stanwell.

## **The aluminium industry**

- 2.35. Aluminium is the world’s second most used metal after steel.<sup>10</sup> The transportation market is the biggest consumer of aluminium, using it in automotive vehicles, aircraft, marine, rail and space vehicles. Aluminium is also used in the transmission of electricity, packaging and the building and construction industries.
- 2.36. Aluminium originates as an oxide called alumina. Deposits of bauxite ore are mined and then refined into alumina. Alumina is then transformed to aluminium using a smelting process. Aluminium smelting is a very energy intensive process.
- 2.37. In Australia there are currently five bauxite mines providing bauxite ore to the seven alumina refineries, which in turn supply alumina to the six Australian aluminium smelters and the export market.
- 2.38. Australia is the largest producer of bauxite in the world, and the largest producer and exporter of alumina.
- 2.39. Australia’s aluminium smelters produced 1.98 million tonnes of primary aluminium in 2008, of which approximately 80% was exported.<sup>11</sup> The six smelters are:
- Bell Bay, Tasmania (owned by Rio Tinto Aluminium (Bell Bay) Limited)
  - Boyne Island, Queensland (owned by Boyne Smelter Limited)
  - Kurri Kurri, NSW (owned by Hydro)

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<sup>10</sup> International Aluminium Institute, [www.world-aluminium.org](http://www.world-aluminium.org), accessed 10 February 2010

<sup>11</sup> The Australian Aluminium Council, [www.aluminium.org.au](http://www.aluminium.org.au), accessed 10 February 2010

- Point Henry, Victoria (owned by Alcoa and Alumina Limited)
- Portland, Victoria (owned by Alcoa, CITIC and Marubeni)
- Tomago, NSW (owned by Alcan Primary Metal Australia Pty Limited and Cathjoh Holdings Pty Limited (members of the Rio Tinto Group), Hydro and Gove Aluminium Finance Ltd)



### **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.

#### **Prior to the draft determination**

- 3.2. Broadly, the applicants submit that the amendments to the GPS Agreements would have little or no anti-competitive effect in any relevant market, and that in any event, the substantial past, ongoing and future public benefits associated with the existing agreements and proposed amendments outweigh any lessening of competition.
- 3.3. The ACCC sought submissions from 66 interested parties potentially affected by the applications, including those involved in the aluminium and mining industry, the electricity industry and various government departments and regulatory authorities. The ACCC did not receive any submissions from interested parties.

#### **Following the draft determination**

- 3.4. On 22 April 2010 the ACCC issued a draft determination in relation to the applications for authorisation. The draft determination proposed to grant conditional authorisation to the specified amendments to the GPS Agreements for the term of the IPPA, that is, until 29 March 2029, and not any extended period.
- 3.5. A conference was not requested to discuss the draft determination.
- 3.6. The ACCC did not receive any interested party submissions in response to the draft determination.
- 3.7. The applicants provided submissions in response to the draft determination. In particular, the applicants provided submissions regarding:
- the counterfactual;
  - a change to the ownership of one of the joint venture parties; and
  - the proposed inclusion of amendments in relation to the use of the GPS Combustion Turbine in the list of specific amendments to the IPPA.
- 3.8. The ACCC's evaluation, taking into account the applicants' submissions, is set out in Chapter 4.

## 4. ACCC evaluation

4.1. The ACCC's evaluation of the amended GPS Agreements is in accordance with tests found in:

- 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 in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public and
  - that benefit, in the case of section 90(6) 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 was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision.
- sections 90(5A) and 90(5B) of the Act which state 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, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public and
  - that benefit, in the case of section 90(5A) 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 were made or given effect to, or in the case of section 90(5B) 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.
- 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 market(s) affected by that conduct.
- 4.4. The applicants submit that the amended GPS Agreements, to the extent that they have any effect on competition, do so in:
- the NEM for the supply and acquisition of electricity;
  - the domestic market for the supply and acquisition of aluminium; and
  - the market for the supply and acquisition of nominated generator services.
- 4.5. The ACCC's analysis of the relevant markets for the purposes of assessing the application is set out below.

### *Queensland market for the supply and acquisition of wholesale electricity*

- 4.6. The applicants submit that a NEM-wide market exists for the supply and acquisition of electricity. The ACCC notes that a NEM-wide market for the supply of electricity was accepted by the Federal Court in the AGL - Loy Yang decision.<sup>12</sup> While noting the Court's market definition in that matter, the ACCC considers that the market for the supply and acquisition of wholesale electricity in Queensland better addresses the relevant competition issues for this authorisation process.
- 4.7. In arriving at this view, the ACCC firstly took into account the operation of interconnectors between Queensland and NSW. At times, these interconnectors can be constrained and in any event they cannot make available power to the Queensland region beyond the capacity of the interconnectors, regardless of the price differential between Queensland and the rest of the NEM.
- 4.8. The ACCC also considers that the competition issues raised by these applications differ substantially from those raised by AGL's acquisition of an interest in the Loy Yang A power station. In particular, the primary aim of the amended GPS Agreements is to ensure a continued secure energy supply for the Smelter, rather than facilitate the involvement of the GPS in the NEM. This 'interdependent relationship' between the GPS and the Smelter is referred to in the applicant's submission.
- 4.9. Therefore, the ACCC believes that a geographic market based on Queensland, taking into account the limited ability to 'import' power from other parts of the NEM, is appropriate for the current process.

