



Australian
Competition &
Consumer
Commission

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: 3 December 2010

Commissioners: Samuel
Kell
Schaper
Court
Dimasi
Walker
Willet

Authorisation no.: A91235

Public Register no.: C2010/554

Summary

The ACCC denies 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.

BMP argues that a single supplier of marine pilotage services is the preferred model for most ports around the world. However, the relevant question for the ACCC to consider in assessing the exclusivity arrangement is not the public benefits and detriments of having a single supplier of marine pilotage services at the Port of Brisbane. As is the case at most ports around the world, MSQ would be likely to acquire marine pilotage services from a single supplier without the exclusivity arrangement.

The relevant question for the ACCC to consider is the public benefits and detriments of the exclusivity arrangement that obliges MSQ to acquire these services from BMP.

A key issue in the draft determination was the extent to which the exclusivity agreement prevented competition for the market. The ACCC accepts that the exclusivity agreement does not completely foreclose competition for the market. In particular, in negotiating the exclusivity agreement with BMP, MSQ would have been expected to have had regard to alternative options for the supply of marine pilotage services to it, such as engaging pilots itself or continuing to use BMP but without an exclusive agreement in place.

These alternatives available to MSQ would have brought some competitive pressure to bear on BMP in negotiating the terms of the exclusivity agreement with MSQ.

However, the ACCC considers that the exclusive agreement is likely to foreclose potential competition to supply pilotage services to MSQ at the Port of Brisbane by removing the incentive for other providers to offer their services for the duration of the agreement.

The ACCC considers that the exclusive agreement is not likely to result in the public benefits claimed by BMP. 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
- the majority of the assets referred to by BMP are likely to be mobile and do not appear to be specific to the customer (i.e. MSQ) such that investment in them 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 exclusivity arrangement is not necessary to ensure continuity and certainty of service.

Accordingly, the ACCC denies authorisation to the proposed exclusivity arrangement.

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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.

Draft determination

- 1.7. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.
- 1.8. On 7 October 2010 the ACCC issued a draft determination proposing to deny authorisation to the exclusive agreement.
- 1.9. A conference was not requested in relation to the draft determination.

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 services¹

- 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.²
- 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.³
- 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.

¹ Productivity Commission, *Economic Regulation of Harbour Towage and Related Services*, 2002, p. 52.

² *Transport Operations (Marine Safety) Act 1994*.

³ 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 was to continue to operate as a government owned corporation until the sale process was completed.
- 2.11. On 10 November 2010 the Queensland Government announced the sale had been completed.
- 2.12. 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.
- 2.13. 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.
- 2.14. Total piloted movements at the port have steadily increased over time, from 4,329 in 1996-97⁴ to 5,704 in 2008.⁵

Pilotage services at the Port of Brisbane

- 2.15. Prior to BMP's establishment, pilotage at the port was undertaken solely by the State of Queensland⁶ and all qualified pilots were employees of the Department.
- 2.16. The Queensland Government privatised the pilotage service in Brisbane on 1 January 1989. BMP was formed, with the company consisting 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.
- 2.17. MSQ has sole responsibility for the provision of pilotage services at Queensland ports to shipowners and shipping agents. The *Transport Operations (Marine Safety) Act 1994*, provides that qualified pilots must be either⁷:
- MSQ employees or
 - acting in the supply of pilotage services under an agreement with MSQ and the pilot or a third party (such as BMP).
- 2.18. Therefore, MSQ is the only party that can contract directly with shipowners for the provision of pilotage services. That is, MSQ contracts with pilotage service providers

⁴ H.M. Kolsen, *Review of Port Pilotage Legislation: Public Benefit and Public Interest Test* 2002, p. 22.

⁵ National Marine Safety Committee, *Regulatory Impact Statement: National Standard for Competencies for Trainee Marine Pilots*, July 2010, p. 51.

⁶ Acting through the Department of Harbours and Marine.

⁷ Section 102A.

(such as BMP) to supply pilotage services at the port and then separately offers pilotage services to shipowners at the port. There is no capacity for shipowners to contract with pilotage providers directly or choose between pilotage providers

- 2.19. Pilotage fees for movements in and out of the port vary depending on the size of the ship; the minimum fee is \$1269.94.⁸
- 2.20. Ship visits to the Port of Brisbane by type of visit from June 2009 to June 2010 are outlined below.

Container ship:	726
General cargo ship	231
Bulk carrier	210
Vehicles carrier	314
Chemical/oil product tankers	150
Crude oil tanker	110
Oil products tanker	110
Ro-Ro cargo ship	14
LPG tanker	113
Chemical tanker	66
Other	205
Total	2249

Pilotage services at other Australian ports

- 2.21. Most ports in Australia have one service provider even if the contract/licence is not exclusive.
- 2.22. In Victoria, pilotage services at the ports of Port Phillip, Melbourne, Geelong and Westernport are undertaken by a private company, Port Phillip Sea Pilots.
- 2.23. 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.
- 2.24. 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

- 2.25. 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

⁸ Port of Brisbane Pty Ltd, *Shipping Handbook 2010*, p. 30.

recruitment, terms and conditions of employment, pilotage fees, provision of infrastructure and/or administration of the pilotage service.⁹

- 2.26. 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 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.
- 2.27. 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.
- 2.28. Recruitment and training of new pilots, consistent with the AMSA licensing requirements, is arranged through the service provider.

