



Draft Determination and interim authorisation

Application for revocation of A91402 and the substitution of
authorisation AA1000440

lodged by

The Association of Professional Engineers, Scientists and Managers,
Australia (APESMA)

in respect of collective bargaining arrangements

Authorisation number: AA1000440

Date 20 June 2019

Commissioners: Sarah Court

Mick Keogh

Delia Rickard

Summary

The ACCC proposes to grant re-authorisation to enable APESMA to continue to collectively negotiate terms of engagement on behalf of its current and future members who provide translator and interpreter services, primarily to Government departments. This conduct has been previously authorised since 4 June 2014 under Authorisation A91402 and remains unchanged in the current application.

The ACCC proposes to grant re-authorisation for 10 years.

The ACCC considers that granting re-authorisation is likely to lead to continued public benefits, including transaction cost savings and improved access to information, which may enable more effective and efficient negotiation, and greater development and retention of qualified practitioners in the industry. Public detriments are likely to be limited. No concerns have been raised by interested parties.

The ACCC has also granted interim authorisation to enable APESMA to continue to engage in the proposed conduct, which is unchanged from that previously authorised by the ACCC under Authorisation A91402 and effectively maintains the current arrangements, while the ACCC is considering the application for re-authorisation.

The ACCC invites submissions in relation to this draft determination before making its final decision. Interested party submissions are requested by 10 July 2019. A final determination is likely to be released by the ACCC by August 2019.

1. The application for authorisation revocation and substitution

- 1.1. On 9 May 2019, the Association of Professional Engineers, Scientists and Managers, Australia (**APESMA**) lodged an application to revoke authorisation A91402 and substitute authorisation AA1000440 for the one revoked (referred to as re-authorisation) with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.2. Authorisation A91402 will expire on 26 June 2019 and APESMA is seeking re-authorisation to continue the same arrangements as previously authorised.
- 1.3. Specifically, APESMA is seeking re-authorisation to continue to:
 - i. collectively negotiate the terms of engagement for translators¹ and interpreters² who operate as independent contractors, and provide interpreting and translating services to the various principal contractors and end-users with whom they contract, and
 - ii. advise translators and interpreters in relation to what constitutes fair rates of pay and other terms of contracts for service (the **Conduct**).
- 1.4. APESMA is seeking re-authorisation on behalf of itself, current and future members of its Translators and Interpreters Division. APESMA is seeking re-authorisation for a further 10 years. This application for re-authorisation AA1000440 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).

¹ Translator: A translator transfers a source text from one language into another, usually within an extended timeframe to allow for corrections and modifications and without the presence of the participants requiring the translation.

² Interpreter: An interpreter transfers a spoken or signed language into another spoken or signed language, usually within a limited time frame in the presence of the participants requiring the translation.

- 1.5. 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.
- 1.6. APESMA has also requested interim authorisation to enable it to continue to engage in the conduct previously authorised by the ACCC under Authorisation A91402, while the ACCC is considering the current application for re-authorisation. See section 6 below.

The Applicant

- 1.7. APESMA³ is a not for profit, member based organisation, registered under the *Fair Work (Registered Organisations) Act 2009*.
- 1.8. APESMA advises that its membership is voluntary and the membership fee structure varies according to the income level of the individual applying to become a member.⁴ Other than interpreters and translators, APESMA represents professionals from a wide variety of disciplines including engineers, scientists, IT professionals, senior managers and executives.
- 1.9. APESMA's rules allow for independent contractors who work in any of these professions to be eligible as members. APESMA's members include both independent contractors and employees, but only independent contractor members are the subject of this re-authorisation⁵.
- 1.10. APESMA currently has 433 members in its Interpreters and Translators Division, being 1.9% of its total membership of 22,649 practitioners. APESMA estimates that it represents around 4.3% of translators and interpreters in Australia.