### *Aluminium markets*

- 4.10. The Smelter uses electricity from the GPS to convert alumina to aluminium through the smelting process. Alumina is composed of aluminium and oxygen, and the smelting

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<sup>12</sup> Australian Gas Light Company v Australian Competition and Consumer Commission (No.3) [2003] FCA 1525 (19 December 2003)

process uses electrical energy to separate the aluminium metal from the oxygen.<sup>13</sup> The Smelter sources its alumina from Queensland Alumina Limited's refinery (80% owned by Rio Tinto).

- 4.11. Aluminium produced at the Smelter is supplied both domestically and exported to markets in Asia and the United States. According to Rio Tinto Aluminium's website, almost 70 per cent of the aluminium is produced in ingot form and exported to markets in Japan and South East Asia.<sup>14</sup>
- 4.12. As the amended GPS Agreements involve arrangements for the supply of electricity to the Smelter, the ACCC considers that markets for the supply of aluminium are likely to be relevant for the purposes of assessing the impact of the applications.
- 4.13. The ACCC has previously considered national markets for the supply of aluminium.<sup>15</sup> In particular, the ACCC has previously considered there to be limited demand side substitutability between primary aluminium and secondary aluminium. Primary aluminium refers to the aluminium produced at the end of the smelting process and secondary aluminium refers to recycled aluminium. Boyne Smelter Limited is a producer of primary aluminium.
- 4.14. The ACCC has also previously considered that there may be separate product markets for primary aluminium used for remelt purposes, such as ingots and T-bar and primary aluminium used for extrusion purposes, such as extrusion billet.<sup>16</sup> The ACCC notes that Boyne Smelter Limited produces primary aluminium for both remelt and extrusion purposes. The ACCC also previously noted that aluminium with differing alloys and purities had a reasonably high degree of supply side substitutability despite limited demand side substitutability, although for some types of aluminium with very high purity levels of other very specialised attributes supply side substitutability may be limited.
- 4.15. For the purposes of assessing the applications, the ACCC does not consider it necessary to form a view as to whether there are separate product markets for certain alloys or purities of aluminium. Given that it would not change the analysis, the ACCC considers it sufficient to consider the impact of the amendments to the GPS Agreements in the context of markets for the supply of primary aluminium for remelt purposes and for extrusion purposes.
- 4.16. The ACCC notes that aluminium is an export oriented industry, however, with a number of domestic customers. The ACCC considers it appropriate to consider a domestic market for the supply of aluminium having regard to the possibility of imports acting as a constraint on domestic pricing.

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<sup>13</sup> [http://www.riotintoalcan.com/ENG/whatweproduce/360\\_making\\_aluminium.asp](http://www.riotintoalcan.com/ENG/whatweproduce/360_making_aluminium.asp)

<sup>14</sup> <http://sales.riotintoaluminium.com/freedom.aspx?pid=409>

<sup>15</sup> See for example ACCC Public Competition Assessment, *Rio Tinto plc – proposed acquisition of Alcan Inc*, 8 November 2007: <http://www.accc.gov.au/content/index.phtml/itemId/866170>

<sup>16</sup> *ibid*

### *Nominated generator services*

- 4.17. As set out above, the operation of the NEM differs in each State and Territory pursuant to derogations specific to that jurisdiction. The applicants' submission notes that these jurisdictional derogations were designed to allow for an orderly transition from the State and Territory based arrangements to the NEM and to preserve as much as possible pre-existing contractual arrangements such as the IPPA.
- 4.18. Under the National Electricity Rules, Queensland is permitted, among other things, to appoint a single State entity as a nominated generator for certain privately owned electricity generators with pre-existing contractual arrangements. These arrangements are referred to as Exempted Generation Agreements and include the GPS.
- 4.19. Clause 9.43.6(a), (b), and (b)(1) – (2) of the National Electricity Rules provides the following:
- (a) For the purpose of supplying electricity under any *exempted generation agreement*, for each *generating system* which forms part of one of the *power stations* listed in Schedule 9E1 the Minister may determine, in consultation in each case with the owner of the relevant generating system, whether a *State Electricity Entity* (the "*Nominated Generator*"), rather than another person engaging in the activity of owning, operating or controlling the *generating system*, should be the *Generator* in respect of the *generating system*.
  - (b) For the purposes of the *Rules* if the *Minister* has determined a *Nominated Generator* for any *generating system* as described in clause 9.43.6(a):
    - (1) the *Nominated Generator* is taken to be, and at all relevant times to have been, and is the person that must register as, a *Generator* in relation to that *generating system*; and
    - (2) any person engaging in the activity of owning, controlling or operating that *generating system*, not being the *Nominated Generator*, is not to, is not entitled to, and is taken to have been exempted from the requirement to, registers as a *Generator* in relation to that generating system.
- 4.20. The applicants submit that a nominated generator acts as a virtual generator, trading the electricity of an actual generator in the NEM. The applicants note that the nominated generator's functions include submitting dispatch offers and otherwise assuming the role of a generator for the purposes of the NEM. The ACCC notes that the Minister appointed Queensland Power Trading Corporation, now Stanwell, as the nominated generator for the GPS.
- 4.21. As set out above, the applicants submit that a market for the supply and acquisition of nominated generator services is relevant for the purposes of assessing the applications.
- 4.22. The ACCC notes however that, as described by the High Court in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd*,<sup>17</sup> a market is the area of close competition between firms or the field of rivalry between them. As a nominated generator is an entity determined by the Minister pursuant to clause 9.43.6 of the National Electricity Rules, the ACCC considers that there would be limited scope for competition, or rivalry between firms, in respect of either the supply or acquisition of nominated generator services.

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<sup>17</sup> (1989) 167 CLR 177.