Pilotage services at international ports¹⁰

- 2.29. 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.

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

¹⁰ 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.

Prior to the draft determination

- 3.2. 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:
- 3.3. 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.

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.'

Following the draft determination

- 3.10. **Shipping Australia** supports the ACCC's draft determination and agrees that the loss of potential competition which could result from the proposed agreement is likely to generate a public detriment by removing the incentive for other providers to offer pilotage services.
- 3.11. **National Bulk Commodities Group** objects to BMP's application because BMP did not go through a competent transparent tender process. NBCG considers that both parallel and serial competition would be difficult to establish at the Port of Brisbane because:
- it would be difficult for any new entrant to attract existing licensed pilots who would be willing to offer alternative services
 - in Brisbane's relatively small market administration costs would be a significant barrier to entry
 - a tender process would likely only attract one bidder unless there are serving BMP pilots who would be willing to start their own company or join a new company.
- 3.12. In light of the above, NBCG considers that the only option that has the potential to deliver limited competitive tension would be an open book arrangement.

- 3.13. **BMP** submits that much of the analysis in the draft determination proceeds on the mistaken view that competition for the supply of marine pilotage services to shipowners and ship agents at the Port of Brisbane would increase in the absence of the exclusivity provision in the agreement. BMP submits that this is incorrect because MSQ has sole responsibility for providing marine pilotage services in the Port of Brisbane by virtue of a statutory monopoly conferred to it. BMP submits that competition to supply services to shippers and ship owners is not possible without amendment to the statutory regime.
- 3.14. BMP also disagrees with the view put forward by interested parties and the ACCC in the draft determination that there was no competition *for* the market. BMP states that in negotiating the agreement with BMP, MSQ considered BMP's offer against its own model for providing the services (i.e. internalising the pilotage service). Consequently, BMP argues, it was, in effect, competing with MSQ for the market.
- 3.15. BMP considers that the benefits of exclusivity are best illustrated by what might happen to the services provided to MSQ if it is removed. BMP argues that in the event MSQ engages pilots from multiple suppliers BMP would be faced with the following risks:
- the reduced ability to recruit and train new “high calibre” pilots (given market uncertainty)
 - the need to minimise expenditure on future “fit for purpose” infrastructure (due to market uncertainty) and
 - the inability to achieve consistency of service provision in the port (especially if MSQ did not adopt identical safety management, fatigue management and service delivery protocols).
- 3.16. The views of BMP and interested parties are further 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) 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(6) of the Act which states that the ACCC shall not authorise proposed conduct unless it is satisfied in all the circumstances that:
- the proposed conduct would result, or be likely to result, in a benefit to the public and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed conduct were engaged in.
- 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.
- 4.5. In the draft determination the ACCC noted the following in relation to relevant areas of competition affected by the arrangements.

Product dimension

- 4.6. 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.
- 4.7. 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.
- 4.8. In the draft determination the ACCC concluded that it considered the relevant product dimension to be the supply of marine pilotage services.

Geographic dimension

- 4.9. 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.

- 4.10. 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.
- 4.11. 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.¹¹ 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.
- 4.12. 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.
- 4.13. 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.¹² 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.¹³
- 4.14. 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.
- 4.15. 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.¹⁴ The time and cost associated with transporting pilots between ports may also act as a constraint.
- 4.16. In the draft determination the ACCC concluded that it considered the relevant geographic dimension to be the Port of Brisbane.

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

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

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

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

Submissions in response to the draft determination

- 4.17. BMP argues that it is incorrect to conclude that the relevant market is the supply of marine pilotage services at the Port of Brisbane.
- 4.18. BMP argues that the market in which it operates is the provision of pilotage services to MSQ. BMP argues that this is reflected in the terms of the agreement which recognises, amongst other things, that:
- MSQ has sole responsibility for providing marine pilotage services in the Port of Brisbane and BMP does not have any direct contractual relationship with shipowners or shipping agents as it invoices and is paid by MSQ alone
 - BMP's sole customer is MSQ and the sole participants in the relevant market are MSQ and BMP
 - the fee MSQ charges shipowners and shipping agents for pilotage services is not calculated by reference to, nor does it have any correlation with, the price paid by MSQ to BMP for BMP's services
 - the price paid to BMP under the agreement was calculated after extensive modelling and comparison with the costs that MSQ would incur if it was to provide the services itself.
- 4.19. BMP states that the ACCC adopting a market definition covering the supply of marine pilotage services at the Port of Brisbane more broadly means that the ACCC has not accurately assessed the impact of the agreement on competition in and for the market.

