



Draft Determination

Application for revocation of A91388 and the substitution of
authorisation AA1000435

lodged by

The Recruitment, Consulting and Staffing Association Limited

in respect of

its Professional Conduct Regime

Authorisation number: AA1000435

Date: 6 June 2019

Commissioners: Sims

Rickard

Featherston

Summary

The ACCC proposes to grant re-authorisation to the Recruitment, Consulting and Staffing Association's (RCSA) Professional Conduct Regime.

RCSA is an Australian recruitment industry association. RCSA's Professional Conduct Regime sets out standards of professional behaviour to which RCSA members must conform, guidelines for the resolution of grievances and processes for dealing with non-compliance by members.

RCSA represents over 2000 corporate and individual members ranging from large multinational recruitment agencies and businesses to individual recruitment consultants. The services provided by RCSA members can include providing staff for short-term hire, permanent placement services and other services such as workforce consulting.

The ACCC considers RCSA's Professional Conduct Regime will result in public benefits by improving professional standards in the industry, enabling market participants to make more informed decisions and providing consistency in behavioural standards where state and territory legislation is misaligned.

The proposed conduct is unlikely to impact on recruitment service providers' ability to compete with each other to provide services. The ACCC has not received any evidence that RCSA has refused membership in an anti-competitive manner.

The ACCC considers that, while evidence of RCSA's use of the sanctions for which it seeks authorisation is limited, and RCSA did not impose sanctions at all under the previous authorisation, A91388, authorisation for these sanctions is likely to have incentivised engagement with the earlier resolution options of RCSA's Professional Conduct Regime. Further, RCSA has used the protection provided by authorisation to refuse membership to applicants that it does not consider suitable for membership.

However, the ACCC is concerned about whether the threat of sanctions is credible and effective as a deterrent to poor behaviour in the first instance given RCSA does not have a strong record of imposing sanctions for non-compliance.

The ACCC has authorised versions of RCSA's Professional Conduct Regime since 2003, but this iteration of the regime, and this authorisation, includes substantial changes from prior iterations.

The ACCC proposes to grant re-authorisation for five years.

The ACCC invites submissions in relation to this draft determination before making its final decision.

1. The application for authorisation revocation and substitution

- 1.1. On 6 February 2019, The Recruitment, Consulting and Staffing Association Limited (**RCSA**) lodged an application with the Australian Competition and Consumer Commission (the **ACCC**) to revoke authorisation A91388 and substitute it with authorisation AA1000435 (referred to as **re-authorisation**). RCSA seeks re-authorisation for its professional conduct regime for ten years. This application for re-authorisation AA1000435 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).

- 1.2. The ACCC can grant authorisation, which provides businesses with legal protection for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.3. The ACCC has previously granted authorisation to RCSA for its professional conduct regime in three successive five-year authorisations.¹ The most recent authorisation was granted on 12 February 2014 and was due to expire on 6 March 2019. RCSA's application for re-authorisation includes substantial changes from prior authorisations.
- 1.4. On 28 February 2019 the ACCC granted interim authorisation under subsection 91(2) of the Act. Interim authorisation suspended the operation of the authorisation sought to be revoked and granted an interim authorisation in substitution. Interim authorisation enables RCSA to continue to give effect to its professional conduct regime that is authorised under authorisation A91388 while the ACCC is considering the substantive application for re-authorisation.²

The Applicant

- 1.5. RCSA describes itself as the peak industry body for recruitment, staffing and workforce solutions in Australia and New Zealand. RCSA represents over 2000 corporate and individual members across the staffing sector who provide recruitment and human resource services such as permanent placement services, contracting services, on-hire services and workforce consulting services. The association also includes two internal Member Groups; the first comprising nursing agencies, the Association of Nursing Recruitment Agencies (ANRA); and another comprising medical recruiters, the Association of Medical Recruiters Australia and New Zealand (AMRANZ).
- 1.6. RCSA submits that it promotes and facilitates professional practice within the recruitment and staffing industry and that it sets the benchmark for industry standards through representation, education, research and business advisory support to its member organisations and accredited professionals who are bound by the RCSA Code for Professional Conduct through membership.