- 4.23. For the purposes of assessing the competitive impact of the amendments to the GPS agreements, the ACCC considers it sufficient to consider any such impact in the Queensland market for the supply and acquisition of wholesale electricity as identified above.

#### *ACCC conclusion on relevant markets*

- 4.24. For the purpose of assessing the applications, the ACCC considers the relevant areas of competition affected by the proposed conduct are likely to be:
- the Queensland market for the supply and acquisition of wholesale electricity
  - separate national markets for the supply of primary aluminium for (i) remelt purposes; and (ii) extrusion purposes.

### **The counterfactual**

- 4.25. 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 conduct for which authorisation has been sought.<sup>18</sup>
- 4.26. Under this test, the ACCC compares the public benefit and anti-competitive detriment arising from the arrangements in the future if the authorisation is granted with those arising 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’.
- 4.27. The applicants submit that the amended GPS Agreements have been executed by the parties but the amendments will not take effect unless and until the amendments are authorised by the ACCC and approved by the AER pursuant to Rule 9.34.6 of the National Electricity Rules.
- 4.28. The applicants further submit that should the ACCC not grant authorisation, the GPS agreements will continue for the time being in their unamended form. The applicants note, however, that some of the provisions of the IPPA are incompatible with the operation of the NEM. In instances involving provisions of the IPPA that cannot prevail over the National Electricity Rules, the applicants submit that it is likely that the arrangements determined would be narrower in ambit than the amendments to the GPS Agreements. The applicants indicate for example, that under the processes provided for by the IPPA, it would be possible for a party to contend for an outcome which was less flexible than that presently proposed to the ACCC. The applicants submit that beyond this, it is difficult to predict the outcome of such a process with any certainty.
- 4.29. In addition to the above, the ACCC notes, among other things, that: the amendments to the GPS Agreements seek to maintain a secure and cost effective supply of electricity for the Smelter within the framework of the NEM, with obligations on Stanwell as the nominated generator, to dispatch GPS electricity into the NEM and purchase back

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<sup>18</sup> *Australian Performing Rights Association* (1999) ATPR 41-701 at 42,936. See also for example: *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 at 48,556; *Re Media Council of Australia* (No.2) (1987) ATPR 40-774 at 48,419.

810MW from the NEM for supply to the Smelter; and following a 2007 restructure of Queensland's energy assets, Stanwell is responsible for trading the output from Gladstone Power Station.<sup>19</sup>

- 4.30. On the basis of the above, the ACCC considers that the counterfactual may involve a scenario where, at least in the medium term, the GPS Agreements continue to operate in their unamended form, subject to arrangements that would address issues arising from any incompatibility between the provisions of the unamended IPPA and the operation of the NEM.
- 4.31. The ACCC considers that it is also possible that the counterfactual may involve a scenario where the applicants supply electricity from the GPS directly into the NEM, without the appointment of a nominated 'virtual' generator. Under this scenario, the applicants would perform the role currently assigned to Stanwell. They would bid the capacity of the GPS into the NEM and also purchase electricity from the NEM for supply to the Smelter.

## Public benefit

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

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.<sup>20</sup>

- 4.33. The applicants submit that the GPS Agreements as previously authorised, and the arrangements under the amended GPS Agreements, have resulted and will continue to result in significant public benefits. In particular, the applicants submit that the ACCC should consider the interdependent relationship between the operation of the Smelter (as expanded) and the operation of the GPS.
- 4.34. The applicants note that the expansion of the Smelter (involving the addition of a third potline) and the acquisition and operation of the GPS were part of a successful strategy to increase the efficiency of both facilities, and provide a secure energy supply for the Smelter. The applicants submit that the amended GPS Agreements, by preserving the risk allocation and economic position of the parties within the framework of the NEM, allow these past efficiency and productivity gains to continue.
- 4.35. The applicants submit that there are past and ongoing benefits to the Australian economy related to the expansion of the Smelter, including:
- (i) substantial capital expenditures;
  - (ii) increased employment and socio-economic benefits;
  - (iii) more revenues for local, state and national governments; and

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<sup>19</sup> <http://www.stanwell.com/361.aspx>

<sup>20</sup> *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.

- (iv) greater efficiency and competitiveness in aluminium smelting.
- 4.36. In addition, the applicants submit that there are significant past, ongoing and future benefits related to the acquisition and operation of the GPS, including:
- (i) substantial capital expenditures;
  - (ii) a secure, reliable and competitively priced power supply for the Smelter;
  - (iii) improved environmental performance; and
  - (iv) increased employment and socio-economic benefits.
- 4.37. When authorising the GPS Agreements in 1994, the Trade Practices Commission considered that the benefits associated with the conduct outweighed any detriment. The Trade Practices Commission accepted that the expansion of the Smelter and the acquisition of the GPS were interdependent, and that the public benefits attributable to the expansion and operation of the Smelter are also attributable to the acquisition and operation of the GPS.
- 4.38. The applicants have made submissions indicating that some of these benefits associated with the GPS Agreements have already eventuated. The GPS Agreements underpinned the Joint Venture's acquisition of the GPS and the expansion of the Smelter. In assessing the public benefits arising from the amendments to the GPS agreements, the ACCC considers it appropriate to take into account past benefits in relation to these arrangements, only to the extent that they are likely to be indicative of ongoing benefits likely to be delivered by the amendments.
- 4.39. The ACCC's assessment of the public benefits likely to flow from the amendments to the GPS Agreements is as follows.