ACCC view

- 4.20. The ACCC accepts that the provision of pilotage services at the Port of Brisbane currently involves two distinct contractual relationships, being that between BMP and MSQ governing the terms on which BMP will provide services and that between MSQ and shipowners and shipping agents governing the terms on which MSQ will on-sell services acquired from BMP to them.
- 4.21. Because MSQ has a statutory monopoly to provide pilotage services to shipowners and shipping agents there is a distinction between the market in which suppliers compete to provide marine pilotage services to MSQ and the market in which MSQ then on-sells these services to shipowners and shipping agents.
- 4.22. While BMP is currently the only supplier of pilotage services to MSQ, the ACCC does not accept that BMP and MSQ are the only possible participants in the market to supply pilotage services to MSQ. There are supply side alternatives to having marine pilotage services supplied by BMP. That is, the relevant market includes all potential suppliers of the services. It is the agreement that precludes alternative suppliers from competing to supply these services. This is discussed in greater detail in the ACCC's assessment of the public detriments of the arrangements.
- 4.23. In this respect, the ACCC considers that the relevant product and geographical dimensions of the market to supply marine pilotage services to MSQ are those concluded by the ACCC in the draft determination.

- 4.24. Further, the terms on which marine pilotage services are supplied to MSQ has the potential to impact on the terms on which MSQ on-sells these services to shipowners and shipping agents. This is also discussed further in the ACCC's assessment of the public detriments of the arrangements.
- 4.25. In conclusion, the ACCC considers that in examining the supply of marine pilotage services at the Port of Brisbane there is a distinction between the market in which suppliers compete to provide marine pilotage services to MSQ and the market in which MSQ then on-sells these services to shipowners and shipping agents. The ACCC considers both these markets are relevant to the ACCC's assessment of the arrangements.

The counterfactual

- 4.26. 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.¹⁵
- 4.27. 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'.
- 4.28. 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.
- 4.29. 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.
- 4.30. 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.
- 4.31. In light of the above assessment, the ACCC considers that absent authorisation, there are three likely counterfactuals:
- in the short term

¹⁵ *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.*

- 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
- in the medium-long term
- another provider may seek to establish itself in competition with BMP or seek to tender for the market.

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.¹⁶

4.33. 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.

4.34. The ACCC's assessment of the likely public benefits from the proposed conduct follows.

The distinction between engaging a single supplier of marine pilotage services and having an exclusivity arrangement

4.35. The specific public benefit arguments submitted by BMP are discussed below. As a preliminary point, the ACCC notes that a common theme in the public benefit arguments submitted by BMP is BMP's contention that the realisation of these public benefits, at least to some extent, is dependant on there being a single, rather than multiple, suppliers of marine pilotage services to MSQ.

4.36. The ACCC accepts that there are potential efficiencies in having a single supplier of marine pilotage services at the Port of Brisbane. As noted by BMP, operators of most ports in Australia, and internationally, choose to be serviced by, or have regulations in place requiring that they be serviced by, a single supplier of pilotage services.

4.37. However, the relevant question for the ACCC to consider in assessing BMP's application is not the public benefits of having a single supplier of marine pilotage services at the Port of Brisbane. Rather, the ACCC is assessing the public benefits of the exclusivity arrangement that obliges MSQ to acquire these services from BMP.

¹⁶ *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.

- 4.38. As noted in the ACCC assessment of the relevant counterfactual against which to assess the arrangements at paragraphs 4.26 to 4.31, absent authorisation there are three likely counterfactuals:
- in the short term
 - 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
 - in the medium-long term
 - another provider may seek to establish itself in competition with BMP or seek to tender for the market.
- 4.39. This being the case, in the short term the benefits of having a single supplier of marine pilotage services at the Port of Brisbane would be achieved without the exclusivity arrangement the subject of the application for authorisation.
- 4.40. In the medium-longer term the ACCC considers it is possible that, in the absence of the exclusive agreement, another provider may seek to establish itself in competition with BMP or seek to tender for the market.
- 4.41. In the longer term it is still most likely that, absent the exclusivity agreement, a single supplier, be it BMP or another party that was successful in tendering for the market, will supply marine pilotage services at the Port of Brisbane.
- 4.42. Alternatively, in the medium to long term competing suppliers could operate in the market. However, this would only occur if MSQ formed the view that there was a benefit in having more than one supplier. While MSQ remains of the view that it is desirable to have a single supplier of marine pilotage services at the Port of Brisbane it is able to, and will, achieve this outcome without the exclusivity agreement. That is, if MSQ wants to engage BMP as the sole supplier of marine pilotage services at the Port of Brisbane it is able to do so independently of any agreement with BMP obliging it to do so.
- 4.43. In this respect, there is a distinction between MSQ choosing to engage BMP, or any other party, as the sole supplier of marine pilotage services at the Port of Brisbane and the proposed exclusivity agreement between BMP and MSQ which locks MSQ into being obliged to only acquire services from BMP.
- 4.44. Therefore, the ACCC is not assessing the public benefits (or public detriments) of MSQ acquiring marine pilotage services from a single supplier, be it BMP or another party. Rather, the ACCC is considering the benefits of the exclusivity agreement that *obliges* MSQ to only acquire marine pilotage services at the Port of Brisbane from BMP.

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

- 4.45. 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.
- 4.46. 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.’¹⁷
- 4.47. 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.
- 4.48. 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.
- 4.49. 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 BMP and MSQ need an exclusive agreement to create certainty regarding the provision of pilotage at the port.