Rationale for the Conduct

- 1.11. APESMA submits that translators and interpreters, as small independent contractors, are unable to enter into true negotiation regarding their terms and conditions of engagement. Instead, they are provided with a standard set of rates, terms and conditions on a 'take it or leave it' basis.
- 1.12. In particular, APESMA submits that:
 - its aim is to ensure its members are engaged upon terms and conditions, including rates of payment, that are no less favourable than those contained in a Federal or State award, enterprise agreement or industrial instrument, and
 - in advising members what may constitute a fair rate of payment, it will provide members with salary survey information and factors to take into account when considering an appropriate rate of pay. The expectation is that APESMA's members will use this information to negotiate their individual contractual relationship with the principal contractor or end-user.

³ APESMA's precursor, the Association of Professional Engineers Australia was established in September 1946.

⁴ APESMA submits that 79% of the members of its Translators and Interpreters Division pay a reduced annual membership fee because they are either unemployed, students, new graduates, lower tier members or because they are earning less than \$50,000 per annum.

⁵ While competition laws (and authorisation) are applicable to collective bargaining by independent contractors, collective bargaining between employees and their employers is governed by industrial relations laws.

Interim authorisation

- 1.13. APESMA has also requested interim authorisation to enable it to continue to engage in the conduct authorised under A91402 in June 2014, while the ACCC is considering the application for re-authorisation. The request for interim authorisation is considered further in Section 6.

2. Interpreting and translating

- 2.1. The primary purchasers of interpreting services in Australia are Government departments including those in health and medical services, court/legal services, social/security/welfare and immigration.
- 2.2. The engagement of interpreters and translators is generally done through agencies, which perform a brokering role, entering into principal contracts with the end user (i.e. the government department), often in response to a tender process.⁶ The agencies in turn enter into agreements with individual translators and interpreters, with the translator or interpreter either becoming the casual employee of the agency or entering into an individual contractor agreement for the provision of services. Government departments don't typically employ translators and interpreters on a full time or part time basis.
- 2.3. APESMA submits that agencies offer 'standard form contracts' to contractors with a table of rates already incorporated into the contract.⁷ Further, that it is rare for interpreters and translators to have the opportunity to negotiate any of the terms of their contract with the agency. Negotiation generally only occurs when particular language skills are in high demand.

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 around 38 potentially interested parties including interpreter and translator end users such as Government departments, interpreter and translator agencies, industry associations, and accreditation and regulatory authorities.⁸
- 3.3. The ACCC did not receive any submissions in relation to this application.
- 3.4. Public submissions by APESMA (and any future submissions from interested parties) can be found on the ACCC's Public Register page for this matter.

4. ACCC assessment

- 4.1. The ACCC has assessed the Conduct in accordance with the relevant authorisation test contained in the Act.

⁶ APESMA submits that Request for Tender documentation would usually include an emphasis on price or hourly rates, with detailed pricing information requested.

⁷ Rates are usually for the first 90 minutes of service, and a further fee for each subsequent 15 minutes.

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.

4.2. APESMA 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 and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsection 90(7) and 90(8) of the Act,⁹ 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).

Relevant areas of Competition

- 4.3. To assess the likely effect of the Conduct, the ACCC identifies the relevant areas of competition.
- 4.4. APESMA submits that interpreting and translating services are mostly provided at a state or local level, with some exceptions, such as work done for Home Affairs, which may require more extensive travel. APESMA submits that most of its members are located in Victoria.
- 4.5. APESMA submits that interpreters and translators are largely engaged concurrently by multiple agencies as independent contractors or casual employees.¹⁰ Further, translators and interpreters who interpret in one language compete with each other for the same jobs, selling their own personal services on a freelance basis.
- 4.6. APESMA submits that agencies typically compete with each other to be the preferred supplier of translation and interpreting services to their clients. They compete with each other to win tenders and contracts for work, largely procured from Federal and State Government departments.¹¹
- 4.7. The ACCC considers that the primary area of competition affected is the provision of interpreting and translating services at the state level. The ACCC does not consider it necessary to precisely identify the relevant areas of competition to assess APESMA's application for re-authorisation.