### **Benefits related to expansion of the Smelter**

(i) *Substantial capital expenditures*

- 4.40. The applicants submit that expenditure during the 1995–1997 construction phase of the Smelter's expansion was over \$1.13 billion, of which 78% was spent in Australia.
- 4.41. The applicants note that the ongoing expenditures related to the Smelter expansion include:
- alumina requirements of 440,000 tones per year;
  - petroleum coke requirements of 84,000 tones per year;
  - liquid pitch requirements of 20,000 tones per year; and
  - natural gas requirements of 390,000 gigajoules per year.



4.42. The ACCC considers that the amendments to the GPS agreements may, at least in part, contribute to the ongoing expenditures related to the Smelter expansion.

*(ii) Increased employment and socio-economic benefits*

4.43. The applicants submit that the Smelter expansion increased employment, with over 1,300 people working on the expansion during peak construction. The expansion of the Smelter is estimated by the applicants to have created around 550 additional jobs, noting that the Smelter is one of the largest employers in the Gladstone area.

4.44. From a national perspective, the applicants submit that the direct economic contribution from the Smelter's output in the form of additional output and employment from sectors such as the manufacturing, property and business services and the finance and insurance sectors, were estimated at \$2 billion. The applicants go on to say that flow on effects were forecast to contribute an additional \$3.07 billion to the Australian economy.<sup>21</sup>

4.45. The ACCC notes that the benefits in respect of increased employment during the construction phase of the Smelter expansion are benefits that have already eventuated, and are therefore not directly relevant in assessing the amendments to the GPS Agreements.

*(iii) Revenues for local, state and national governments*

4.46. The Joint Venture Participants submit that the Smelter expansion benefits the national, state and local governments, for example by increasing tax revenues for the Commonwealth Government. The applicants further submit that the expanded Smelter increased annual operating expenditure by approximately \$400 million, increasing gross national product.

4.47. While the ACCC notes the applicants' submissions in this regard, it does not consider that there is a sufficient nexus between the amendments and any benefits in the form of government revenue.

*(iv) Greater efficiency and competitiveness in aluminium smelting*

4.48. The applicants submit that the addition of a third potline enhanced the Smelter's operating efficiency in the increasingly competitive aluminium smelting market, specifically by lowering the unit cost of production. They consider the Smelter's expansion lead to productivity improvements, an increase in energy efficiency, better usage of raw materials and further economies of scale and improved overall performance.

4.49. When authorisation was granted to the initial GPS Agreements in 1994, the Trade Practices Commission recognised that the public was likely to benefit as a result of the Smelter expansion through further development of an efficient, internationally competitive smelter. In the Trade Practices Commission's view, the public was likely

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<sup>21</sup> Source: *Submission in support of applications for authorisation - Rio Tinto Aluminium Limited, 24 December 2009*

to benefit through an increase in the value of exports and the overall development of the Australian economy.

- 4.50. To the extent that the amendments to the GPS Agreements contribute to the efficiency and competitiveness of the Smelter by providing a mechanism for the applicants to secure a cost effective supply of power to the Smelter, the ACCC considers that the amendments would be likely to result in continued public benefits in the form of increases to the value of exports and the overall development of the Australian economy.
- 4.51. The applicants also submit that since the expansion of the Smelter the owners have continued to invest in projects to further enhance the capacity and productivity of the Smelter, maintaining the competitiveness of the Smelter. The ACCC does not consider that any public benefits arising from these further investments would necessarily be directly linked to the acquisition and operation of the GPS, and thus the amendments to the GPS Agreements.

### **Benefits related to the acquisition and operation of the GPS**

#### *(i) Substantial capital expenditures*

- 4.52. Following the acquisition of the GPS in 1994, a plant refurbishment program was undertaken to ensure continuing reliable operation of the GPS over its 35 year plus life. The \$170 million expenditure was timed to coincide with accumulated age and service hours applicable to each unit of the GPS. From 1999 to the present, the Joint Venture Participants submit that they continue to invest in ongoing operational improvements to ensure reliability for the term of the GPS Agreements.
- 4.53. The ACCC considers, however, that there is an insufficient nexus between the amendments to the GPS Agreements and any public benefit associated with substantial capital expenditures in relation to the GPS.

#### *(ii) A secure, reliable and competitively priced power supply for the Smelter*

- 4.54. The applicants submit that the acquisition and operation of the GPS is integral to the benefits associated with the Smelter because the cost and reliability of power supply is crucial to producing aluminium at world competitive prices.
- 4.55. The ACCC accepts that the amendments to the GPS Agreements provide an efficient mechanism that would allow the applicants to continue to ensure that the Smelter is able to source a low cost, reliable supply of power.

#### *(iii) Improved environmental performance*

- 4.56. The applicants submit that as part of the GPS refurbishment, approximately \$90 million was spent on ensuring the GPS met the environmental standards specified in the State Agreement. This led to a decrease in the production of hazardous pollutants. Further the applicants submit that they have invested millions of dollars in environmental programs to ensure the GPS continues to meet or exceed World Environmental Best Practice.

4.57. The applicants consider that the amended GPS Agreements provide a framework to incentivise the parties to improve the efficiency of the GPS, resulting in a decrease of emissions, including CO<sub>2</sub> emissions.

4.58. The ACCC considers that the amended GPS Agreements may give rise to some incentive for the applicants to ensure that the GPS continues operating efficiently, although this incentive would be likely decline as the agreements approach the end of their term. The ACCC further considers that there is unlikely to be a sufficient nexus between improved environmental performance of the GPS and the amendments to the GPS Agreements to conclude that the amendments would be likely to give rise to public benefits in this regard.

