



Australian  
Competition &  
Consumer  
Commission

# **Draft** Determination

## **Application for authorisation**

**lodged by**

**Brisbane Marine Pilots Pty Ltd**

**in respect of**

**an exclusive pilotage services agreement at the Port of Brisbane**

**Date: 7 October 2010**

**Authorisation no.: A91235**

**Public Register no.: C2010/554**

**Commissioners:** Samuel  
Kell  
Schaper  
Dimasi  
Walker

## Summary

The ACCC proposes to deny authorisation for an exclusive arrangement between Brisbane Marine Pilots and Maritime Safety Queensland in relation to the provision of pilotage services at the Port of Brisbane.

On 10 June 2010 Brisbane Marine Pilots Pty Ltd (BMP) applied for authorisation to give effect to an arrangement it has entered into with the State of Queensland (Maritime Safety Queensland). Under the agreement, MSQ must acquire all pilotage services at the Port of Brisbane exclusively from BMP until 31 December 2013.

BMP has been the sole provider of marine pilots at the port since 1989.

The ACCC considers that the exclusivity agreement between MSQ and BMP is likely to foreclose potential competition in and for the market for pilotage services at the Port of Brisbane, by removing the incentive for other providers to offer their services for the duration of the agreement. This loss of potential competition is likely to constitute a significant detriment.

The information available to the ACCC suggests that there is likely to be substantial growth in ship movements at the Port of Brisbane over the next 10 to 20 years. The ACCC is concerned that the proposed agreement would deter potential new providers of pilotage services from entering or contesting this growing market.

The ACCC is not convinced that the exclusive agreement is required to deliver the public benefits claimed by the applicant. In particular, the ACCC considers that:

- as the incumbent provider and sole employer of qualified pilots at the port, BMP has sufficient certainty to guarantee the supply of pilotage services
- irrespective of how many providers supply pilotage at a port, pilots have the incentive to perform the services with due care and diligence to ensure optimum safety
- it is not clear that the majority of the assets referred to by BMP are non-mobile and specific to the customer (i.e. MSQ) such that they would need to be underpinned by an exclusive arrangement
- sufficient incentive to invest in infrastructure may be achieved through non-exclusive contractual arrangements, as is the case in other Australian ports.

The ACCC will now seek submissions from the applicant and interested parties in relation to this draft determination prior to making a final decision. The applicant or interested parties may also call a conference in relation to this draft determination.

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## List of abbreviations

Act	<i>Trade Practices Act 1974 (Cth)</i>
AMPI	Australasian Marine Pilots Institute
ASMA	Australian Maritime Safety Authority
ARP	Australian Reef Pilots Pty Ltd
BMP	Brisbane Marine Pilots Pty Ltd
GBR	Great Barrier Reef
IC	Industry Commission
MSQ	Maritime Safety Queensland
NBCG	National Bulk Commodities Group Inc
PA	Ports Australia
port	Port of Brisbane
the services	marine pilotage services
SAL	Shipping Australia Limited
Tribunal	Australian Competition Tribunal

# 1. The application for authorisation

- 1.1. On 10 June 2010 Brisbane Marine Pilots Pty Ltd (BMP) lodged application for authorisation A91235 with the ACCC.
- 1.2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Trade Practices Act 1974* (the Act). The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Further information about the authorisation process is contained in Attachment A. A chronology of the significant dates in the ACCC's consideration of this application is contained in Attachment B.
- 1.3. Application A91235 was made under section 88(8) of the Act to engage in conduct that constitutes or may constitute, exclusive dealing.
- 1.4. In particular, BMP applied for authorisation of a pilotage services agreement (the agreement) it has entered into with the State of Queensland (represented by the Department of Transport trading as Maritime Safety Queensland (MSQ)). Under the agreement, MSQ must acquire all pilotage services at the Port of Brisbane exclusively from BMP. BMP seeks authorisation until 31 December 2013.
- 1.5. The agreement requires BMP to supply marine pilots to handle the arrival, departure and removal, from one berth to another, of ships in the port as MSQ requires and as directed by the harbour master.
- 1.6. In providing the services, BMP must ensure that:
  - BMP personnel performing the services use reasonable skill, care and diligence and efficiency
  - BMP personnel performing the services are properly trained, licensed and fit in all respects to perform the services
  - the services are made available to MSQ at all times and in all conditions unless notified otherwise
  - it employs a sufficient number of qualified pilots
  - it provides the transport required to allow the pilots to undertake the services.

## 2. Background to the application

### The applicant

- 2.1. BMP is owned by marine pilots operating in the Port of Brisbane (the Port). BMP has been the sole provider of marine pilots in the port since its establishment in 1989.
- 2.2. BMP employs 37 marine pilots. BMP is also the only current employer of qualified pilots in the port.

### Marine pilotage services<sup>1</sup>

- 2.3. Marine pilots guide large vessels within port waters by advising on vessel manoeuvring, tug numbers and positioning. They are usually mariners with command experience and comprehensive port-specific knowledge and skills.
- 2.4. In nearly all Australian ports the use of a pilot is mandatory for large vessels. In Queensland, Parts 6 and 8 of the *Transport Operations (Marine Safety) Act 1994* require that a ship must not be navigated in a compulsory pilotage area unless a pilot is used. All port pilots in Queensland are licensed by MSQ.
- 2.5. Usually pilotage is arranged by a shipping agent on behalf of its client, through the harbour master, with a lead time of between 24 and 48 hours. Pilots are transported to the ship on either a helicopter or a pilot boat. Certain vessels are exempt from pilotage, including where the ship's master is certified to have local knowledge, non-commercial vessels and small vessels.<sup>2</sup>
- 2.6. Pilotage is sometimes provided by the port authority or by private providers who are contracted by the port authority or relevant government agency. In either case, vessels pay a fee for pilotage services.
- 2.7. Pilotage services are typically subject to licensing arrangements. Licences that are non-exclusive allow for multiple service providers in the port while exclusive licenses prevent the entry of other service providers.

### Port of Brisbane

- 2.8. The Port of Brisbane is the third largest and fastest growing container port in Australia, and Queensland's largest general cargo port. It is located at the mouth of the Brisbane River, and since 1976 has been managed by the Port of Brisbane Corporation Limited (the Corporation), a government owned corporation.<sup>3</sup>
- 2.9. On 2 June 2009 the Premier of Queensland announced the State Government's Renewing Queensland Plan, which included the sale of a number of government assets, including the Corporation.

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<sup>1</sup> Productivity Commission, *Economic Regulation of Harbour Towing and Related Services*, 2002, p. 52.

<sup>2</sup> *Transport Operations (Marine Safety) Act 1994*.