The Conduct

- 1.7. RCSA seeks re-authorisation for its professional conduct regime, which sets out the professional standards for, and regulates the conduct of, its members in relation to the provision of recruitment and human resources services (the **Professional Conduct Regime**). At a high level, these professional standards relate to the manner in which recruitment agencies and other service providers deal with job seekers and employers, and the ways in which RCSA members interact with each other in providing those services.
- 1.8. RCSA's application for re-authorisation includes:
 - For 12 months, authorisation in respect of its existing Code for Professional Conduct (**Old Code**) and Disciplinary and Dispute Resolution Procedures (**DDRP**).
 - For nine years following this period, a new Code of Professional Conduct (**Code 5**) to replace the Old Code, which specifies and guides standards for ethics, probity and professional conduct.

¹ See ACCC determinations granting previous authorisations on 24 September 2003 ([A90829](#)), 21 January 2009 ([A91102](#)), and 12 February 2014 ([A91388](#)).

² See ACCC decision of 28 February 2019 available at www.accc.gov.au/authorisationsregister.

- For 10 years commencing from the date of authorisation, new Professional Conduct Grievance Interventions Guidelines (**PCGIG**) to replace the DDRP, which establish procedures for managing professional conduct grievance interventions and disputes and in accordance with which members may be liable to the imposition of sanctions including exclusion, suspension and fines.
 - For 10 years commencing from the date of authorisation, specific clauses of RCSA's Constitution³ and By-Laws⁴, identical to those previously authorised.
- 1.9. RCSA has sought authorisation for its Old Code and DDRP as a transitional measure to allow its members and their clients to familiarise themselves with Code 5 and effect any operational transition necessary, and to allow RCSA to make a statement of strategic priorities and intent to accompany Code 5. RCSA intends to delay the introduction of Code 5 until March 2020, but to introduce the PCGIG as soon as practicable.
- 1.10. RCSA seeks authorisation to continue to enter into arrangements pursuant to the Professional Conduct Regime, which may involve breaches of the Act, namely:
- Excluding from the supply of association services⁵:
 - Those upon whom sanctions are imposed.
 - Applicants for membership, who are refused membership.
 - Excluding from the supply of workforce services⁶:
 - Members who are constrained from providing services in a certain manner.
 - Members upon whom sanctions are imposed.
 - Applicants who may encounter a partial barrier to entry where potential clients stipulate RCSA (or equivalent) membership and membership is refused.
 - Third line forcing where an applicant for membership is required to include related entities and assume responsibility for their conduct, and to supply sponsorship or franchise services to related entities on the condition that they obtain membership services from RCSA (the '**Membership Extension Principle**'). For example, a franchisor that applies for corporate membership may be required to include all franchisees in its application.

2. Background

- 2.1. In its application for re-authorisation, RCSA notes that the new Code 5 and PCGIG are different to previously authorised versions as they adopt a principles based approach, focusing on enhancing standards of professional conduct rather than

³ Clause 2.1 (Classes of Membership), clause 2.2 (Criteria for Membership), clause 2.8 (Exclusion or Suspension or other sanctions), clause 8.3 (By Laws), and clause 15 (Dispute Resolution).

⁴ Clause 1.1b (Membership Extension Principle) and clause 1.10 (Objections to Membership).

⁵ 'Association services' being RCSA membership and any entitlements conferred by membership, including eligibility for members to use their affiliation with RCSA on corporate and promotional material.

⁶ 'Workforce services' being those offered by workforce services providers (e.g. recruitment agencies) to the recruitment and human resources market.

adopting a rules based, policing approach. RCSA's stated rationale for these changes is:⁷

- The current code of conduct was introduced following industry deregulation in the early 1990s. At that time, RCSA saw its role as an industry regulator in an environment with an absence of national, uniform or harmonised legislation.
- Since that time, there has been a significant change in regulatory oversight for the industry, including the introduction of labour hire licensing regimes in a number of state jurisdictions. In addition, there are a number of other new regulations that impact and govern a range of member business activities as well as the possibility of the introduction of a national licensing regime for the sector in the future.
- In light of changes to the regulatory environment and increasing overlap of the industry code with statutory regulations, RCSA aspires to move away from its role as an industry regulator to that of an advocate for enhanced industry and professional standards.
- Its objective is to promote the utilisation of the Code of Professional Conduct to achieve self-regulation of the on-hire worker services sector, wherever possible and effective, rather than see the introduction of additional legislative regulation to address deficiencies in the industry.