*(iv) Increased employment and socio-economic benefits*

4.59. The applicants submit that historically, and continuing under the amended GPS Agreements, the GPS is a major employer in the Gladstone area, with 265 employees. The applicants submit that the direct and indirect economic contribution to the Gladstone region for the GPS is estimated at \$400 million in 2007/2008. The applicants also note that the GPS, through its operator NRG Gladstone Operating Services Pty Limited, fosters and maintains a positive relationship with the local community through various community programs.

4.60. The ACCC considers however that the amendments to the GPS agreements are not sufficiently directly related to public benefits in the form of increased employment and other socio-economic benefits.

*(v) Other benefits*

4.61. The applicants submit that the GPS has, in addition to the 810 MW of dedicated capacity for the Smelter, additional electricity capacity of up to approximately 800 MW for the benefit of Queensland and the national economy.

4.62. The applicants further submit that the GPS provides 15% of Queensland's power needs, and contributes to the availability of reliable and competitively priced power in the region, opening the door for business and investment opportunities in the Gladstone area and across the state of Queensland. The applicants submit that the increased flexibility provided by the amended GPS Agreements enhances the ability of Stanwell to utilise the GPS to participate in the NEM. The applicants note that the amendments to the GPS Agreements remove restrictions on Stanwell's dispatch of the GPS capacity.

4.63. The ACCC considers that the amended GPS Agreements would be likely to deliver public benefits by facilitating supply of electricity into the NEM and enhancing flexibility in relation to Stanwell's ability to utilise the GPS to participate in the NEM.

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

4.64. On the basis of the above, the ACCC considers that the amendments to the GPS Agreements would be likely to give rise to continued public benefits as follows:

- benefits associated with a mechanism that provides for a secure, reliable and cost effective supply of power to the Smelter, including contributions to the value of exports and the development of the Australian economy; and
- a mechanism that facilitates the supply of electricity into the NEM and enhances the flexibility of Stanwell's ability to utilise the GPS to participate in the NEM.

4.65. The ACCC considers that these benefits are likely to arise irrespective of which of the two counterfactual situations outlined above, are taken into account.

## **Public detriment**

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

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>22</sup>

4.67. The applicants submit that the amendments to the GPS Agreements seek to:

- preserve, to the extent possible, the financial arrangements that underpinned the acquisition of the GPS;
- ensure that Boyne Smelter Limited, through Stanwell as the nominated generator, has security of supply and can take its energy entitlements from the GPS; and
- provide Stanwell with significantly increased flexibility as to when the GPS will be dispatched.

4.68. In summary, the applicants' submission identifies the following potential trade practices issues:

- The JVA establishes the arrangements under which the Joint Venture Participants may supply electricity at certain prices - being the same price at which each joint venture participant makes that supply. The amendments provide for the arrangements between Joint Venture Participants and Stanwell to purchase supply electricity to Boyne Smelter Limited up to 810 MW.
- Under the amendments to the IPPA, Stanwell, as the nominated generator, will make dispatch offers in the NEM in respect of the GPS capacity. Stanwell will compensate the joint venture participants on the same terms for having the GPS available for sales of electricity in the NEM, excess generation, and in the event of Stanwell's wilful default and the joint venture participants will continue to supply Boyne Smelter Limited on the same terms, pay and receive a common price for capacity support and economy interchange energy and (in the case of financial default by Stanwell) direct Stanwell as to how the GPS capacity should be bid.

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<sup>22</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- Under the restated Capacity Purchase Agreements, each joint venture participant sells capacity and energy to Stanwell on the same terms, including price.
- Under certain provisions of the restated Power Purchase Agreements, the joint venture participants agree on the terms and conditions, including price, at which they will each supply electricity to Boyne Smelter Limited.
- Under the restated Operation and Maintenance Agreements, the joint venture participants agree to appoint NRG Gladstone Operating Services Pty Limited as operator of the GPS and agree the terms and conditions of that appointment including the fee payable to NRG Gladstone Operating Services Pty Limited.
- Under the restated Power Sales Administration Agreements each joint venture participant appoints NRG Gladstone Operating Services Pty Limited to administer the IPPA, the CPAs and the PPAs, subject to direction by the relevant joint venture participant. The contracts contain the same or similar terms.

4.69. The applicants submit, however, that the arrangements under the amended GPS Agreements (and the specific provisions) for which authorisation is sought are not likely to contravene the Act as the Joint Venture Participants are not in competition in any relevant market. The applicants further submit that to the extent that the GPS Agreements (including the specific provisions) raise any substantial lessening of competition or exclusive dealing issues, these provisions of the amended GPS Agreements have no such effect or likely effect or purpose. The applicants note that although some of the amended GPS Agreements contain exclusive provisions with suppliers or customers, they are unlikely to result in a substantial lessening of competition because of the relatively small portion of the market that would be affected by such provisions.

4.70. The applicants further submit that, if the ACCC were to determine otherwise, the public benefits that have flowed in the past will continue to flow as a result of the amended GPS Agreements and will outweigh any detriment which may result from those agreements.

### **ACCC assessment of detriment**

4.71. The ACCC has examined the possible theories of harm arising from the amendments to the GPS Agreements. The ACCC does not consider that the amendments would be likely to give rise to an anti-competitive detriment in any of the relevant markets. The ACCC considers that any effect on competition would be unlikely on the basis of the factors set out below which, in particular, indicate that it would be unlikely that the applicants would be able to influence the domestic price of aluminium or the price of electricity in Queensland.