Future with and without the Conduct

- 4.8. In applying the authorisation test, the ACCC compares the likely future with the Conduct that is the subject of the authorisation to the likely future in which the Conduct does not occur.
- 4.9. APESMA submits that if re-authorisation is not granted:
- individual contractors will contract with end-users or agencies as individuals and may rely upon APESMA's advice, as to what may constitute appropriate terms and conditions for their contractual relationship
 - the current high turnover of practitioners within the industry will increase, and
 - low earnings and poor conditions for practitioners will continue to result in translating and interpreting no longer being seen as a viable profession, with little time and money invested in professional development.
- 4.10. The ACCC considers that, without re-authorisation, interpreters and translators are likely to be offered 'take it or leave it' contracts, with limited ability for input or

⁹ See subsection 91C(7).

¹⁰ See paragraph **Error! Reference source not found..**

¹¹ See paragraphs **Error! Reference source not found..**

negotiation. The ACCC notes that without re-authorisation, while APESMA would not engage in collective bargaining on behalf of these members, it may still provide them with general advice and/or assistance as to the relevant factors to consider when seeking to negotiate their contractual terms and conditions.

Public benefits

4.11. 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.*¹²

4.12. APESMA submits that the Conduct will lead to the same public benefits as considered by the ACCC previously, including, but not limited to:

- a reduction in transaction costs for participants to the Conduct,
- improved quality of information to translators and interpreters, and
- the retention of skilled practitioners in the industry.

4.13. The ACCC's assessment of the likely public benefits from the Conduct follows.

Transaction costs savings

4.14. APESMA submits that the Conduct is likely to reduce transaction costs as a result of:

- conducting a single negotiation process rather than a series of individual negotiations between interpreters, translators, agencies and end users, and
- sharing the costs of obtaining professional advice in relation to collective negotiations.

ACCC view

4.15. The ACCC considers generally that transaction costs can be lower for all participants where a single negotiating process is utilised, such as a collective bargaining arrangement, relative to a situation where multiple negotiation processes are necessary. This can especially be the case when the bargaining group consists of small business or self-employed individuals such as translators or interpreters.

4.16. Where APESMA undertakes a single negotiation process with agencies and end-users on behalf of member translators and interpreters, the administrative costs associated with negotiation are shared amongst the bargaining group and are likely to be lower. By pooling their resources in a single negotiation, the incentive to invest in negotiating a more efficient contract is increased.

¹² 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.

Greater input into contracts

- 4.17. APESMA submits that translators and interpreters are not able to enter into a true negotiation or bargaining process with either agencies or end-users regarding the terms and conditions under which their services are provided. Instead, translators and interpreters are provided with a standard set of rates, terms and conditions on a 'take it or leave it' basis.
- 4.18. APESMA submits that in 2018, the Victorian Government announced a \$21.8 million funding boost over four years to improve working conditions and pay for contracted and casually employed interpreters. The Victorian Government issued a set of minimum rates, terms and conditions that Panel Language Service Providers must comply with when engaging interpreters to perform work funded by the Victorian Government.
- 4.19. APESMA submits that to ensure the Victorian Government rates introduced in 2018 are mirrored in contracts between agencies and practitioners, it will share information with its members as to what the correct rates are, how those rates and terms are to be applied, and further let them know that they are minimum rates only and more favourable rates can be negotiated. APESMA submits that there is a lack of clarity about which jobs are Victorian Government funded and attract the new rates of pay.
- 4.20. More generally, APESMA submits that it will be providing members with salary survey information, and factors to take into account such as taxation, superannuation, professional indemnity insurance, and travel costs to assist members in considering what the fair rate of pay may be in their individual circumstances.
- 4.21. APESMA submits that providing interpreters and translators with such information will lessen the risk of this vulnerable group's "exploitation", and result in enhanced efficiencies in the contractual conditions negotiated by interpreters and translators.
- 4.22. APESMA submits that it has successfully engaged in collective bargaining on behalf of its members since the ACCC granted authorisation in 2014. Below is further detail.