Previous Authorisations

- 2.2. RCSA's professional conduct regime was first authorised on 24 September 2003 for a period of five years (A90829), with a minor variation to this authorisation granted on 9 January 2006.
- 2.3. The ACCC re-authorised RCSA's professional conduct regime for a period of five years on 21 January 2009 (A91102) with minor variations to aspects of the DDRP granted on 2 July 2010.
- 2.4. The ACCC most recently re-authorised RCSA's professional conduct regime on 12 February 2014 for a period of five years (A91388) with minor variations to aspects of its constitution granted on 3 March 2017.
- 2.5. The current version of RCSA's Professional Conduct Regime contains substantial amendments to RCSA's professional conduct regime as authorised in 2014. These are outlined below.

Changes to RCSA's Old Code under Authorisation A91388

- 2.6. RCSA submits it has recalibrated its Code 5 to set out overarching standards of professionalism, whereas its Old Code focussed on setting prescriptive rules and on legal non-compliance. RCSA submits Code 5 sets out high level and easy to understand principles to facilitate understanding by RCSA members and the public of what behaviour is appropriate and should be expected of RCSA members in their dealings with job seekers, employers, recruitment agencies and other industry participants.
- 2.7. RCSA submits that, in the context of declining levels of trust between service providers and work seekers, Code 5 shifts the focus of RCSA's Professional Conduct Regime

⁷ Recruitment, Consulting and Staffing Association Limited, 'Application for revocation of an authorisation proposed conduct and substitution of a replacement' 6 February 2019, p. 13, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/recruitment-consulting-staffing-association>

towards identifying and raising standards of professionalism for service providers, and away from other functions better suited to statutory regulators and civil litigants.

- 2.8. RCSA has indicated there are likely to be instances of professional conduct grievances that it is well placed to investigate as a voluntary industry body and that where it refers conduct to a regulator or otherwise, this does not preclude it from monitoring those processes and any findings, or from conducting its own investigations as appropriate.
- 2.9. Code 5 articulates two sets of standards: personal professionalism standards and operational integrity standards. RCSA calls upon its members to embed these standards in their dealings with job seekers, clients, and other workforce service providers. This includes that RCSA members must: deal respectfully with stakeholders (e.g. treating people with courtesy and dignity and ensuring work seekers are given equal opportunities for career progression and skill enhancement); handle information with due regard to privacy and confidentiality; obtain adequately informed consent (e.g. from a job-seeker to be presented to a potential employer); establish and maintain credible grievance handling procedures; and must conduct their business in a way that does not contribute to worker exploitation. RCSA considers its Code 5 articulates these values more thoroughly, completely and contemporarily than equivalent sections of the Old Code.
- 2.10. In addition, Code 5 establishes a continuous disclosure duty on RCSA members for events and findings that could reasonably be expected to reflect adversely on the character or reputation of the member, the association, or the industry.

Changes to RCSA's DDRP under Authorisation A91388

- 2.11. RCSA submits that its new PCGIG provides a more robust framework for allocating grievances to appropriate resolution much earlier in the process, and incorporates recent conflict resolution advances. The PCGIG retains all processes present in the DDRP, but configures them differently, with more of a focus on early resolution. The PCGIG incorporates a number of other changes, including:
 - Introducing a new process for RCSA to refer member conduct to a statutory regulator, commission, or tribunal. RCSA has historically regarded its proceedings as confidential domestic matters internal to RCSA. This change allows for the handling of grievances that are outside of RCSA's scope as a voluntary industry association.
 - Introducing a precautionary notification mechanism that allows RCSA to note a caution against a member on its public Register of Members where RCSA decides to intervene in a grievance.
 - Strengthening recommendations and directions made during different stages of the course of RCSA interventions, which may result in the imposition of sanctions where they are not complied with.
- 2.12. RCSA submits that there will be a range of professional conduct matters that do not fall within the jurisdiction of an enforcement body but which will be of interest to RCSA. Where RCSA refers member conduct to statutory enforcement bodies, RCSA will have the option to proceed with its own intervention concurrently or following the publication of regulatory findings.