### **Queensland market for the supply and acquisition of wholesale electricity**

- The GPS represents a relatively small proportion of electricity supplied in the Queensland market. The applicants submissions indicate that the GPS has generating capacity of 1680MW, representing 13% of Queensland generation capacity. The applicants' submission further indicates that after the supply of the dedicated capacity of 810 MW for the Smelter, the GPS has additional electricity

capacity of up to approximately 800 MW for supply to the Queensland electricity market. Accordingly, it would be unlikely that the applicants would have the ability to affect the price of electricity in the Queensland market for the supply and acquisition of wholesale electricity.

### **National markets for the supply of primary aluminium for (i) remelt purposes and (ii) extrusion purposes**

- Only one joint venturer, Rio Tinto Aluminium, supplies aluminium domestically. The applicants' submission indicates that aluminium produced at the Smelter is delivered to the Boyne Smelter Limited joint venturers, other than Rio Tinto Aluminium, at agreed overseas ports.
- As set out at paragraph 2.39, the ACCC notes the existence of other smelters across Australia, including smelters located in New South Wales and Victoria.

4.72. On the basis of the factors set out above, the ACCC considers that the amendments to the GPS agreements are unlikely to give rise to any significant competition detriment in the Queensland market for the supply and acquisition of wholesale electricity, or the national markets for the supply of primary aluminium for (i) remelt purposes and (ii) extrusion purposes.

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

4.73. 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.

4.74. In the context of applying the net public benefit test in section 90(8)<sup>23</sup> of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>24</sup>

4.75. For the reasons outlined in this chapter the ACCC considers the public benefits likely to result from the amendments to the GPS Agreements are:

- benefits associated with a mechanism that provides for a secure, reliable and cost effective supply of power to the Smelter, including contributions to the value of exports and the development of the Australian economy; and
- a mechanism that facilitates the supply of electricity into the NEM and enhances the flexibility of Stanwell's ability to utilise the GPS to participate in the NEM.

4.76. The ACCC does not consider that the amendments to the GPS agreements would be likely to give rise to any significant competition detriments. The ACCC notes in

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<sup>23</sup> 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.

<sup>24</sup> *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

particular that the GPS represents a relatively small proportion of power supplied in the Queensland electricity market, and the existence of other aluminium producers across Australia.

- 4.77. Accordingly, the ACCC considers the public benefit that is likely to result from the conduct is likely to outweigh the public detriment. The ACCC is therefore satisfied that the relevant tests are met.

### **Conditions**

- 4.78. The Act allows the ACCC to grant authorisation subject to conditions.<sup>25</sup>
- 4.79. The applicants have requested that any authorisation granted by the ACCC be expressed to apply to a person who becomes a party to the amended GPS Agreements after they are amended or after authorisation is granted, as permitted in section 88(10) of the Act.
- 4.80. The 1994 determination which granted authorisation to the original GPS Agreements extended to future parties. As the arrangements under the original GPS Agreements underpin the amendments, the ACCC considers it appropriate to grant authorisation to a person who becomes a party to the amended GPS Agreements, provided that the applicants notify the ACCC of any changes to the parties in accordance with the conditions set out below.

### **Length of authorisation**

- 4.81. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>26</sup> The ACCC does not generally grant authorisation for unlimited periods because, in granting authorisation, the ACCC needs to be satisfied that the public benefit test would be met for the period of the authorisation.
- 4.82. In this instance, the applicants request authorisation for the arrangements under the amended GPS Agreements for a period of:
- 45 years; or
  - the term of the Interconnection and Power Pooling Agreement (which extends to 29 March 2029) and any extended term pursuant to the exercise of the option under the terms of the Interconnection and Power Pooling Agreement,
- whichever is the earlier.
- 4.83. The term of the IPPA, absent any options to extend, is 35 years from 30 March 1994, that is, approximately 19 years from now. Consequently, the period of authorisation sought by the applicants is consistent with the term of the IPPA as entered into in 1994, including any extended term pursuant to the exercise of the options.

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<sup>25</sup> Section 91(3).

<sup>26</sup> Section 91(1).

- 4.84. When authorising the GPS Agreements in 1994, the Trade Practices Commission did not specify the period for which authorisation would remain in force. Consequently, the authorisation applies to the term of the agreements.
- 4.85. In support of the period of authorisation sought, the applicants reiterate that the need for authorisation of the amended GPS Agreements arises because of the need to accommodate certain changes to the commercial arrangements in consequence of the introduction and operation of the NEM.
- 4.86. The applicants submit that in order to expand the Smelter, it was necessary to obtain competitive, secure, long term power purchase arrangements for the supply of electricity. The applicants note that aluminium smelters are capital intensive and stable long term power arrangements are required in order to attract funding. This meant it was necessary to enter into long term contractual arrangements for the supply of electricity from the owners of the GPS to the Smelter. The applicants submit that the term of the IPPA has not changed since 1994, reflecting the continued need for certainty for the sale and purchase of electricity under the arrangements.
- 4.87. Further the applicants submit that the term of the GPS Agreements remain consistent with the life of the underlying assets.
- 4.88. In the applicants' opinion, the acquisition and operation of the GPS by the Joint Venture has resulted, and will continue to result, in substantial public benefits to Queensland and Australia.
- 4.89. Furthermore, the applicants submit that the commercial arrangements under the GPS Agreements formed part of the basis for substantial investment made by the GPS Joint Venture Participants and Boyne Smelter Limited in the expansion of the Smelter and the acquisition and refurbishment of the GPS.
- 4.90. Specifically, during the construction phase of the Smelter expansion, expenditure amounted to over \$1.13 billion dollars. The purchase price of the GPS was \$750 million and there are ongoing capital works at the GPS (\$170 million to 1999) to ensure the continuing reliable operation of the GPS. In February 2008, Rio Tinto Aluminium announced that Boyne Smelter Limited would be investing \$670 million in the Smelter. The applicants submit that underpinning this investment decision was the view that electricity would continue to be supplied in accordance with the GPS Agreements at least until 2029.
- 4.91. The applicants submit that the period for which authorisation is sought will continue to ensure that the GPS Joint Venture Participants and the owners of the Smelter achieve an appropriate commercial return on the substantial investments made in the expansion and subsequent ongoing modernisation of the Smelter and the acquisition and operation of the GPS.
- 4.92. In addition, the applicants claim that none of the relevant markets are of a character which would require a review of the authorisation by the ACCC in the short to medium term. The applicants submit that the NEM is a relatively mature market and the generation of electricity by coal fired generators is a mature technology. Further, the applicants claim that long term contracts for the supply and acquisition of electricity are