A single safety management system and optimisation of safety practices

Submissions prior to the draft determination

- 4.50. BMP submits that the exclusive arrangement ensures that commercial pressures do not impede the provision of an effective safety management system.
- 4.51. 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.

¹⁷ 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.

- 4.52. BMP notes that concern over the impact of privatisation of pilotage in the Great Barrier Reef 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).
- 4.53. 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.¹⁸
- [aggressive competition in the market] is the major issue affecting the achievement of an optimal safety outcome.¹⁹
- The adoption of a safety culture of continuous improvement ... is proving to be elusive ... it may be unattainable under the present service delivery model.²⁰
- 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.²¹
- 4.54. 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.
- 4.55. Ports Australia 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.'
- 4.56. Shipping Australia Limited (SAL) is of the view that competition between pilotage service providers has not resulted in any safety issues.
- 4.57. 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.

¹⁸ Ibid, paragraph 4.4.

¹⁹ John McCoy, *AMSA Coastal Pilotage Regulation Review* 2005, paragraph 5.2.

²⁰ 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.

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

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 draft determination

- 4.58. In its draft determination the ACCC concluded the following.
- 4.59. 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 pilotage 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.'²²
- 4.60. 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:²³
- 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.
- 4.61. 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.
- 4.62. 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 objectives are effectively pursued in a multi-provider setting; for example, construction and handling of hazardous waste.
- 4.63. 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.
- 4.64. 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.

²² 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.

²³ 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.

Submissions in response to the draft determination

- 4.65. BMP submits that regulators are likely to have difficulty in setting specific procedures in complex safety critical industries where specific local knowledge is required, which is likely to result in regulation that is reactive rather than proactive. As a result, BMP argues that regulators are more likely to set general standards and then audit to ensure compliance. BMP argues that competing operators inevitably develop different systems to comply with regulatory standards and requirements and that monitoring of multiple providers results in increased auditing and regulatory costs.
- 4.66. Further, BMP argues that the interaction of a number of safety systems in a confined safety critical space where close coordination is required will contribute to confusion and a heightened risk to safety and that in these situations a sole provider of services ensures the best safety outcomes. BMP submits that this has been recognised by other jurisdictions where pilotage services are provided by a single supplier.
- 4.67. BMP also argues that there is a conflict of interest between the commercial interests of ship owners and the public interest of safe passage; for example, pressure to navigate in restricted visibility or at increased speed to maintain a vessel's schedule. BMP argues that if shipowners are able to choose between pilot providers in a competitive environment, pilots or their organisations would be required to compete for the available work where pilots' livelihood then depends on acting in the shipowner interest rather than the public interest.

ACCC view

- 4.68. The ACCC remains of the view, as expressed in its draft determination, that irrespective of how many providers supply pilotage at a port, pilots have the incentive to perform the services with due care and diligence. As noted above, MSQ is responsible for regulating safety at the Port of Brisbane and as the sole acquirer of these services directly from pilotage suppliers, MSQ is in a position to ensure the operation of an effective safety regime for the provision of pilotage at the port. This remains the case irrespective of whether there are single or multiple providers of those services.
- 4.69. The ACCC notes BMP's arguments regarding the additional regulatory burden involved in managing a number of competing suppliers. However, the ACCC considers that while the minimising of these costs and any related safety concerns may support an argument for a single supplier of pilotage services, it does not necessarily support an argument for the exclusivity arrangement proposed by BMP. As discussed above, absent the exclusivity arrangement it is likely that marine pilotage services at the Port of Brisbane will continue to be supplied by a single provider and therefore the costs identified by BMP as a result of having multiple providers will be avoided.
- 4.70. The ACCC also notes BMP's argument about safety concerns if shipowners are able to choose between pilot providers. However, as noted directly above, marine pilotage services at the Port of Brisbane will likely be supplied by a single provider absent the exclusive arrangement.
- 4.71. In addition, as noted by BMP, even if there was more than one provider of services to MSQ, there is no capacity at the Port of Brisbane for shipowners to choose between

pilot providers. By virtue of its statutory monopoly MSQ has sole responsibility for providing marine pilotage services in the Port of Brisbane and pilots do not have any direct contractual relationship with shipowners or shipping agents. This will remain the case irrespective of whether the exclusivity agreement between BMP and MSQ is given effect to.

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

- 4.72. BMP submitted that the exclusivity arrangement provides it with the certainty required to make a commercial decision to invest in the infrastructure necessary to ensure safe delivery of pilotage services.
- 4.73. In its draft determination the ACCC noted that 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 of a world first pilot dispatch system
 - expansion of office space for support staff and
 - renewal of its vehicle fleet acquiring environmentally friendly vehicles.
- 4.74. The ACCC noted that this expenditure on infrastructure may enable BMP to provide a better quality service and reduce costs that would otherwise be incurred by MSQ. However, it was not clear to the ACCC 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.
- 4.75. Consequently, the ACCC concluded that it was not clear that these investments would not have occurred in the absence of exclusivity.