<sup>3</sup> Port of Brisbane Corporation, viewed 10 September 2010, <<http://www.portbris.com.au/>>.

- 2.10. As part of the sale process, on 1 July 2010 the Queensland Government transferred all equipment and machinery, including the dredging fleet, all employees of the Port of Brisbane Corporation, and the operating rights associated with the Port of Brisbane to a new operating company - the Port of Brisbane Pty Ltd (PBPL). PBPL is a wholly owned subsidiary of the Port of Brisbane Corporation and will continue to operate as a government owned corporation until the sale process is completed by the end of 2010.<sup>4</sup>
- 2.11. There are currently seven dedicated container berths in the port with a further two being developed. There are two oil refineries situated at Brisbane, which makes crude oil the port's principal import. Crude oil is processed and the resulting refined products are shipped to other areas of Australia.
- 2.12. Other imports include fertilisers, chemicals, motor vehicles, cement clinker and gypsum, paper and building products and machinery. Exports include coal, refined petroleum products, grain and woodchips, mineral sand, scrap metal, tallow, live cattle, beef and dairy products and timber.
- 2.13. Total piloted movements at the port have steadily increased over time, from 4,329 in 1996-97<sup>5</sup> to 5,704 in 2008.<sup>6</sup>

#### **Pilotage services at the Port of Brisbane**

- 2.14. Prior to BMP's establishment, pilotage at the port was undertaken solely by the State of Queensland<sup>7</sup> and all qualified pilots were employees of the Department.
- 2.15. The Queensland Government privatised the pilotage service in Brisbane on 1 January 1989. BMP was formed, and the company consisted of the previous pilots employed by the government, each becoming a shareholder. BMP became responsible to the Government for providing the infrastructure, administration and the facilitation of pilotage services as a private entity.
- 2.16. Pilotage fees for movements in and out of the port vary depending on the size of the ship; the minimum fee is \$1269.94.<sup>8</sup>
- 2.17. The types of vessels typically piloted at the Port are outlined in Table 1.

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<sup>4</sup> Ibid.

<sup>5</sup> H.M. Kolsen, *Review of Port Pilotage Legislation: Public Benefit and Public Interest Test* 2002, p. 22.

<sup>6</sup> National Marine Safety Committee, *Regulatory Impact Statement: National Standard for Competencies for Trainee Marine Pilots*, July 2010, p. 51.

<sup>7</sup> Acting through the Department of Harbours and Marine.

<sup>8</sup> Port of Brisbane Pty Ltd, *Shipping Handbook 2010*, p. 30.

**Table 1: Port of Brisbane - ship visits by type, June 2009 to end of July 2010**

Ship Type	2009/ Jul	2009/ Aug	2009/ Sep	2009/ Oct	2009/ Nov	2009/ Dec	2010/ Jan	2010/ Feb	2010/ Mar	2010/ Apr	2010/ May	2010/ Jun	2010/ Jul	Last 12 Months
CONTAINER SHIP	66	65	66	73	69	69	66	63	61	65	65	64	74	800
GENERAL CARGO SHIP	15	20	24	18	25	21	20	19	20	20	22	22	25	256
BULK CARRIER	18	30	16	16	16	16	20	19	22	17	15	23	22	232
VEHICLES CARRIER	23	28	27	29	27	26	27	26	32	29	32	31	34	348
CHEMICAL / OIL PRODUCTS TANKER	14	13	11	11	11	16	12	16	14	17	14	15	11	161
CRUDE OIL TANKER	11	9	13	9	10	13	9	14	10	7	7	9	8	118
OIL PRODUCTS TANKER	12	11	14	11	9	11	9	5	5	10	14	11	9	119
RO-RO CARGO SHIP	1	0	1	1	1	1	1	1	2	2	3	1	1	15
LPG TANKER	15	9	14	11	9	8	12	7	13	11	11	8	12	125
CHEMICAL TANKER	2	9	4	6	6	5	4	2	10	4	9	7	5	71
<b>Other</b>	<b>13</b>	<b>14</b>	<b>21</b>	<b>21</b>	<b>16</b>	<b>26</b>	<b>17</b>	<b>23</b>	<b>17</b>	<b>15</b>	<b>17</b>	<b>18</b>	<b>18</b>	<b>223</b>
<b>TOTAL</b>	<b>190</b>	<b>208</b>	<b>211</b>	<b>206</b>	<b>199</b>	<b>212</b>	<b>197</b>	<b>195</b>	<b>206</b>	<b>197</b>	<b>209</b>	<b>209</b>	<b>219</b>	<b>2468</b>

### Pilotage services at other Australian ports

- 2.18. Most ports in Australia have one service provider even if the contract/licence is not exclusive.
- 2.19. In Victoria, pilotage services at the ports of Port Phillip, Melbourne, Geelong and Westernport are undertaken by a private company, Port Phillip Sea Pilots.
- 2.20. Pilotage at New South Wales ports are also supplied by single providers. In Sydney, pilotage at Sydney Harbour and Port Botany are provided by Sydney Pilot Service, a wholly owned subsidiary of Sydney Port Corporation. The pilots are employees of the corporation. At Newcastle Port, pilotage is provided by the Newcastle Port Corporation.
- 2.21. A private company, Fremantle Pilots, supplies pilotage services at Fremantle and Kwinana ports under contract to the Fremantle Port Authority.

### Pilotage services at the Great Barrier Reef and Torres Strait

- 2.22. The licensing, operational administration and tariff structure of marine pilotage in the GBR and Torres Strait region was originally the responsibility of the Queensland Government. In 1993 the Australian Government assumed responsibility for regulating coastal pilotage and decided that the pilot licensing system would be administered by the Australian Maritime Safety Authority (AMSA). There would be no regulation of the commercial aspects of pilotage services, such as the numbers of pilots, their recruitment, terms and conditions of employment, pilotage fees, provision of infrastructure and/or administration of the pilotage service.<sup>9</sup>
- 2.23. Two competing pilotage providers emerged from the former statutory monopoly, now known as Torres Pilots Pty Ltd and Australian Reef Pilots Pty Ltd. Pilots offer their services through private personal companies as contractors to either of these pilotage

<sup>9</sup> AMSA Review Panel Report, *The Delivery of Coastal Pilotage Services in the Great Barrier Reef and Torres Strait*, October 2008, p. 10.

service providers. The providers act as booking agents for the pilots' services and accept a commission fee from the pilot based on a percentage of the pilotage fee or an agreed payment under the contract.

- 2.24. In July 1996, a third group was formed, Hydro Pilots Australia Pty Ltd (Hydro), by three coastal pilots providing their own infrastructure and only servicing ships using Hydrographers Passage through helicopter transfers.
- 2.25. Recruitment and training of new pilots, consistent with the AMSA licensing requirements, is arranged through the service provider.