a feature of the NEM for large users of electricity, such as smelters, refineries and fertiliser plants.

- 4.93. The ACCC considers the duration of authorisation on a case-by-case basis. As set out in the ACCC's *Guide to Authorisation*,<sup>27</sup> in practice, the ACCC will only grant perpetual authorisations in exceptional circumstances. In recent years the ACCC has granted authorisation for limited periods. Because markets are constantly evolving and the ACCC needs to be satisfied that a net public benefit will continue to be realised for the duration of the authorisation. Where applicants seek to engage in the authorised conduct beyond the timeframe for which authorisation is granted, applicants have the opportunity to apply for revocation and substitution or submit a fresh application for authorisation setting out public benefit and detriment claims for consideration by the ACCC.
- 4.94. The ACCC may grant authorisation for longer periods when, for example, conduct requires investments that would only be likely if the conduct is authorised for a longer period.
- 4.95. The ACCC notes the applicants' submissions that underpinning their investment decision was the view that electricity would continue to be supplied in accordance with the GPS Agreements at least until 2029. The ACCC therefore does not consider it appropriate to grant authorisation to any extended term beyond the basis of the applicants' investment decision. The ACCC considers that authorisation for the term of the IPPA, absent any options to extend, would provide the applicants with sufficient certainty regarding the continuation of the GPS and Boyne Smelter arrangements for the purposes of sustaining their investments.
- 4.96. As such, the ACCC considers it appropriate to grant authorisation to the amendments to the GPS Agreements until 29 March 2029, that is, the term of the IPPA absent any options to extend.

## **Variations to the amended GPS Agreements**

- 4.97. The ACCC notes that any further amendments to the GPS Agreements during the term of this authorisation would not be covered by the authorisation.

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<sup>27</sup> <http://www.accc.gov.au/content/index.phtml/itemId/788405>

## 5. Determination

### The application

- 5.1. On 24 December 2009, Rio Tinto Aluminium Limited (**Rio Tinto Aluminium**), on behalf the GPS Joint Venture Participants, lodged applications for authorisation A91205–A91207 with the ACCC.
- 5.2. Application A91205 was made using Form A, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88 (1A) and 88 (1) of the Act to make and give effect to a provision of a contract, arrangement or understanding, a provision of which is, or may be, a cartel provision and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act.
- 5.3. Application A91206 was made using Form B, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88 (1A) and 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 be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
  - 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.
- 5.4. Application A91207 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, Rio Tinto Aluminium is seeking authorisation on behalf of itself and the participants in the GPS Joint Venture for amendments to agreements in relation to electricity generated by the GPS and supplied to the Boyne Island Smelter and the National Electricity Market (the amended GPS Agreements). As set out above, the ACCC notes some inconsistency in the applicants' application and submission with regard to whether authorisation is sought for the amendments only or for the amended agreements in their entirety. As discussed with the applicants, the ACCC has taken the view that it is appropriate to consider authorisation solely for the amendments, taking into account that the applicants have not applied for revocation and substitution of the 1994 authorisation in relation to the agreements in unamended form.

### The net public benefit test

- 5.6. For the reasons outlined in Chapter 4 of this determination, the ACCC considers that in all the circumstances the conduct 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 conduct.

- 5.7. The ACCC is also satisfied that the conduct for which authorisation is sought are likely to result in such a benefit to the public that the conduct should be allowed to take place.
- 5.8. The ACCC therefore **grants** authorisation to applications A91205 – A91207 **subject to the following conditions:**

#### **Condition 1**

- The applicants must, within 5 business days of any change to the parties to the amended GPS Agreements, notify the ACCC in writing of that change.

#### **Condition 2**

- If the applicants notify the ACCC of a change to the parties to the amended GPS Agreements, the ACCC may, within 20 business days of receipt by the ACCC of that notification, direct in writing the applicants to, and the applicants must, furnish or produce information, documents and materials in relation to the change to the parties to the amended GPS Agreements within the applicants' custody, power or control to the ACCC in the time and in the form directed by the ACCC.
- Nothing in this condition requires the provision of information or documents in respect of which the applicants have a claim of legal professional privilege.
- The power of the ACCC in this condition may be exercised by an employee of the ACCC.

