



# Draft Determination and interim authorisation

Application for authorisation AA1000444

lodged by

Clubs Australia

in respect of

collective bargaining on behalf of its members with a number of  
suppliers across a range of goods and services

Authorisation number: AA1000444

Date: 14 August 2019

Commissioners: Keogh  
Rickard  
Court  
Ridgeway

## Summary

The ACCC proposes to grant authorisation for 10 years to Clubs Australia to collectively bargain on behalf of its current and future members, being registered clubs across Australia, with various suppliers from industries including wagering services, gaming machines, food and beverage, and professional services. Negotiations would be on price and non-price terms, including data-related terms for suppliers that can access the personal or purchasing information of club patrons.

The ACCC previously authorised Clubs Australia to engage in similar conduct for five years in 2014, but the previous authorisation covered a narrower group of suppliers and did not include bargaining over data-related terms.

The ACCC considers that limited detriment is likely to result from the proposed collective bargaining, including in relation to supplier groups for whom Clubs Australia members represent a significant purchaser. Participation by clubs and suppliers is voluntary and there is not a specific opt-in process for clubs to join or be bound by the collective bargaining.

The ACCC is satisfied that there are likely to be public benefits in the form of transaction cost savings, better input into contracts and improved privacy protections.

The ACCC has also decided to grant interim authorisation to enable Clubs Australia to collectively negotiate on behalf of its clubs on the same terms and with the same suppliers as previously authorised.

### 1. The application for authorisation

- 1.1. On 4 June 2019, Clubs Australia lodged application for authorisation AA1000444 with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.2. Authorisation 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. Clubs Australia submits that the Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act and may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the *Competition and Consumer Act 2010* (Cth).
- 1.3. Clubs Australia seeks authorisation to collectively bargain on behalf of its current and future members with various suppliers of good and services to registered clubs. The application for authorisation was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.4. Clubs Australia also seeks interim authorisation under subsection 91 of the Act to enable it to collectively negotiate with the same targets (suppliers) and on the same terms as the previous authorisation<sup>1</sup> which expired on 28 March 2019.
- 1.5. Clubs Australia seeks authorisation for ten years.

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<sup>1</sup> A91381

## The Applicant

- 1.6. Clubs Australia is a peak body for licensed clubs and provides services to its member clubs including workplace relations, government relations, member enquiry, and Responsible Gambling Services.
- 1.7. Licensed clubs are not-for profit, member-based entities, which offer the public a range of hospitality, entertainment and social services. The services provided by licensed clubs include on-premises liquor consumption, restaurant facilities, gaming machines and wagering. The revenue generated from these activities enables clubs to provide financial and non-financial support to their communities, as well as fund club-specific objectives.
- 1.8. Clubs Australia advises that there are 6,440 licensed clubs in Australia, most of which are Clubs Australia members, located as follows:
- Victoria 1,641
  - New South Wales 1,347
  - South Australia 1,317
  - Western Australia 979
  - Queensland 855
  - Tasmania 197
  - Northern Territory 55
  - Australian Capital Territory 49

## The Proposed Conduct

- 1.9. Clubs Australia seeks authorisation to collectively bargain with 89 suppliers of goods and services that are likely to be acquired by registered clubs across Australia. The categories of suppliers<sup>2</sup> are:
- wagering services
  - electronic gaming machines and related services
  - music rights and related products
  - subscription broadcast services
  - energy services
  - automatic teller machines and cash-handling products
  - insurance and insurance-related products and services
  - compliance services
  - food, beverages and related products
  - gaming systems
  - point of sale systems
  - electronic sign-in or ID-scanning services
  - database management, information technology and digital communications

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<sup>2</sup> Attachment A lists counterparties with whom the ACCC proposes to authorise Clubs Australia to collectively bargain.

- 1.10. Clubs Australia proposes to collectively bargain with the suppliers in relation to price, terms of supply, settlement discounts, product development, joint advertising and marketing, and distribution terms.
- 1.11. Clubs Australia also proposes to negotiate on data-related terms with a subset of suppliers, to seek improved terms for how those suppliers collect, store and manage membership and other patron information. For example, Clubs Australia seeks to remove terms under which a clubs assigns, or otherwise conveys ownership of, patron information to a supplier. The categories of suppliers that Clubs Australia proposes to with negotiate on data-related terms are:
- gaming systems
  - point of sale systems
  - electronic sign-in or ID-scanning services
  - database management, information technology and digital communication services,

as set out at Attachment B.

(the **Proposed Conduct**).

*How negotiations will operate in practice*

- 1.12. The ACCC understands that Clubs Australia does not intend, nor would it be practical, to negotiate a single standard contract with each supplier on behalf of its entire membership base. Given the diversity of Clubs Australia's members, it is more likely that collective bargaining will only be relevant to a subset of clubs, for example on state, regional, or other lines of common interest, as this will maximise the efficiency of negotiations. Therefore, it is unlikely a supplier will face a bargaining group comprised of all clubs, unless this is in the interests of all parties to the negotiations.
- 1.13. Clubs Australia proposes to commence collective negotiations with suppliers throughout the period of authorisation as it becomes aware of 'trigger' conditions, being:
- prices that Clubs Australia considers excessive or otherwise unreasonable given market or commercial factors, or
  - non-price terms which may operate to disadvantage clubs under the agreement, or unreasonably risk legal action from the counterparty or a third-party.
- 1.14. In addition, Clubs Australia intends to commence negotiations on data-related terms, and with suppliers of anti-money laundering and counter-terrorism financing services, immediately.
- 1.15. Clubs Australia advises that a select group of its staff would conduct collective bargaining on behalf of member clubs. The operation of negotiations would be that:
- Clubs Australia would engage with the supplier/s to request they:
    - add, remove, or amend specific terms in the contract which are being offered to clubs; or
    - offer clubs a different contract or pricing model.