#### **Pilotage services at international ports<sup>10</sup>**

- 2.26. Most ports in the world are serviced by a single pilotage provider. Hong Kong attempted competition between four suppliers but ultimately provided the service via a regulated pilot authority. In the United Kingdom, devolution of pilotage to the port authorities in 1987 resulted in each port having one pilotage service.

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<sup>10</sup> The information in this section is taken from BMP's supporting submission and the AMSA Panel Review Report, *The Delivery of Coastal Pilotage Services in the Great Barrier Reef and Torres Strait*, October 2008, pp. 6-7.

### 3. Submissions received by the ACCC

- 3.1. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. To this end the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application.
- 3.2. Broadly, BMP submits that the exclusive agreement provides the public with significant benefits that would not be realised if there was competition to provide pilots at the Port. BMP considers that exclusivity:
- creates certainty regarding pilotage services in the Port, which in turn attracts high calibre candidates and promotes collegiate responsibility among pilots for safety in the Port
  - ensures a single safety management system applies at the Port and enhances optimisation of safety practices
  - promotes expenditure on developing infrastructure and support for pilots resulting in enhanced safety outcomes.
- 3.3. The ACCC sought submissions from around 20 interested parties potentially affected by the application, including marine pilotage companies, maritime authorities, government departments and shipping bodies. A summary of the submissions received from interested parties follows:

#### *Submissions in support of the application for authorisation*

- 3.4. **Australasian Marine Pilots Institute** is supportive of the exclusivity agreement. AMPI submits that competition between pilotage providers (i.e. in a multi-provider setting) does not deliver an efficient, well managed pilot service. In guiding a ship into port, a pilot must exercise judgment taking into account the requirements of the relevant stakeholders. This judgment becomes compromised if the individual is exposed to commercial pressure.

#### *Submissions opposed to the application for authorisation*

- 3.5. **Australian Reef Pilots** considers that authorisation would limit the choice of port managers to select cost-effective future strategies and operational effectiveness and would be expected to result directly in the continuation of unhelpful practices in port pilotage.
- 3.6. **National Bulk Commodities Group Inc** does not support the application. NBCG suggests that rather than having a single pilotage provider, there are three models that may be achievable:
- serial competition model
  - parallel competition model
  - an open-book exchange of financial data provided to the licensor by the licensee.

3.7. NBCG submits that an open-book exchange would demonstrate to customers that the Port of Brisbane's pilotage model is subject to competitive tension. NBCG suggests that a licence could be issued for a set period (e.g. seven years) with an annual transparent review of revenue and expenditure along with arrangements to deal with non-compliance should KPIs not be met. Such a review would be undertaken by the licensor assisted by an independent arbitrator. During this exchange pilotage volume increases or decreases as well as pilot productivity could be evaluated.

3.8. **Ports Australia** is opposed to the application. PA considers that:

- there is no need for an authorisation to, in effect, formally legitimise the monopoly provision of pilotage services in the Port of Brisbane
- the grounds for granting authorisation, as cited by BMP in their application, are all contestable in some measure
- an authorisation would be counter to the strategic interests of the ports community and would compromise opportunities to establish competitive pilotage markets in the future.

*Submissions that neither support nor oppose the application for authorisation*

3.9. **Shipping Australia** does not have any objections to the application for authorisation, but disagrees with some of the statements made by BMP in its supporting submission. In particular, SA disagrees with the statement that 'where a competitive model has been attempted (such as the Great Barrier Reef and Torres Strait) it has been the subject of considerable criticism or shown to be flawed.'

3.10. The views of BMP and interested parties are outlined in the ACCC's evaluation of the arrangements in Chapter 4 of this determination. Copies of public submissions may be obtained from the ACCC's website ([www.accc.gov.au/AuthorisationsRegister](http://www.accc.gov.au/AuthorisationsRegister)) and by following the links to this matter.

## 4. ACCC evaluation

- 4.1. The ACCC's evaluation of the pilotage services agreement is in accordance with the test found in 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 test 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 area(s) of competition affected by that conduct.
- 4.4. BMP submits that the relevant market is the market for the provision of pilots to MSQ at the Port of Brisbane.

#### *Product dimension*

- 4.5. The nature of marine pilotage services is discussed above in Chapter 2. As noted there, one of the key features of such services is the need for port-specific knowledge and skills on the part of the pilot. Taken in combination with the legislative requirement for all large vessels to use a pilot in compulsory pilotage areas, the ACCC considers that there are limited demand side alternatives to marine pilotage services for the majority of ships wishing to utilise the Port of Brisbane.
- 4.6. BMP states there are no other organisations or individuals capable of providing pilotage services to MSQ. The ACCC does not entirely accept this view, for reasons discussed later (under Public detriment). However, the ACCC acknowledges that the specialised nature of pilotage services means that supply side alternatives are likely to be limited to marine pilots who have, or are able to attain, the requisite level of port-specific knowledge and skills.
- 4.7. For the purposes of this analysis, the ACCC considers the relevant product dimension to be the supply of marine pilotage services.

#### *Geographic dimension*

- 4.8. As noted earlier, pilotage services are provided at all Australian ports. At this stage, the ACCC has not been provided with any information that indicates the extent to which ships would switch away from using the Port of Brisbane in response to a small but significant and non-transitory increase in the price of pilotage services at that port.
- 4.9. Indeed the ACCC recognises that there are likely to be a multitude of other reasons which are more likely to influence the choice of port for a cargo or container ship.

- 4.10. The ACCC notes that, generally speaking, pilotage services represent a small proportion of the overall cost of transporting cargo to its ultimate destination. Pilotage represents approximately 10 per cent of total port and ship related charges.<sup>11</sup> At this level, the ACCC considers that pilotage services at other Australian ports are unlikely to represent a significant demand side constraint on pilotage services at the Port of Brisbane.
- 4.11. The ACCC also considers that pilots operating at other Australian ports are likely to represent a limited supply side substitution possibility in the Port of Brisbane in the short term due to the requirement that pilots hold qualifications that are relevant to the port.
- 4.12. Marine pilots are licensed by the relevant pilotage authority to operate within the jurisdiction of their port. Pilots employed by BMP hold a licence issued by MSQ with endorsements to operate in the Brisbane pilotage area.<sup>12</sup> Port authorities normally provide some specific training to pilots to enable them to familiarise themselves with the local port environment, e.g. visual reference points and local knowledge of tides, swells, currents, depths and shoals.<sup>13</sup>
- 4.13. In Queensland, the *Transport Operations (Marine Safety) Act 1994* requires pilots to have the following qualifications in order to obtain a licence:
- a licence to operate a ship as its master in the pilotage area; or equivalent skills and experience
  - appropriate ship handling ability and
  - a detailed knowledge of the pilotage area for which the licence is sought.
- 4.14. This means that a pilot trained to provide pilotage services at Gladstone Port, for example, cannot provide these services at the Port of Brisbane until they have the requisite experience at that port. It takes approximately three years for a pilot to be fully trained in order to qualify for an unrestricted licence.<sup>14</sup> The time and cost associated with transporting pilots between ports may also act as a constraint.
- 4.15. For the purposes of this analysis, the ACCC considers the relevant geographic dimension to be the Port of Brisbane.