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties, including the Fair Work Commission, the Fair Work Ombudsman, State authorities, other recruitment/staffing associations, RSCA member customers and recruitment agencies that are not RSCA members.⁸
- 3.3. The ACCC received five submissions from RSCA members in support of RSCA's request for re-authorisation and changes to its Professional Conduct Regime.
- 3.4. RSCA made three submissions to provide supporting information consisting of a "frequently asked questions" document and two responses to ACCC information requests.
- 3.5. APSCo Australia, an alternative recruitment industry association, made a submission in support of RSCA's Code 5 as an appropriate response to increased federal and state regulation, and stated that the proposed arrangements were not anti-competitive. APSCo Australia further stated that the evidence and supplementary materials presented by RSCA, and its intent to provide additional guidelines, is to be commended and supports the view that RSCA provides a framework to promote high standards of professional behaviour and conduct for association members. APSCo Australia noted, however, that it considers the opportunities for individuals to raise concerns and understand the intervention process may be somewhat more difficult under the new regime.
- 3.6. RSCA responded to APSCo Australia's concerns, noting that the PCGIG is essentially for the internal guidance of RSCA itself in managing professional conduct grievances and that the process from the perspective of someone looking to raise a concern will not change. RSCA further noted that it has already prepared and made publically available education materials relating to the PCGIG and intends to provide extensive training post-authorisation of the Code 5 framework.
- 3.7. Public submissions by RSCA and interested parties are on the [public register](#) for this matter.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. RSCA has sought authorisation for Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act or constitute exclusive dealing within the meaning of section 47 of the Act and substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsection 90(7) and 90(8) of the Act⁹, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the Conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).

⁸ A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

⁹ See subsection 91C(7).

4.3. In its assessment of the application, the ACCC considers that:

- the likely future without the Conduct is that RCSA's Professional Conduct Regime would remain in place. However, there would be less of an incentive for RCSA members to adhere to Code 5, as RCSA would not have statutory protection to enforce the PCGIG, which include imposing sanctions for code breaches.
- the relevant area of competition likely to be affected by the Conduct is the supply of recruitment and workforce services in Australia.

Public benefits

4.4. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*¹⁰

4.5. RCSA submits that the Conduct is likely to result in public benefits in the form of:

- promoting equitable dealing in the workforce services market,
- providing improved means of continuing effective regulation through assisting members to act ethically and professionally within the workforce services industry and providing effective grievance intervention mechanisms, and
- fostering business efficiency to the extent that the arrangements provide for efficient business models (for example, supplier transitions, where a client redirects in whole or in part its requirements for the supply of on-hire services from one workforce services provider to another workforce service provider) and facilitate faster resolution of grievances.

4.6. RCSA further submits that the proposed arrangements will assist members to act professionally and ethically and reduce the risk that parties who deal with members (work seekers; business consumers; other service suppliers) will be exposed to unprofessional conduct.

4.7. The ACCC has assessed RCSA's public benefit claims and considers RCSA's Professional Conduct Regime is likely to raise professional standards in the industry and in turn result in a reduction of information asymmetry by providing market participants (including job seekers and employers) with an indication that RCSA members' professional conduct adheres to a particular standard.

Improved professional standards and reduction of information asymmetry

4.8. Information asymmetry can arise between: a) service providers and their clients; b) service providers and work seekers; or c) service providers and other service providers. In these circumstances, those seeking to acquire and supply labour market services may have insufficient information to make informed and efficient decisions.

4.9. For example, information asymmetries can impact on job seekers if information about remuneration is withheld or they are given misleading information about a job vacancy.

¹⁰ Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

Such conduct may arise because a recruiter may be incentivised to place a job seeker into employment in order to achieve a commission or obtain a fee, whereas a job seeker is incentivised by employment opportunities with attractive benefits and remuneration.

4.10. In addition, the ACCC considers that information asymmetries may lead to workseekers and clients choosing not to engage with workforce services providers at all in circumstances where it would be beneficial for them to do so. For example, due to search costs of distinguishing between service providers, and uncertainty about which service providers may be more likely to perform to a high standard versus those that would not.

4.11. The ACCC considers RCSA's Professional Conduct regime is likely to reduce this imbalance and to result in a public benefit by: firstly, raising standards in the industry so that unprofessional or inappropriate conduct becomes less likely, and secondly by providing job seekers and clients with an assurance that by choosing to deal with an RCSA member, they can expect a high standard of ethical conduct and professional behaviour. In turn, job seekers can make more efficient and informed decisions about which recruitment services provider is likely to best suit their needs.