Translating and Interpreting Service (TIS) National

- 4.23. TIS National is an agency owned by the Department of Home Affairs which currently engages over 3,000 interpreters as independent contractors across Australia.
- 4.24. APESMA submits that it and TIS National have engaged in discussions around a new Deed of Standing Offer given to interpreters, which raised many concerns for APESMA.
- 4.25. APESMA submits that as a result of collective negotiations, contractual changes were applied to not only APESMA's members but to all TIS National interpreters. Changes included:
 - TIS National to continue to pay indemnity insurance.
 - Cancellation fees would only be enforced against practitioners in extraordinary circumstances.
 - TIS National would not delay the payment of fees for work completed.
 - TIS National would continue to increase rates of pay by the CPI.

Language Loop

- 4.26. Language Loop is a Victorian interpreting and translating service provider, owned by the State of Victoria (formerly VITS Language Link).
- 4.27. APESMA submits that it is continuing to engage with Language Loop with a view to incorporating newly applicable standard rates of pay into a collective agreement to apply across all Language Loop interpreters.

General

- 4.28. APESMA also submits that it has conducted surveys and developed a recommended rates schedule for members which has been distributed to members and industry stakeholders. An updated version is currently being developed and will be distributed by email, Facebook and at meetings of the Interpreters and Translators Division.

ACCC view

- 4.29. Where there is information asymmetry, the party that is less informed may accept or contemplate different terms than it would if more information was available to it. Market outcomes may not, therefore, promote efficiency and welfare. Information asymmetry can often be addressed by improving the transparency of market information. If collective bargaining improves the availability and use of information, it has the potential to enable contracts to be negotiated that better reflect the needs of members of the bargaining group.
- 4.30. The ACCC accepts that translators and interpreters operating as independent contractors may have limited access to industry information, for example rates of pay commensurate with their experience, and have little input into negotiations with agents and end users concerning their contractual terms and conditions, including fees.
- 4.31. The ACCC accepts that the greater availability of information is likely to address confusion amongst the industry around rights as employees or contractors, and the newly introduced rates of pay, terms and conditions by the Victorian Government. Further, better information is likely to lead to a better understanding by agencies and end users about the factors affecting the future of the industry, may lead to more investment in the training and development of practitioners, and recognition of experience and quality.
- 4.32. The Conduct does not limit the ability of agencies or end users to tailor collectively negotiated contracts to individual circumstances where appropriate, to offer standard terms or conditions, or to deal directly with individual translators or interpreters.

Retention of skilled practitioners in the industry

- 4.33. APESMA submits that translators and interpreters perform vital services in the community by contributing their expert skill in a diverse range of settings. This includes:
- maintaining the integrity of our courts and justice system
 - ensuring access to health care services and medical information
 - providing access and equity in relation to the delivery of human and immigration services, and

- underpinning extensive commercial activity in a diverse range of business settings both domestically and internationally.

4.34. APESMA submits that the retention of skilled practitioners is imperative to ensure a public benefit of high quality service. It submits there are potential risks associated with less qualified practitioners, which may include miscarriages of justice, lives may be endangered, or increased stress and trauma experienced, and protection visas and refugee applications may be wrongly granted, refused or cancelled.

ACCC view

4.35. The ACCC accepts that the Conduct is likely to result in more efficient outcomes, which may contribute to the development and retention of qualified interpreters and translators, who may have greater incentives to invest in their own training and development, and by making it more attractive for skilled practitioners to remain in the industry.

4.36. This is likely to result in public benefits by ensuring that the services provided to the community are of a high standard.

ACCC conclusion on public benefits

4.37. The ACCC considers that the Conduct is likely to continue to deliver transaction cost savings for practitioners, agencies and end users.

4.38. The ACCC accepts that the Conduct is likely to provide translators and interpreters as well as end-users and agencies with improved access to information. This is likely to enable more effective input into contractual negotiations, resulting in more efficient outcomes.

4.39. To the extent that negotiated contracts better reflect the issues relevant to the industry, it is more likely that skilled and experienced practitioners will be attracted to, and remain, in the industry.

Public detriments

4.40. 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.¹³

4.41. APESMA considers that little, if any public detriment or impact on competition is likely to result from the Conduct. No interested party submissions were received on detriments that have arisen from the previously authorised Conduct.