#### *Conclusion on market*

- 4.16. For the purposes of assessing this application, the ACCC considers that the relevant market is the supply of marine pilotage services at the Port of Brisbane.

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<sup>11</sup> Department of Infrastructure, Transport and Regional Economics, *Statistical Report: Waterline Journal 47*, June 2010, p. 44.

<sup>12</sup> BMP, Response to ACCC request for further information, 22 September 2010, p.1.

<sup>13</sup> National Marine Safety Committee, *Regulatory Impact Statement, National Standards for Competencies for Trainee Marine Pilots* p. 9.

<sup>14</sup> BMP, Response to ACCC request for further information, 22 September 2010, p.2.

## The counterfactual

- 4.17. 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>15</sup>
- 4.18. Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.
- 4.19. Pilotage services are provided to Australian ports in a number of ways. They are provided by pilots who are port employees or employees of a government agency, or by companies formed by pilots with an agreement with the responsible government agency to provide pilotage services on an exclusive basis.
- 4.20. At present, the only pilots licensed (under MSQ regulations) to provide the services at the Port of Brisbane are employees of BMP. The ACCC understands that licensing conditions, in particular the requirement that pilots have port-specific experience, may make it difficult to establish a pool of qualified pilots to compete with the incumbent provider in the short-term.
- 4.21. Shipping Australia submits that a possible counterfactual involves MSQ engaging the pilots as employees and administering the pilotage services at the Port. The ACCC notes that the pilotage services agreement contains a provision whereby, in the event BMP defaults on its obligations, MSQ can require the pilots to transition back to employment with MSQ.
- 4.22. In light of the above assessment, the ACCC considers that in the short-term, absent authorisation, there are two likely counterfactuals:
- BMP continues to be the sole provider of marine pilots at the Port of Brisbane, but without an exclusive agreement in place; or
  - the pilots are engaged as employees of MSQ.
- 4.23. In the medium-long term, the ACCC considers it is possible that, in the absence of an exclusive agreement, another provider may seek to establish itself in competition with BMP or seek to tender for the market. This issue is discussed further in the ACCC’s evaluation of the public detriment.

## Public benefit

- 4.24. 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:

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<sup>15</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.*

...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>16</sup>

- 4.25. BMP submits the exclusivity arrangement will deliver public benefits, including:
- certainty regarding pilotage services in the port, which in turn attracts high calibre candidates and promotes collegiate responsibility among pilots for safety in the port
  - a single safety management system and optimisation of safety practices
  - the promotion of expenditure on developing infrastructure and support for pilots resulting in enhanced safety outcomes.
- 4.26. The ACCC's assessment of the likely public benefits from the proposed conduct follows.

**Exclusivity creates certainty regarding pilotage services in the port, which in turn attracts high calibre candidates and promotes collegiate responsibility among pilots for safety in the port**

- 4.27. BMP submits that the exclusive arrangement creates certainty which in turn attracts high calibre candidates to pilotage in the Port of Brisbane and promotes collegiate responsibility among pilots for safety in the port.
- 4.28. BMP submits that in areas where the competitive model operates (such as the Great Barrier Reef) operators have been less successful in attracting candidates for employment, with a greater dependency being placed on the migration of foreign pilots. BMP suggests this view is supported by pilots who have indicated that the effects of competition have 'increased difficulties in attracting new entrants to join what is an ageing pool of qualified pilots.'<sup>17</sup>
- 4.29. BMP considers that the exclusive arrangement for which authorisation is sought ensures that the body of pilots employed by BMP continue to be solely responsible for creating and maintaining the levels of safety in the port.
- 4.30. The ACCC considers that as the incumbent provider and sole employer of qualified pilots at the port, BMP has sufficient certainty to guarantee the supply of pilotage services. It is not clear to the ACCC how exclusivity would assist BMP in attracting high calibre pilots.
- 4.31. In the absence of the exclusive agreement, the legislative requirement for ships to be piloted at the Port of Brisbane means that either BMP or an alternative provider would be contracted to provide those services. Any such provider would need to meet the safety standards mandated by MSQ in order to obtain a licence. As such, the ACCC is not convinced that exclusivity is required to deliver this claimed public benefit.

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<sup>16</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.

<sup>17</sup> AMSA Review Panel Report, AMSA Panel Review Report, *The Delivery of Coastal Pilotage Services in the Great Barrier Reef and Torres Strait*, October 2008, paragraph 2.29.

## A single safety management system and optimisation of safety practices

- 4.32. BMP submits that the exclusive arrangement ensures that commercial pressures do not impede the provision of an effective safety management system.
- 4.33. BMP states that, pursuant to its agreement with MSQ at the Port, it has developed the following policies and systems:
- a comprehensive training and recruitment policy
  - a comprehensive and effective safety management and reporting system and
  - a fatigue management system.
- 4.34. BMP notes that concern over the impact of privatisation of pilotage in the GBR and Torres Strait led to a number of reviews being commissioned by the Queensland Government and AMSA into coastal pilotage regulation and associated pilotage safety systems:
- Review of Port Pilotage Legislation in Queensland, 1998 (KPMG Review)
  - Review of Marine Ports Pilotage Legislation, 2002 (Kolsen Report)
  - AMSA Coastal Pilotage Regulation Review, 2005 (McCoy Report)
  - The Delivery of Coastal Pilotage Services in the Great Barrier Reef and Torres Strait 2008 (AMSA Report)
- 4.35. BMP draws on these reports to suggest that having competing pilotage providers may hinder optimal safety outcomes; for example, BMP identifies the following quotes:
- [the competitive model has] led to competition between providers to an extent that could undermine shipping safety ... if continued unchecked.<sup>18</sup>
- [aggressive competition in the market] is the major issue affecting the achievement of an optimal safety outcome.<sup>19</sup>
- The adoption of a safety culture of continuous improvement ... is proving to be elusive ... it may be unattainable under the present service delivery model.<sup>20</sup>
- Industry feedback and anecdotal comment suggests that this approach is likely to put at risk the high standards of safety, which are mandatory. Even a marginal increase in the risk in the rate of incidents arising may far outweigh any benefit derived from a more competitive pilotage market.<sup>21</sup>
- 4.36. BMP notes that while the McCoy Report does not come to any conclusion regarding whether the competitive model was the cause of a perceived lack of safety standards, submissions to the review suggested that, in a competitive market, commercial pressures tend to override safety issues.