4.12. In particular the ACCC considers that:

- There is some evidence that RCSA's Professional Conduct Regime has been effective in raising professional standards to date. Specifically, the level of non-compliance with the Code appears to be low. While there are substantial amendments proposed to the Professional Conduct Regime, the ACCC has not received any information to indicate that this is likely to affect the level of member compliance in the future. We consider that RCSA prefers less stringent forms of intervention backed by the threat of sanctions and note that, should this reflect a reluctance to impose sanctions where they are warranted, this could in turn make the threat of sanctions less credible and less effective in deterring misconduct in the first instance. While RCSA has only imposed sanctions on a few occasions in the past, and sanctions were not imposed at all under A91388, the ACCC does not have evidence to indicate that sanctions have not been imposed where appropriate. In addition, the ACCC notes that RCSA has used the protection provided by authorisation to refuse membership to applicants that it does not consider suitable for membership.
- We also note that, as a voluntary association, those who choose to become RCSA members may be more likely to comply, or intend to comply, with the standards specified in the Code. Further, the threat of sanctions, including expulsion, creates an additional incentive for members to engage with RCSA's compliance pathways that are more conciliatory and less stringent, and reduces the risk of non-compliance or refusal to engage with compliance measures. We are satisfied that RCSA's educative and cooperative approach, supported in part by the threat of sanctions, has encouraged engagement with its intervention methods, and is likely to result in public benefits.
- This said, in considering any future application for authorisation, the ACCC is likely to look for evidence that RCSA is undertaking effective enforcement and compliance activities leading to appropriate deterrence. Evidence that RCSA has not imposed sanctions, where they would have been appropriate for delivering specific and general deterrence, would raise concerns as to whether the benefits arise to the extent claimed.

- The operation and enforcement of RCSA's Professional Conduct Regime is likely to incentivise higher levels of equitable dealings and facilitate effective self-regulation of professional operational standards in the employment services market. RCSA's Professional Conduct Regime sets standards that are above those required by the law and its guidance material specifies and guides how members should approach specific situations, for example the transition of job-seekers between service providers. RCSA submits that its guidance material on this transition process provides procedures for ensuring that job seekers are satisfactorily informed of their options and entitlements.

The ACCC considers that higher standards and guidance materials are likely to promote equitable dealing (e.g. by providing those job seekers most likely to be affected by a transition with the opportunity to have input into the decision to go or stay) and foster efficiency by providing consistent and appropriate approaches that members can adopt in their dealings.

- Any confusion that could arise about whether individual service providers who form part of the same franchise or corporate group are all RCSA members and are all bound by the Professional Conduct Regime is likely to be prevented by the potential third line forcing conduct arising from the 'Membership Extension Principle'. For example, if a franchisor represented itself as an RCSA member it could be unclear as to whether all franchisees are also bound by the Professional Conduct Regime. The Membership Extension Principle allows RCSA to require a franchisor or corporate group to include its franchisees or related entities involved in providing the same or similar services in any application for RCSA membership or to assume responsibility for the franchisee/related entity's conduct that may be inconsistent with the Code.
- To the extent that regulation of the recruitment industry is not uniform across Australia, and to the extent statutory regulators do not capture all professional conduct matters, RCSA's Professional Conduct Regime is likely to result in the promotion of consistency across the industry for higher standards of services, ethics, and professional conduct.

Public detriments

4.13. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

...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.¹¹

4.14. RCSA submits that any detriments to the public resulting from the conduct are minimal and its Professional Conduct Regime is unlikely to result in anticompetitive behaviour in the supply of recruitment and workforce services.

Access to RCSA services

4.15. Membership of RCSA may provide an advantage to recruitment service providers over those that choose not to become members because members hold themselves to a higher professional conduct regime than is required by law. This may make RCSA members more attractive to job seekers and potential employers. If members are

¹¹ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

inappropriately expelled or not accepted as members this may impact on their ability to compete to provide recruitment services.

4.16. However, the ACCC considers that this anticompetitive detriment is unlikely, as:

- The ACCC has not received any evidence that RCSA has refused membership in an inappropriate or anticompetitive manner.
- RCSA's Professional Conduct Regime contains a dispute resolution and appeals process. The ACCC has not received any evidence to suggest it is not administered in a fair and transparent way.
- While some franchises and corporate groups may be precluded from becoming members under the Code unless they also require their franchisees and related entities to also become members, it is not a requirement to join RCSA in order to provide recruitment services. Businesses will elect to sign up if they see benefit to the group. In any event, the incidence of such arrangements is not so great as to suggest that any substantial lessening of competition in the provision of recruitment services would result from this Membership Extension Principle.
- RCSA membership is voluntary, open to all eligible service providers, and is not a necessary requirement for recruitment, consulting and on-hire service providers. Approximately 25% of service providers are members of RCSA. Alternative industry associations are available including professional associations for multi-disciplined professions, the Australian Human Resources Institute, Chambers of Commerce, and other industry associations (for example APSCo Australia). These associations may constrain RCSA where workseekers and clients give weight to membership of an association (but not specifically RCSA) in their dealings.