Submissions in response to the draft determination

- 4.76. BMP submits that the exclusivity arrangement provides both BMP and MSQ with the certainty required to ensure BMP invests in the relevant "fit for purpose" infrastructure, technology, training and development of pilots and management systems for the maintenance of safety and protection of the environment.
- 4.77. BMP submits that multiple pilotage providers would require duplication of expensive services and infrastructure such as pilot launches, dispatch and administrative systems in a limited market. BMP states that the cost of duplication would have to be recovered from the market or, alternatively, would result in a reduction in the standard of these services.

ACCC's view

- 4.78. While BMP argues that the exclusivity arrangement provides certainty for it to make "fit for purpose" investments, BMP provides no examples of such fit for purpose investments it has, proposes to, or will be required to undertake.

- 4.79. Most of the examples of investments undertaken by BMP noted above appear to be in respect of assets that are mobile and not specific to the customer.
- 4.80. Accordingly, the ACCC does not consider that BMP has provided any information that would substantiate a claim that the exclusivity arrangement provides certainty for it to make fit for purpose investments. Further, as concluded in the draft determination, while there is a public benefit in having commercial certainty to undertake the type of investment identified by BMP, this could be achieved through non-exclusive contractual arrangements, as is the case in other Australian ports.
- 4.81. With respect to BMP's submission that multiple pilotage providers would require duplication of expensive services and infrastructure, as discussed at paragraphs 4.39 to 4.44, the ACCC considers that absent the exclusivity arrangement there would likely continue to be a single provider of marine pilotage services to MSQ.
- 4.82. Further, if there were multiple providers, the cost of any duplication would be reflected in the terms on which competing suppliers provided their services. That is, parties would not compete with BMP to provide these services on terms that did not provide for them to cover these costs. This being the case, these duplication costs would only be incurred if MSQ considered there was sufficient benefit in having more than one provider to outweigh the cost of this duplication.

Continuity and certainty of service

- 4.83. In its submission in response to the draft determination BMP submits that exclusivity provides the State, and hence the public, with certainty regarding the provision of pilotage services in the Port of Brisbane. BMP argues that certain provisions in the agreement guarantee continuity of service both during the contract and at the end of the term, ensuring that pilotage in the Port of Brisbane is undertaken according to world's best practice and by an organisation with a pre-eminent international reputation.
- 4.84. BMP argues that in the absence of exclusivity there would be no commercial incentive for BMP to enter into any form of contract with MSQ at all. BMP submits that in those circumstances, the price set by BMP for the services it supplies to MSQ could be set on an ad hoc basis (depending upon daily, weekly or monthly demand).
- 4.85. BMP also submits that exclusivity ensures that all vessels in the Port of Brisbane receive a non-discriminatory pilotage service with pilots available at all times and to all vessels equally. BMP argues that in a competitive environment pilots and their organisations would seek to service the most desirable assignments based on ease of task, duration of pilotage and ability to maximise revenue.

ACCC's view

- 4.86. The ACCC notes that certainty of supply could also be achieved through non-exclusive contractual arrangements. That is, contracts could be tailored so as to place an obligation on the supplier to provide marine pilotage services as required without also placing an obligation on MSQ to only acquire pilotage services from the contracted supplier. In these circumstances BMP would maintain a commercial incentive to enter into a supply contract with MSQ.

- 4.87. In any event, the ACCC considers that the alternative scenario that BMP has suggested would result absent the exclusivity arrangement, where prices could be set according to demand, would be an efficient, pro-competitive outcome which would be in the public interest.
- 4.88. The ACCC does not place any weight on BMP's argument that the exclusivity arrangement generates a public benefit by avoiding a situation where pilots and their organisations would seek to service the most desirable assignments based on ease of task, duration of pilotage and ability to maximise revenue. As noted above, legislation mandates that MSQ is the only party that can contract directly with shipowners for the provision of pilotage, meaning there is no capacity for shipowners to choose between pilotage providers.. This will remain the case irrespective of whether the exclusivity agreement between BMP and MSQ is given effect to.

ACCC conclusion on public benefits

- 4.89. The ACCC is not convinced that the exclusive agreement is required to deliver the public benefits claimed by BMP. 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
 - the majority of the assets referred to by BMP are likely to be mobile and do not appear to be specific to the customer (i.e. MSQ) such that investment in them 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 exclusivity arrangement is not necessary to ensure continuity and certainty of service.

Public detriment

- 4.90. 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.²⁴

- 4.91. BMP submits that no public detriment will flow from the exclusivity arrangement.
- 4.92. The ACCC considers that there are two key issues to consider in assessing the potential for detriment to result from the exclusive arrangement:

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

- whether competition in supplying pilots to MSQ could be achieved at the Port of Brisbane (e.g. by having multiple providers supply services to MSQ)
 - whether competition for the market for the supply of pilots to MSQ could be achieved at the Port of Brisbane.
- 4.93. 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

- 4.94. 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.
- 4.95. Ports Australia submitted that substantial growth was 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:
- 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%.
- 4.96. The ACCC's draft determination included data about total container throughput for Australia's five largest ports, including the average annual growth rate at the Port of Brisbane from 2007-08 to 2029-30. The information available to the ACCC suggested that the Port of Brisbane would experience significant growth in shipping movements in the next 10 to 20 years. The ACCC did not have sufficient information, however, to determine at what point it might be economically efficient to have more than one supplier of pilotage services at the Port of Brisbane.
- 4.97. However, in its draft determination the ACCC was not persuaded that economies of scale in the market would be sufficient to prevent multiple service providers from competing to supply pilotage at the port.