ACCC view

4.42. The ACCC considers that the Conduct will give rise to limited, if any, public detriments, due to the following:

- Participation in the Conduct is voluntary for APESMA members, agencies and end-users. Information provided by APESMA to members is guidance only

¹³ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

and collectively negotiated contracts will only be entered into where both the individual APESMA member and the target consider it to be in their best commercial interest to do so.

- The Conduct does not impact on the ability of agencies and end users to negotiate directly with individual translators and interpreters.
- Competition amongst interpreters and translators who provide the same services is unlikely to be significantly affected. Membership of APESMA is not a requirement to operate in the industry and the majority of practitioners are not members of APESMA.
- The level of negotiations between individual APESMA members and agencies and end-users is low, and as discussed above, without the Conduct, contracts are likely to be offered on a 'take it or leave it' basis.
- Agencies tender for work from Government and commercial end-users for the right to provide interpreter and translator services. If re-authorisation is granted, competition between agencies in tendering for interpreter and translator service contracts will remain unchanged.

4.43. Therefore, for the reasons outlined in this draft determination, the ACCC is satisfied that the Conduct is likely to result in public benefits and that the public benefits would outweigh any likely detriment to the public from the Conduct.

5. Draft determination

The application

- 5.1. On 9 May 2019, APESMA lodged an application to revoke authorisation A91402 and substitute authorisation AA1000440 for the one revoked (referred to as re-authorisation). This application for re-authorisation AA1000440 was made under subsection 91C(1) of the Act.
- 5.2. APESMA seeks re-authorisation to collectively negotiate the terms of engagement for its translator and interpreter members who operate as independent contractors, and to advise translators and interpreters in relation to what constitutes fair rates of pay and other terms of contracts for service.
- 5.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

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 which the ACCC proposes to authorise

- 5.7. The ACCC proposes to revoke authorisation A91402 and grant authorisation AA1000440 in substitution to enable APESMA to:
- collectively negotiate the terms of engagement for translators and interpreters who operate as independent contractors and provide interpreting and translating services to the various principal contractors and end-users with whom they contract, and
 - to advise translators and interpreters in relation to what constitutes fair rates of pay and other terms of contracts for service.
- 5.8. The Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 5.9. The ACCC proposes to grant authorisation AA1000440 for 10 years. The ACCC notes that the Conduct has already been operating for almost 5 years, interested parties have not raised concerns, and the ACCC is satisfied that the likely public benefits are likely to outweigh the detriment for the period of re-authorisation.
- 5.10. This draft determination is made on 20 June 2019.

6. Interim authorisation

- 6.1. Authorisation A91402 expires on 26 June 2019. APESMA requests interim authorisation to enable it to continue to engage in the conduct previously authorised by the ACCC under Authorisation A91402, while the ACCC is considering the current application for re-authorisation. The previously authorised conduct is no different to the current application for re-authorisation.
- 6.2. APESMA submits that interim authorisation will ensure that its current efforts to bargain and advocate on behalf of its translator and interpreter members may continue. In particular, APESMA is currently in discussions with agencies regarding terms and conditions offered by State and Federal Governments. Further, APESMA submits that considering the current authorisation A91402 has been in place for almost 5 years, there will be no change to the status quo.
- 6.3. The ACCC accepts that current negotiations constitute a level of urgency for APESMA and that there may be harm to APESMA's members should interim authorisation not be granted. The ACCC also accepts that granting interim authorisation will maintain the market status quo.
- 6.4. The ACCC's initial view, as set out in this draft determination, is that the Conduct is likely to continue to result in public benefits and minimal public detriment.
- 6.5. Therefore, the ACCC has decided to suspend the operation of authorisation A91402 (which expires on 26 June 2019) and grant interim authorisation in substitution for the authorisation suspended. The interim authorisation allows APESMA to continue to engage in conduct authorised by the ACCC under Authorisation A91402.
- 6.6. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until interim authorisation is revoked.

7. Next steps

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