Reduced competition between recruitment service providers

4.17. The ACCC does not consider that the Conduct will reduce competition between recruitment service providers. The Professional Conduct Regime is not likely to facilitate the sharing of information and coordination between competitors in relation to fees and/or broader conduct, resulting in a reduction of choice for consumers and/or leading to higher prices (and/or lower wages).

4.18. The ACCC considers that the risks of detriment in the form of reduced choices and/or higher prices are low, as RCSA's Professional Conduct Regime relates to professional standards and dispute resolution procedures and not fees, wages and/or broader conduct.

4.19. The Conduct may result in public detriment if RCSA does not hold members to higher professional standards than those required by legislation, and does not impose appropriate sanctions for non-compliance. Workseekers or businesses might engage RCSA members over other market participants due to an impression of a higher level of disciplinary (as opposed to compliance) intervention than is accurate.

4.20. However, the ACCC considers that RCSA's Professional Conduct Regime clearly sets out its preference for early guidance and compliance measures over the imposition of sanctions. RCSA has published, and proposes to publish significant guidance materials to assist in interpreting the Code, including periodic public statements of strategic intent, Code guidelines, and consensus statements. The ACCC further considers that detriment of this form is unlikely so long as there is a high level of member compliance with RCSA's Professional Conduct Regime, regardless of the type of disciplinary activity undertaken by RCSA.

Balance of public benefit and detriment

4.21. For the reasons outlined in this draft determination, the ACCC is satisfied that the Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Conduct.

Length of authorisation

- 4.22. The Act allows the ACCC to grant authorisation for a limited period of time.¹² This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
- 4.23. In this instance, RCSA seeks re-authorisation for ten years, rather than the five years granted to it on three previous occasions. RCSA submits that this is an appropriate period considering the increased impact of external regulation and oversight and the success of the Professional Conduct Regime over a long period. RCSA further considers its members and the public would benefit from stability created by a longer period of authorisation of the Code, especially in the current climate of evolving labour procurement practices and supply chain integrity requirements.
- 4.24. The ACCC typically grants authorisations for periods of up to five years, although the ACCC has granted authorisation for longer periods (up to 20 years) when supported by the facts.
- 4.25. The ACCC notes that RCSA has submitted a substantially amended Professional Conduct Regime in response to significant changes in its regulatory environment, and has identified further regulatory change as likely. The ACCC considers these facts do not support a longer authorisation period.
- 4.26. Given the assessment of public benefits and detriments likely to result from the Conduct, the ACCC proposes to re-authorise RCSA's Professional Conduct Regime for five years. The ACCC further proposes to authorise RCSA's Old Code and DDRP for 12 months (being the first year of the five-year period).

5. Draft determination

The application

- 5.1. On 6 February 2019 RCSA lodged an application for re-authorisation. This application for re-authorisation AA1000435 was made under subsection 91C(1) of the Act.
- 5.2. RCSA seeks re-authorisation for its Professional Conduct Regime, which sets out the professional standards for, and regulates the conduct of, its members in relation to the provision of recruitment and human resources services.
- 5.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

¹² Subsection 91(1)

The authorisation test

- 5.4. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Conduct.
- 5.5. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Conduct, including any lessening of competition.
- 5.6. Accordingly, the ACCC proposes to grant re-authorisation.

Conduct that the ACCC proposes to authorise

- 5.7. The ACCC proposes to revoke authorisation A91388 and grant authorisation AA1000435 in substitution to enable RCSA to administer its revised Professional Conduct Regime, which sets out the professional standards for, and regulates the conduct of, its members in relation to the provision of recruitment and human resources services.
- 5.8. Specifically, the ACCC proposes to grant authorisation to RCSA for:
 - 12 months in respect of its Old Code and DDRP.
 - Five years commencing from the date of authorisation for the PCGIG and Code 5.
 - Five years commencing from the date of authorisation, in respect of specific clauses of RCSA's Constitution and By-Laws, identical to those previously authorised.
- 5.9. The Conduct may include a cartel provision within the meaning of Division 1 of Part IV of the Act or constitute exclusive dealing within the meaning of section 47 of the Act and substantially lessen competition within the meaning of section 45 of the Act.
- 5.10. This draft determination is made on 6 June 2019.

6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.