Submissions in response to the draft determination

- 4.98. BMP submits that the figures cited in the draft determination do not necessarily reflect the growth in the market for the provision of pilotage services in the Port of Brisbane because:
- They do not take into account projected and actual increase in ship size. Larger vessels decrease the number of shipping movements, and therefore the pilotage task, required to achieve a given level of cargo movement through the port. As an example, while the number of containers handled in Brisbane has increased by 26% in the last five years, the average container exchange has increased from under 500 to over 800 containers per vessel.

- The figures are based on Australia wide throughputs and cannot be relied upon to represent the projected growth at the Port of Brisbane.
 - They assume that the expected growth in Australian coal exports will result in shipping growth at the Port of Brisbane.
- 4.99. BMP also submits that experience in large overseas ports such as Hong Kong and Rotterdam indicates that a single pilotage provider is the preferred model for pilotage provision regardless of scale.

ACCC view

- 4.100. The ACCC notes BMP's submissions regarding the likely growth in the market for the provision of pilotage services at the Port of Brisbane. The ACCC also notes that BITRE has forecast a significant increase in the number of port calls for ships visiting Australian ports up to 2029-30.²⁵ In any event, the issue of whether significant growth is going to be experienced at the Port of Brisbane over the coming years is not material to the ACCC's assessment of the impact on competition of the arrangements.
- 4.101. With respect to BMP's submission that a single pilotage provider is the preferred model at most ports, the relevant question in considering the impact on competition of the exclusivity agreement is not whether these services would continue to be provided by a single provider absent the exclusivity agreement. Rather, the ACCC is required to assess the impact on the conduct sought to be authorised on the ability of other providers to compete to provide these services, either alongside, or instead of, BMP.
- 4.102. In this respect, the ACCC remains of the view, as expressed in its draft determination, that economies of scale in the market would not appear to be sufficient to prevent multiple service providers from competing for the right to supply pilotage services to MSQ at the Port of Brisbane. This issue is discussed further below.

Barriers to entry for competition in supplying pilotage services to MSQ

- 4.103. In its draft determination the ACCC concluded the following.
- 4.104. 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.²⁶ The highest cost is claimed to be the launches and helicopters that transport pilots to vessels.
- 4.105. The Industry Commission (IC), however, was of the view that pilotage does not constitute a natural monopoly in larger ports.²⁷

²⁵ Bureau of Infrastructure, Transport and Regional Economics, *Australian Maritime Activity to 2029-30: Statistical Report*, p. 43.

²⁶ Productivity Commission, *Economic Regulation of Harbour Towage 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.

²⁷ Industry Commission, *Port Authority Services and Activities*, 1993, p. 92.

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.

- 4.106. 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.
- 4.107. Similarly, in its 1998 *Review of Port Pilotage Legislation in Queensland*,²⁸ 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.²⁹
- 4.108. The requirements of a pilotage service are qualified pilots and a means of conveying the pilot from shore to ship.
- 4.109. 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.³⁰
- 4.110. The information available to the ACCC suggests that there is significant potential growth in demand for pilotage services. According to one industry source, the demand for pilotage movements in Australian ports is expected to increase by 12 percent by 2014.³¹
- 4.111. The relatively low capital cost of entry coupled with increased demand suggests to the ACCC there may be limited ability for a provider to exploit economies of scale in this market.
- 4.112. Based on the information available, the ACCC is not convinced 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 through an exclusive agreement. In determining what the most efficient arrangement for the provision of these services may be, the Industry Commission concluded that:³²

²⁸ KPMG, *Review of Port Pilotage Legislation*, 1998.

²⁹ The prescription of fees for pilotage services was subsequently repealed.

³⁰ Industry Commission, *Port Authority Services and Activities*, 1993, p 92.

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

³² Industry Commission, *Port Authority Services and Activities*, 1993, p. 92.

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.

- 4.113. 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.
- 4.114. 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.
- 4.115. 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.

Submissions in response to the draft determination

- 4.116. BMP considers that much of the analysis in the draft determination proceeds on the mistaken view that competition for the supply of marine pilotage services to shipowners and shipping agents at the Port of Brisbane would increase in the absence of the exclusivity provision in the agreement. BMP submits that this is incorrect because, as a result of a statutory monopoly, the sole provider of pilotage services to shipping agents and shipowners in the port is MSQ. BMP submits that competition in that market is not possible without amendment to the statutory regime.
- 4.117. As noted, BMP also submits that the experience in large overseas ports such as Hong Kong and Rotterdam, each with over 33,000 shipping arrivals per annum, indicates that a single pilotage service provider is the preferred model for port pilotage provision regardless of scale.