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<sup>18</sup> Ibid, paragraph 4.4.

<sup>19</sup> John McCoy, *AMSA Coastal Pilotage Regulation Review* 2005, paragraph 5.2.

<sup>20</sup> AMSA Review Panel Report, AMSA Panel Review Report, *The Delivery of Coastal Pilotage Services in the Great Barrier Reef and Torres Strait*, October 2008, paragraph 4.5.

<sup>21</sup> H.M. Kolsen, *Review of Port Pilotage Legislation: Public Benefit and Public Interest Test* 2002, pp. 8-9.

### *Submissions by interested parties*

- 4.37. Ports Australia (PA) rejects BMP's assertion that competitive pilotage markets inherently produce unsafe outcomes. PA notes that reported incidents in the Great Barrier Reef and Torres Strait have diminished over time. While the competitive regime has been the subject of criticism, 'this has often been based on anecdote and has come from parties that are hostile to the introduction of competition in pilotage.'
- 4.38. Shipping Australia Limited (SAL) is of the view that competition between pilotage service providers has not resulted in any safety issues.
- 4.39. Australian Reef Pilots (ARP) submits that BMP's emphasis on safety is not unique; these systems are fundamental to all pilotage providers in Australia. In ARP's opinion, coastal pilotage regulations routinely submit operators to more rigorous scrutiny than ports pilotage, and there is no evidence to suggest BMP's safety systems are superior. ARP is audited by AMSA against the Queensland Coastal Pilotage Safety Management Code, which is based on the International Safety Management Code. AMSA audits participant providers annually.

### *ACCC's view*

- 4.40. The evidence available to the ACCC suggests that a competitive market setting is not inconsistent with the pursuit of safety objectives. None of the reports cited by BMP reached conclusions about whether competition for pilot services impeded safety at the port. In particular, the AMSA Report noted that 'no evidence has been found to date that the competitive environment has adversely affected safety outcomes.'<sup>22</sup>
- 4.41. In the United States, the Federal Trade Commission examined potential differences in safety between marine pilots in monopoly-like cartels and those subject to greater "commercial pressures", noting that:<sup>23</sup>

Pilots who are supposedly insulated by their cartel membership from commercial pressure to take excessive risk have occasionally caused serious accidents. On the other hand, there may also have been accidents caused by inexperienced pilots called into service by competitive demands. It is difficult to identify any trends or to correlate the accidents with differing commercial or competitive situations.

- 4.42. The ACCC agrees with Ports Australia's submission that:

The maintenance of safe outcomes in a competitive pilotage market comes down to the governance and auditing standards attached to the industry. In short, if a pilotage company operating within a competitive market is audited ... and does not meet the conditions of its accreditation then its right to operate should be removed or restricted pending improvement.

- 4.43. MSQ is responsible for regulating safety at the Port of Brisbane and therefore has an incentive to ensure the operation of an effective safety regime for the provision of pilotage at the port. This incentive exists irrespective of whether there are single or multiple providers of those services. There are numerous markets where safety

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<sup>22</sup> AMSA Review Panel Report, AMSA Panel Review Report, *The Delivery of Coastal Pilotage Services in the Great Barrier Reef and Torres Strait*, October 2008, p. 11.

<sup>23</sup> Federal Trade Commission, 'Comment in response to a proposal to regulate competition among marine pilots in Alaska', viewed 9 September 2010, [www.ftc.gov/be/v9400018](http://www.ftc.gov/be/v9400018).

objectives are effectively pursued in a multi-provider setting; for example, construction and handling of hazardous waste.

- 4.44. The ACCC recognises, however, that there may be some additional costs associated with managing safety in an environment where there are multiple providers of pilotage services.
- 4.45. Irrespective of how many providers supply pilotage at a port, the ACCC considers that pilots have the incentive to perform the services with due care and diligence or face disciplinary action and loss of licence. In this case, the ACCC does not see the connection between the monopolistic provision of pilotage services at the Port of Brisbane and ensuring optimum safety. That is, there is no nexus between the public benefits claimed by BMP and the exclusive agreement for which authorisation is sought.

#### **Exclusivity promotes expenditure on developing infrastructure and support for pilots resulting in enhanced safety outcomes**

- 4.46. BMP submits that the exclusivity arrangement provides BMP with the certainty required to make a commercial decision to invest in the infrastructure necessary to ensure safe delivery of pilotage services.
- 4.47. In the last four years, (during which time BMP had an exclusive arrangement with MSQ) BMP has undertaken the following infrastructure expenditure:
- construction of additional pilot boats for use in the Port
  - acquisition of precision navigation instruments for use in pilotage
  - development a world first pilot despatch system using PMDAs
  - expansion of office space for support staff and
  - renewal of its vehicle fleet acquiring environmentally friendly vehicles.
- 4.48. This expenditure on infrastructure may enable BMP to provide a better quality service and reduce costs that would otherwise be incurred by MSQ. It is not clear to the ACCC, however, that the majority of the assets referred to by BMP are non-mobile and specific to the customer (i.e. MSQ) such that they would need to be underpinned by an exclusive arrangement.
- 4.49. Consequently it is not clear to the ACCC that these investments would not have occurred in the absence of the exclusivity. The ACCC considers that there is a public benefit in having commercial certainty to undertake this type of investment, but this may be achieved through non-exclusive contractual arrangements, as is the case in other Australian ports.

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

- 4.50. The ACCC is not convinced that the exclusive agreement is required to deliver the public benefits claimed by the applicant. In particular, the ACCC considers that:
- as the incumbent provider and sole employer of qualified pilots at the port, BMP has sufficient certainty to guarantee the supply of pilotage services

- irrespective of how many providers supply pilotage at a port, pilots have the incentive to perform the services with due care and diligence to ensure optimum safety
- it is not clear that the majority of the assets referred to by BMP are non-mobile and specific to the customer (i.e. MSQ) such that they would need to be underpinned by an exclusive arrangement
- sufficient incentive to invest in infrastructure may be achieved through non-exclusive contractual arrangements, as is the case in other Australian ports.

## Public detriment

4.51. 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>24</sup>

4.52. BMP submits that no public detriment will flow from the exclusivity arrangement.

4.53. The ACCC considers that there are two key issues to consider in assessing the potential for detriment to result from the exclusive arrangement:

- whether competition **in** the market for pilotage services could be achieved at the Port of Brisbane (e.g. by having multiple providers perform the services)
- whether competition **for** the market for pilotage services could be achieved at the Port of Brisbane (e.g. through a competitive tender process prior to the expiration of the exclusive agreement on 31 December 2013).