### **Conduct for which the ACCC grants authorisation**

- 5.9. The ACCC grants authorisation to the GPS Joint Venture Participants for the following amendments to agreements, in the form provided to the ACCC, in relation to electricity generated by the GPS and supplied to the Smelter and the NEM until 29 March 2029:
- amendments to the JVA which have the purpose or effect that:
    - the electricity generated by the GPS will be offered by the Nominated Generator on behalf of each Joint Venture participant at the same (or similar) prices; and
    - all of the GPS generated electricity supplied to the NEM will be through the Nominated Generator;
  - amendments to the IPPA which have the purpose or effect that:
    - Stanwell will make dispatch offers in the NEM in respect of the GPS capacity;
    - Stanwell will compensate the Joint Venture Participants on the same terms for having the GPS available for sales of electricity in the NEM, excess generation, and in the event of Stanwell's wilful default; and

- the Joint Venture Participants will continue to supply Boyne Smelter Limited on the same terms, pay and receive a common price for capacity support and economy interchange energy, and (only in the case of financial default by Stanwell) may direct Stanwell as to how the GPS capacity (not paid for by Stanwell) should be bid.

and which specifically include:

- the designation of Stanwell as the Nominated Generator in the NEM for the GPS (clause 1.15);
- provision for Stanwell to bid the capacity of the GPS into the NEM (clauses 5A.6.2-6.3, and 6.5(b));
- requirements for the Joint Venture Participants to dispatch the GPS in accordance with dispatch instructions received from The Australian Energy Market Operator (clauses 5.2(b) and 6.4);
- provisions for ancillary services provided to the NEM (clause 12 and Schedule 2);
- amendments to reflect current names of each of the parties and to remove certain redundant terms and clauses (clauses 2.3, 3.4, 5.7(b) and 8.4);
- replacing what were previously the system control obligations with provisions that reflect the operation of the GPS in the NEM and the role of Powerlink (clauses 7.4 and 20);
- amendments to deal with the reimbursement or indemnification of liabilities incurred by Stanwell in respect of the Smelter base load (810 MW) in its role as Nominated Generator in the NEM for the GPS under the *Renewable Energy (Electricity) Act 2000* (Cth) (clauses 8.1, 8.3 and 26.8 and Schedule 17);
- amendments to include dispatch incentives for the GPS to proactively maximise the available capacity of the GPS consistent with Stanwell's market interests (clauses 6.9 and 14 and Schedule 16); and
- amendments in relation to the use of the GPS Combustion Turbine (clause 11).
- amendments to the CPAs to reflect the amendments to the IPPA (clauses 8.2(a), 9.16 and 10.8).
- amendments to the PPAs that reflect the amendments to the IPPA including those related to those IPPA changes concerning:
  - the basis for calculating capacity support payments in certain circumstances (clause 5.1);
  - the security of supply provisions (clauses 3.1 and 3.2 and Schedule 1); and

- amendments to the OMA that reflect the amendments to the IPPA (clauses 1.7-1.9, 3.1, 3.4(b), 3.9(h), 3.10, 4.1, 6.8(b), 6.9 and Schedule 1, Part II 25-35 and Schedules 5A and 6;
  - amendments to the PSAAs that reflect the amendments to the IPPA and related agreements.
- 5.10. Further, the authorisation is in respect of the amendments to the GPS Agreements as it stands at the time authorisation is granted. Any changes to the amended GPS Agreements during the term of the authorisation would not be covered by the authorisation.
- 5.11. This determination is made on 2 June 2010.
- 5.12. The attachments to this determination are part of the determination.

### **Date authorisation comes into effect**

- 5.1. This determination is made on 2 June 2010. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 24 June 2010.

## **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 A91205–A91207**

The following table provides a chronology of significant dates in the consideration of the applications by the GPS Joint Venture for the amended GPS Agreements.

<b>DATE</b>	<b>ACTION</b>
24 December 2009	Applications for authorisation lodged with the ACCC.
20 January 2010	Applicants provide requested information.
29 January 2010	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
3 February 2010	Applicants provide supplementary submission in support of the period for which authorisation is sought.
9, 19 February 2010	Applicants provide requested information.
9, 16 April 2010	Applicants provide requested information.
22 April 2010	Draft determination issued.
6, 7 May 2010	Applicants provide submissions on draft determination
7 May 2010	Closing date for submissions from interested parties on the draft determination
2 June 2010	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.
- (5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:
  - (a) that the provision would result, or be likely to result, in a benefit to the public; and
  - (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
    - (i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and
    - (ii) the provision were given effect to.
- (5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:
  - (a) that the provision has resulted, or is likely to result, in a benefit to the public; and
  - (b) that the 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.
- (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.<sup>28</sup>

However, the Tribunal has previously stated that regarding the test under section 90(6):

[the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.<sup>29</sup>

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). Further, as the wording in sections 90(5A) and 90(5B) is similar, this approach will also be applied in the test for conduct that may be a cartel provision.

## Conditions

The Act allows the ACCC to grant authorisation subject to conditions.<sup>30</sup>

## 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 future<sup>31</sup>
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>32</sup>

## Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation<sup>33</sup>. 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.

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<sup>28</sup> *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

<sup>29</sup> *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

<sup>30</sup> Section 91(3).

<sup>31</sup> Section 88(10).

<sup>32</sup> Section 88(6).

<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup>

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 conduct.

## Revocation; revocation and substitution

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.<sup>36</sup> The ACCC may also review an authorisation with a view to revoking it in certain circumstances.<sup>37</sup>

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.<sup>38</sup> The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.<sup>39</sup>

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<sup>34</sup> Subsection 91A(1)

<sup>35</sup> Subsection 87ZD(1).

<sup>36</sup> Subsection 91B(1)

<sup>37</sup> Subsection 91B(3)

<sup>38</sup> Subsection 91C(1)

<sup>39</sup> Subsection 91C(3)