ACCC's view

- 4.118. The ACCC notes that under the relevant legislation, MSQ is the only party capable of contracting directly with shipping agents and owners for the provision of pilotage services at the Port of Brisbane. However, this statutory monopoly would not prevent providers from competing to supply pilotage to MSQ, which MSQ then on-sells. The exclusive agreement forecloses this potential competition. That is, absent the agreement, there could be competition to supply pilotage services to MSQ.
- 4.119. In relation to BMP's submission that a single provider is the preferred model for pilotage at ports regardless of scale, the ACCC considers this argument of itself does not support the need for exclusivity. This issue is addressed in the ACCC's assessment of the public benefits of the arrangements at paragraphs 4.34 to 4.43.

Potential for competition for the market at the Port of Brisbane

Submissions prior to the draft determination

- 4.120. 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.
- 4.121. BMP submitted 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.
- 4.122. Ports Australia 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.
- 4.123. 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.
- 4.124. 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.
- 4.125. BMP considered 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.

ACCC's draft determination

- 4.126. In its draft determination the ACCC concluded the following.
- 4.127. Nearly every port in Australia has a single provider of pilotage services. The National Bulk Commodities Group 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.
- 4.128. The ACCC considers this does not mean that a competitive market would not, or could not, be viable.
- 4.129. 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.³³
- 4.130. 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.³⁴
- 4.131. 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.
- 4.132. 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.

Submissions in response to the draft determination

- 4.133. BMP disagrees with the conclusion that there was no competition for the market. BMP submits that the price to be paid to BMP under the agreement was calculated after extensive and intense negotiations with MSQ by way of comparison to an existing model developed by MSQ regarding the likely cost of those services if MSQ was to provide the service itself.

³³ Ports Australia, NBCG submission.

³⁴ KPMG, *Review of Port Pilotage Legislation*, 1998.

- 4.134. Consequently, BMP submits that in negotiating the agreement, it was effectively competing with MSQ for the market. The pricing for the provision of pilotage services under the agreement reflects the certainty created by the exclusive agreement offered by MSQ. BMP contends that if it had failed to offer a price less than or equal to MSQ's model, presumably MSQ would not have agreed to BMP's engagement. However, the agreement was MSQ's preferred model compared with an assessment of its own competitiveness.
- 4.135. Therefore, BMP submits, competition for the market already exists and was a significant factor in the negotiation process between it and MSQ.

ACCC's view

- 4.136. The ACCC accepts that the negotiations for the agreement, particularly the possibility the pilots may have transitioned back to employment with MSQ in the event agreement could not be reached, would likely have constrained BMP's price and service offering. Additionally, in negotiations MSQ would have had regard to potential alternatives other than using BMP or supplying these services itself (i.e. appointing a third party supplier other than BMP).
- 4.137. In this respect, BMP submits that the price paid to BMP under the agreement was calculated after extensive modelling and comparison with the costs that MSQ would incur if it was to provide the services itself.
- 4.138. The extent to which MSQ's views about the cost of it providing pilotage services itself would provide a competitive constraint on BMP's price and service offering would depend on the regard it had to prevailing market conditions in assessing the cost of it providing these services. In this respect the ACCC notes that MSQ has not engaged pilots directly for over 20 years and, to the ACCC's knowledge, does not appear to have actively tested the market for the provision of these services in recent years. If the cost at which MSQ considered that it could provide pilotage services was significantly above that at which BMP is able to provide these services the extent of the competitive constraint that MSQ providing these services itself would place on BMP's price and service offering would be limited.
- 4.139. Accordingly, while regard had by MSQ to the cost of providing these services itself potentially provides some competitive constraint on BMP's price and service offering, the extent of this competitive constraint is not clear.
- 4.140. More generally however, the agreement precludes competition for the market for its duration. As noted previously, BMP considers that the sole participants in the relevant market are MSQ and BMP. The ACCC does not agree with this assertion. MSQ and BMP are the sole participants in this market only by virtue of the agreement. Absent the agreement, other providers could compete to supply pilots to MSQ.
- 4.141. While it would likely remain the case that MSQ would acquire pilotage services from a single supplier, the terms on which those services were provided would be constrained by the threat of entry from competing suppliers. The agreement removes this competitive tension.

- 4.142. The ACCC notes that the duration of the proposed arrangement is three years. While this may appear to be a relatively short period, BMP 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 the contrary, the agreement envisages a continuation of the current scenario. It contains a provision that requires the parties to begin early good faith negotiations for the purposes of reaching a further agreement for a period commencing 1 January 2014.
- 4.143. On this basis, the ACCC considers the exclusive agreement is likely to foreclose potential competition for the market beyond the short term.
- 4.144. However, as noted above, at the time the agreement was entered into, MSQ would have been expected to have had regard to alternative options for the supply of marine pilotage services to it, such as engaging pilots itself or continuing to use BMP but without an exclusive agreement in place. The ACCC accepts these alternatives available to MSQ would have brought some competitive pressure to bear on BMP in negotiating the terms of the exclusivity agreement with MSQ.
- 4.145. The ACCC also accepts that MSQ is well placed to assess potential options for the provision of pilotage services at the Port of Brisbane and that if, having done so, an exclusive agreement with BMP is its preferred option, this may indicate that it does not consider the competitive constraint that a non-exclusive agreement would provide to be a significant benefit.