4.54. If either of these scenarios is possible, the ACCC considers that the exclusive agreement is likely to result in detriment by removing the threat of entry or actual entry by competing providers.

### **Potential for multiple pilotage service providers at the Port of Brisbane (i.e. competition in the market)**

4.55. The demand for pilots is directly related to the number of ships requiring pilotage that enter a port. This in turn is dependent on a number of factors, including the level of economic activity, trade flows and port geography.

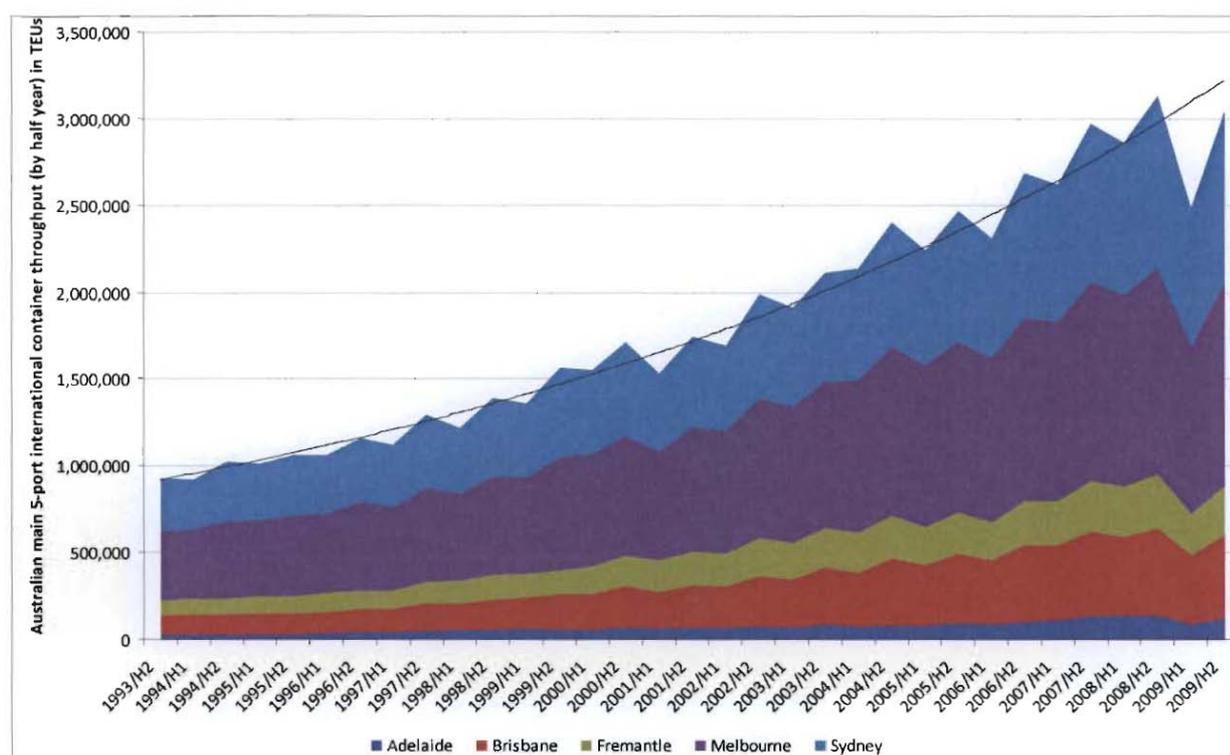
4.56. Ports Australia submits that substantial growth is forecast in Australia's container and bulk trades over the next 10 to 20 years, which may see a significant expansion in pilotage markets. In the work conducted for the development of the National Ports Strategy various growth scenarios were tested. It established that:

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<sup>24</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- For container trades a compound annual growth rate of 5.0% - 7.5% will increase port throughput by between 3 to 6 times in 25 years. At 7.5% compound annual growth Australia's international container task will double by 2020.
- Coal exports will grow from around 260 million tonnes in 2008/09 to over 700 million tonnes in 2030, based on a medium compound annual growth rate of 5%.

**Figure 1 Development of the main 5-port container throughput (six-monthly), 1993-2009**



Source: Industry data / analysed & graphed by GHD Meyrick

**Table 2: Total container throughput**

Port	000 TEU 2007-08 (000)	000 TEU 2029-2030	Average annual growth rate 2007-08 to 2029-30
Adelaide	302	536	2.65%
Brisbane	900	1958	3.60%
Fremantle	583	1640	4.81%
Melbourne	2257	6654	5.04%
Sydney	1778	3579	3.23%
Australia total	6300	15452	4.16%

Source: BITRE 2010

- 4.57. It seems likely that the Port of Brisbane will experience significant growth in shipping movements in the next 10 to 20 years. The ACCC does not have sufficient information to determine at what point it may be economically efficient to have more than one supplier of pilotage services at the Port of Brisbane.
- 4.58. However, the ACCC is not persuaded that economies of scale in this market would be sufficient to prevent multiple service providers from competing to supply pilotage at the port. This issue is discussed further below.

### *Barriers to entry*

4.59. Port authorities and state governments have sometimes claimed that pilotage services are a natural monopoly due to economies of scale stemming from fixed costs of pilotage provision.<sup>25</sup> The highest cost is claimed to be the launches and helicopters that transport pilots to vessels.

4.60. The Industry Commission (IC), however, was of the view that pilotage does not constitute a natural monopoly in larger ports:<sup>26</sup>

Where there is a sufficient number of ship movements to require a number of pilots, economies of scale are not sufficient to prevent private pilots from competing for the right to provide a service.

In the smaller regional ports, the lack of sufficient ship movements to employ even a single pilot on a full-time basis does not necessarily constitute a natural monopoly in pilotage. The employment of competing pilots on a part-time or contractual basis, or the availability of pilots to service more than one port, may satisfy pilotage requirements in these ports.

4.61. The IC concluded that the major impediments to entry are regulatory, namely the requirement that pilots are suitably qualified and have ready access to a reliable boarding system. The costs involved in obtaining these, in the IC's view, do not significantly deter entry.

4.62. Similarly, in its 1998 *Review of Port Pilotage Legislation in Queensland*,<sup>27</sup> KPMG found the principal restrictions on competition were:

- the requirement to be licensed by Queensland Transport in order to be a port pilot
- the requirement that a port pilot must be either an employee of Queensland Transport or an entity prescribed by regulation
- prescriptions in respect of the fees charged for pilotage services.<sup>28</sup>

4.63. The requirements of a pilotage service are qualified pilots and a means of conveying the pilot from shore to ship.

4.64. The ACCC understands that a pilot boat costs in the region of \$1 to \$2 million. In its submission to the Industry Commission Review, Port Phillip Sea Pilots provided evidence that the cost of launches it uses for boarding outside Port Phillip Heads is more than \$650,000 and that the total value of its property, plant and equipment exceeds \$3.5 million. Pilots do not need to own the means of boarding the vessels they pilot; launches could be owned separately and hired as required.<sup>29</sup>

4.65. The information available to the ACCC suggests that there is significant potential growth in demand for pilotage services. Total piloted movements at the Port of

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<sup>25</sup> Productivity Commission, *Economic Regulation of Harbour Towing and Related Services*, 2002, pp. 52-53. See for example, Sydney Ports Corporation, *Submission to the Review of Port Competition and Regulation in NSW*, September 2007.

<sup>26</sup> Industry Commission, *Port Authority Services and Activities*, 1993, p. 92.

<sup>27</sup> KPMG, *Review of Port Pilotage Legislation*, 1998.

<sup>28</sup> The prescription of fees for pilotage services was subsequently repealed.

<sup>29</sup> Industry Commission, *Port Authority Services and Activities*, 1993, p 92.

Brisbane have steadily increased, from 4,239 in 1996-97 to 5,704 in 2008.<sup>30</sup> According to one industry source, the demand for pilotage movements in Australian ports is expected to increase by 12 percent by 2014.<sup>31</sup>

- 4.66. The relatively low capital cost of entry coupled with increased demand suggests to the ACCC there is limited ability for a provider to exploit economies of scale in this market.
- 4.67. Based on the information available, the ACCC does not consider that pilotage at the port is a natural monopoly and therefore does not accept that greater efficiencies will be achieved by having a single operator provide pilotage at the port. In determining what the most efficient arrangement for the provision of these services may be, the Industry Commission concluded that:<sup>32</sup>

For larger ports, the availability of licences to all who meet safety and other requirements related to the availability of a service would be conducive to the provision of the most efficient service to port users. In this context, the issue of exclusive licences for the provision of pilotage in Melbourne, Sydney and Brisbane is difficult to justify.

- 4.68. The ACCC is of the view that BMP has significant market power which is further entrenched by the exclusive arrangement. Without the agreement, BMP would be constrained by the actual entry or the potential for competition for the provision of pilotage services. With the agreement, there is no incentive for another provider to attempt to enter the market and compete.
- 4.69. Even if there was no actual entry of a competing pilotage provider at the Port of Brisbane, the ACCC considers that the threat of entry can discipline BMP's price and service offering. This pro-competitive effect is removed by the exclusive agreement.
- 4.70. The ACCC considers that the absence of any competitive pressure on BMP may lead to public detriment in the form of higher pilotage costs which may be passed on to shipping companies and ultimately, consumers.

#### **Potential for competitive tendering at the Port of Brisbane (i.e. competition for the market)**

- 4.71. A public tender process for pilotage services at the port would introduce competition for that market.
- 4.72. BMP submits that the failure of the competitive tender process in similar markets is highlighted by the tender for pilotage services in Cairns. In 2001, the Cairns Port Authority requested tenders for the provision of services at the port. The tender was awarded to a private company rather than the incumbent provider, Ports Corporation of Queensland. It was subsequently realised that the successful tenderer did not have the capacity to perform the services required. Following this failure, the Minister for Transport ordered an investigation into the tender process which resulted in the pilotage services being taken over by MSQ.

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<sup>30</sup> H.M. Kolsen, *Review of Port Pilotage Legislation: Public Benefit and Public Interest Test 2002*, Appendix 2.

<sup>31</sup> National Marine Safety Committee, *Regulatory Impact Statement: National Standard for Competencies for Trainee Marine Pilots*, July 2010, p. 10.

<sup>32</sup> Industry Commission, *Port Authority Services and Activities*, 1993, p. 92.

- 4.73. PA submits that the case of Cairns is dated and not particularly instructive. The Port of Cairns is small and its pilotage market is not comparable to the markets at ports such as Brisbane and Newcastle.
- 4.74. Shipping Australia suggests that the failure of the tender process in Cairns does not necessarily mean there could not be a different outcome in the future.
- 4.75. Australian Reef Pilots (ARP) submits that in industries that require long lead times to supply the capital equipment and provide trained crews, serial competitive tendering has delivered proven advantages. ARP considers this public benefit was delivered by:
- provision and maintenance of choice for contracting authorities in order to optimise cost effective service delivery
  - penalties for failure to maintain services and other transgressions
  - continuous service improvements and enhanced delivery standards to be met and maintained over time
  - tenders called before the existing contract expires to provide timely and cost effective changeover without the need for compensation.
- 4.76. BMP considers that competition for the market is not possible unless there is:
- a willingness to reduce the current necessary level of pilot qualifications; or
  - a means to effect the transfer of port specific knowledge of the incumbent pilots; or
  - a means to ensure that a dynamic safety management system developed by a discreet pilotage organisation that can apply to the whole port jurisdiction, including competing organisations.
- 4.77. Nearly every port in Australia has a single provider of pilotage services. The NBCG noted that because maritime service markets in Australia are relatively small, ports find a single service provider model a natural fit as opposed to serial or parallel competition models.
- 4.78. The ACCC considers this does not mean that a competitive market would not, or could not, be viable.
- 4.79. The ACCC recognises that there may be certain constraints on the serial competition model; particularly ensuring a substantial field of potential bidders. The difficulty of establishing a pool of suitably qualified pilots was also cited in a number of interested party submissions as a significant barrier to entry.<sup>33</sup>
- 4.80. There are two components of pilot training: general and port-specific. Because pilots must have port-specific qualifications in order to provide pilotage at a port, new pilots seeking accreditation must be trained by the incumbent providers. The KPMG Review noted that if incumbent pilots were not willing to provide training, it would take more than 18 months to train new pilots.<sup>34</sup>

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<sup>33</sup> Ports Australia, NBCG submission.

<sup>34</sup> KPMG, *Review of Port Pilotage Legislation*, 1998.