Cost of pilotage services

Submissions prior to the draft determination

- 4.146. 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.
- 4.147. 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.
- 4.148. A number of interested parties expressed concern that the exclusive agreement results in higher pilotage costs than would be the case in a competitive market.
- 4.149. 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.
- 4.150. 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.

- 4.151. 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%.
- 4.152. To demonstrate the impact that competition in pilotage delivered to the shipping industry and other stakeholders, ARP compared 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.

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

ACCC's draft determination

- 4.153. The ACCC noted 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.³⁵ The ACCC did 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 invited further submissions on the issue.

Submissions in response to the draft determination

- 4.154. BMP submits that the beneficiary of a reduction in any price for the services currently provided by BMP is MSQ alone. That is, there is no correlation between the price paid to BMP for its services under the agreement and the price charged by MSQ for marine pilotage services in the Port of Brisbane. The greater the differential the greater the 'profit' for MSQ. BMP states that MSQ uses this profit to provide services in other ports and areas over which it has jurisdiction that are less profitable.

ACCC's view

- 4.155. The ACCC accepts BMP's submission that, as a statutory monopoly, MSQ is able to set prices for pilotage services to shippers and shipping agents unconstrained by the threat of competition for the provision of these services. This will remain the case irrespective of whether the exclusivity agreement is entered into. Therefore, any benefits from an improved competitive environment, in the form of pilotage services being provided to MSQ on more favourable terms, may not be fully passed on to shipowners and shipping agents.

³⁵ AMSA Review, p. 11.

- 4.156. However, MSQ is a division of the Department of Transport and Main Roads with the stated role of protecting Queensland's waterways and the people who use them, thereby providing safer, cleaner seas. As such MSQ does not have the same incentive to maximise profits as a commercial operation would. Although MSQ may have some incentive to maximise revenue to, as BMP submits, cross subsidise the provision of services in less profitable areas of its business.
- 4.157. This being the case, whether the benefits of greater competition for the provision of pilotage services to MSQ were reflected in the terms and conditions on which MSQ on-supplied these services to shippers, or directed towards the provision of other services by MSQ, the ACCC considers that these benefits would, at least to some extent, be passed on by MSQ.
- 4.158. Therefore, to the extent that any restriction on competition as a result of the exclusivity agreement results in services being supplied to MSQ on less competitive terms the ACCC considers this to be a public detriment.

ACCC conclusion on public detriments

- 4.159. The ACCC considers that the exclusivity agreement between MSQ and BMP is likely to foreclose potential competition to supply pilotage services to MSQ at the Port of Brisbane, by removing the incentive for other providers to offer their services to MSQ for the duration of the agreement.
- 4.160. In negotiating the exclusivity agreement with BMP, MSQ would have been expected to have had regard to alternative options for the supply of marine pilotage services to it, such as engaging pilots itself or continuing to use BMP but without an exclusive agreement in place. The ACCC accepts these alternatives available to MSQ would have brought some competitive pressure to bear on BMP in negotiating the terms of the exclusivity agreement with MSQ.
- 4.161. However, the exclusivity agreement precludes competition for the market to supply marine pilotage services to MSQ for its duration.

Balance of public benefit and detriment

- 4.162. 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.
- 4.163. In the context of applying the net public benefit test in section 90(8)³⁶ of the Act, the Tribunal commented that:

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

³⁶ 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.

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

- 4.164. For the reasons outlined in this chapter, the ACCC considers the arrangement is not likely to result in the public benefits claimed by BMP and is likely to result in some anti-competitive detriment.
- 4.165. 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(6) is met.

5. 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.

The net public benefit test

- 5.3. For the reasons outlined in Chapter 4 of this determination, the ACCC is not satisfied that the conduct for which authorisation is sought is 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.
- 5.4. The ACCC therefore **denies** authorisation to application A91235.
- 5.5. This determination is made on 3 December 2010.
- 5.6. Section 90(4) requires that the Commission state in writing its reasons for a determination. The attachments to this determination are part of the determination.

Application for review

- 5.7. Pursuant to section 101 of the Trade Practices Act 1974, a person dissatisfied with this determination may apply to the Australian Competition Tribunal for its review. An application must be made within 21 days of the date of this determination; that is, on or before 24 December 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 application A91235

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

DATE	ACTION
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.
22 October 2010	Closing date for submissions from interested parties in relation to the draft determination.
15 November 2010	Submission received from BMP in response to the draft determination.
3 December 2010	Final 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.³⁸

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.³⁹

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.⁴⁰

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 future⁴¹

³⁸ *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.

³⁹ *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.

⁴⁰ Section 91(3).

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

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation⁴³. 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.⁴⁴ 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.⁴⁵

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.⁴⁶ The ACCC may also review an authorisation with a view to revoking it in certain circumstances.⁴⁷

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.⁴⁸ The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.⁴⁹

⁴¹ Section 88(10).

⁴² Section 88(6).

⁴³ Section 90(10A)

⁴⁴ Subsection 91A(1)

⁴⁵ Subsection 87ZD(1).

⁴⁶ Subsection 91B(1)

⁴⁷ Subsection 91B(3)

⁴⁸ Subsection 91C(1)

⁴⁹ Subsection 91C(3)