- 4.81. The ACCC considers this problem is not insurmountable. The ACCC agrees with the submission by Ports Australia that with appropriate preparations, MSQ could encourage another provider or directly employ pilots at the port if it viewed the introduction of competition as worthwhile. Alternatively, a subset of the pilots currently employed by BMP could form a breakaway group and establish in competition with BMP.
- 4.82. BMP submits that a serial competition model using a tender process would be artificial given the absence of another entity with the ability to provide the required level of service on an exclusive basis.
- 4.83. The fact that no party currently has the capacity to perform the required services does not mean this would not be possible in the future. However, the highly specialised nature of the labour means the incumbency advantages enjoyed by the current provider are significant. The ACCC considers that the need to guarantee a supply of suitably qualified pilots to compete with BMP means there is likely to be a significant set up period before a new operator could commence providing the services at the Port. MSQ could factor in this set up period by commencing a tender process well before the services are required.
- 4.84. The ACCC notes that the duration of the proposed arrangement is three years. While this may appear to be a relatively short period, the applicant has not provided any information to suggest that MSQ intends to put in place measures designed to introduce competition at the conclusion of the agreement (e.g. by conducting a tender process). On this basis, the ACCC considers the exclusive agreement is likely to foreclose any potential competition for the market beyond the short term.

### **Cost of pilotage services**

- 4.85. BMP notes that the effective ‘monopoly’ created by the arrangement does not affect the fees charged to ship owners for pilotage services in the Port. This is because those fees are set by MSQ (without consultation with BMP) and historically there has been no correlation between the fees charged to ship owners and the price paid to BMP. BMP submits that during the 20 years it has been the sole provider of pilots to the State of Queensland, BMP’s price for each pilotage, as a percentage of the fee set by MSQ for the pilotage, has reduced steadily.
- 4.86. Ports Australia submits that BMP has considerable market power through its monopoly on pilots licensed to operate at the Port of Brisbane and considers that
- under these circumstances there can certainly be no assumption of “no public detriment” in terms, for example, of costs on trade ... it can reasonably be deduced that they have secured a monopoly price for the provision of services in the [Pilotage Services] Agreement.
- 4.87. Shipping Australia is not aware of the financial arrangement between MSQ and BMP for the provision of the services, but notes that any cost increases to the shipping companies would lead to higher costs to the consumers in Queensland.
- 4.88. Australian Reef Pilots’ (ARP) experience in the coastal pilotage market is that competition has resulted in lower costs to shippers. For example, during 2010, pilotage

rates at the Port of Brisbane will be increasing by 18.8% while coastal pilotage increases will average 7.8%.

- 4.89. To demonstrate the impact that competition in pilotage has delivered to the shipping industry and other stakeholders, ARP compares the cost for a one way pilotage of a small to medium sized bulk carrier of 175 metres length (Handymax size) at the Port of Brisbane with a transiting of the inner route (between Cairns and Thursday Island) of the Great Barrier Reef.

	<b>Cost excl. GST</b> \$	<b>Approx. Time</b> (Hours)	<b>Cost per hour</b> \$
<b>Port of Brisbane</b> (from 1 October 2010)	<b>4,249</b>	<b>4</b>	<b>967</b>
<b>Inner Route</b> (1 July 2010)	<b>7,900</b>	<b>30</b>	<b>263</b>

- 4.90. The ACCC notes the concerns raised by interested parties that the exclusive agreement results in higher pilotage costs than would be the case in a competitive market. The AMSA review noted that when pilotage services in the GBR and Torres Strait were opened up to competition in 1993, there was a 20% reduction in the cost of coastal pilotage to the shipping industry.<sup>35</sup> The ACCC does not have sufficient information, however, to determine what the underlying drivers were for the reduction in coastal pilotage costs and whether similar conditions exist at the Port of Brisbane. The ACCC would welcome further submissions on this issue.

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

- 4.91. The information available to the ACCC suggests that there is potential for both competition in and for the market for pilotage services at the Port of Brisbane.
- 4.92. The ACCC considers that the exclusivity agreement between MSQ and BMP is likely to foreclose potential competition in and for the market for pilotage services at the Port of Brisbane, by removing the incentive for other providers to offer their services for the duration of the agreement. This loss of this potential competition is likely to constitute a significant detriment.

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

- 4.93. 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.
- 4.94. In the context of applying the net public benefit test in section 90(8)<sup>36</sup> of the Act, the Tribunal commented that:

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<sup>35</sup> AMSA Review, p. 11.

<sup>36</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.

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>37</sup>

- 4.95. For the reasons outlined in this chapter, the ACCC considers the arrangement is not likely to result in the public benefits claimed by BMP.
- 4.96. Accordingly, the ACCC considers the public benefit that is likely to result from the conduct is not likely to outweigh the public detriment. The ACCC is therefore not satisfied that the test in section 90(8) is met.

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<sup>37</sup> *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

## 5. Draft determination

### The application

- 5.1. On 10 June 2010 Brisbane Marine Pilots Pty Ltd lodged application for authorisation A91235 with the Australian Competition and Consumer Commission (the ACCC).
- 5.2. Application A91235 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 give effect to an agreement whereby Maritime Safety Queensland must acquire all pilotage services at the Port of Brisbane exclusively from Brisbane Marine Pilots Pty Ltd. BMP seeks authorisation until 31 December 2013.
- 5.3. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

### The net public benefit test

- 5.4. For the reasons outlined in Chapter 4 of this draft determination, the ACCC is not satisfied that the conduct for which authorisation is sought is likely to result in such a benefit to the public that the conduct should be allowed to take place.
- 5.5. The ACCC therefore **proposes to deny** authorisation to application A91235.
- 5.6. This draft determination is made on 7 October 2010.
- 5.7. The attachments to this determination are part of the draft determination.

### Further submissions

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

## **Attachment A — the authorisation process**

The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

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

The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.

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

Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.

The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

## **Attachment B — chronology of ACCC assessment for application A91235**

The following table provides a chronology of significant dates in the consideration of the application by Brisbane Marine Pilots Pty Ltd.

<b>DATE</b>	<b>ACTION</b>
10 June 2010	Application for authorisation lodged with the ACCC.
9 July 2010	Closing date for submissions from interested parties in relation to the application for authorisation.
2 August 2010	Submission received from BMP in response to interested party submissions.
7 October 2010	Draft determination issued.

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

## Trade Practices Act 1974

### Section 90—Determination of applications for authorisations

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

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

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (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>38</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>39</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>40</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>41</sup>

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<sup>38</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>39</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>40</sup> Section 91(3).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>42</sup>

## **Six- month time limit**

A six-month time limit applies to the ACCC's consideration of new applications for authorisation<sup>43</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.

## **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>44</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>45</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>46</sup> The ACCC may also review an authorisation with a view to revoking it in certain circumstances.<sup>47</sup>

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.<sup>48</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>49</sup>

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<sup>41</sup> Section 88(10).

<sup>42</sup> Section 88(6).

<sup>43</sup> Section 90(10A)

<sup>44</sup> Subsection 91A(1)

<sup>45</sup> Subsection 87ZD(1).

<sup>46</sup> Subsection 91B(1)

<sup>47</sup> Subsection 91B(3)

<sup>48</sup> Subsection 91C(1)

<sup>49</sup> Subsection 91C(3)