- If the supplier accepts Clubs Australia's request, the supplier would then offer the amended or new contract and/or pricing model to all interested clubs.<sup>3</sup>
- Individual clubs would each decide whether to enter into the contract with the supplier (including any negotiated price), negotiated by Clubs Australia.

## 2. Background

### Rationale

- 2.1. Clubs Australia submits that various commercial practices may result in clubs entering into unfavourable or inefficient contracts with their suppliers, for example, where clubs do not possess the bargaining power, or cannot endure the transaction costs, to negotiate complete or balanced terms. Clubs Australia further submits that opportunistic conduct or the exercise of market power by clubs' suppliers may result in unfavourable or inefficient outcomes.

### Previous Authorisation

- 2.2. Clubs Australia was authorised on 28 March 2014 for a period of five years (Authorisation **A91381**) for substantially similar conduct to that proposed in its current application. This authorisation expired on 28 March 2019.
- 2.3. Clubs Australia submits that under the previous authorisation it was able to collectively negotiate with ATM suppliers, which resulted in:
- Greater contract input, allowing clubs to 'shop around' through the removal of automatic rollover clauses.
  - Transaction cost savings, as member clubs were not all required to conduct due diligence and employ a negotiating strategy.
  - Enhanced goods and services to clubs' end customers, as clubs were able to benefit from competition when not restrained by automatic rollover clauses.
- 2.4. Clubs Australia also negotiated improved terms with Tabcorp leading to higher digital commissions and cheaper equipment prices for participating members. However, Victorian based clubs decided to not rely on the terms of any potential agreement between Clubs Australia and Tabcorp, demonstrating the voluntary nature of negotiations.

### Differences between the previous authorisation and current application

- 2.5. Clubs Australia has included both additional suppliers and new categories of suppliers in the current application. New industry categories are:
- Electronic gaming machines and related services
  - Gaming systems.
  - Compliance services
  - Food, beverages and related products
  - Point of sale systems
  - Electronic sign-in or ID-scanning services
  - Database Management information technology and digital communications.

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<sup>3</sup> Clubs Australia submits that this commitment to Clubs Australia to offer clubs the amended or new contract would likely constitute an understanding or arrangement.

- 2.6. In addition, Clubs Australia wishes to negotiate on data-related terms, in addition to other price and non-price terms, with a number of suppliers from specific industry categories. Clubs Australia seeks to negotiate improved terms for how suppliers collect, store and manage membership and other patron information. Clubs Australia also proposes to ensure providers promptly notify member clubs of data breaches and that providers only use member data to fulfil the provider's obligations under the agreement.
- 2.7. While noting the expanded list of suppliers and inclusion of data-related terms, the ACCC considers that the Proposed Conduct is substantially similar to that previously authorised.

### 3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including suppliers who are targets of the proposed collective bargaining, relevant industry associations and peak bodies, consumer groups and state government and relevant regulatory bodies.<sup>4</sup>
- 3.3. The ACCC received six public submissions from interested parties in relation to the application for authorisation.
- 3.4. SG Gaming ANZ Pty Ltd (**SGA**), an Electronic Gaming Machine (**EGM**) and gaming systems supplier, opposes the authorisation as it applies to SGA, providers of EGMs, and providers of gaming systems. SGA submits that clubs represent at least 51% of the Australian market for the supply of EGMs, that EGM and gaming systems providers could not offer products or services on a national basis, and that SGA has no interest in, or use for, club patron or player personal information and would not accept negotiation on data-related terms. SGA requested that Clubs Australia remove them from the list of target suppliers in the application for authorisation.
- 3.5. Clubs Australia responded to SGA's submission, noting that Clubs Australia does not have specific plans to negotiate pricing terms with EGM or gaming systems providers unless concerns arise. In addition, Clubs Australia noted that clubs only constitute 41% of Australian venues that contain EGMs, and that 69.4% of clubs do not operate EGMs. Clubs Australia submitted that the competition implications of collective bargaining are limited by the current low level of individual negotiations by clubs, the fact that participation in the arrangements is voluntary both for clubs and suppliers, and the absence of boycott activity.
- 3.6. Further, Clubs Australia submits that, due to clubs' diversity, collective bargaining (including with EGM suppliers) is likely to occur on behalf of smaller groups, rather than on behalf of Clubs Australia's full membership base, including due to different regulatory and technical requirements between jurisdictions. It notes that while there might be broader commonality of interest across clubs on the issues of preventing misuse of patron information, there is not any anticompetitive detriment resulting from the data-related element of the Proposed Conduct.
- 3.7. Clubs Australia notes, in response to SGA's refusal to consider negotiations on data-related terms that Clubs Australia is aware of instances where data clauses have

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<sup>4</sup> A list of the parties consulted and the public submissions received is available from the ACCC's public register [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

resulted in privacy risks eventuating for clubs. Where a provider already adheres to the data terms proposed by Clubs Australia, they should have no reason to object to the terms, and that the provider may benefit from the same reasonable terms applying to its competitors.

- 3.8. Make It Cheaper, an energy services provider, supports authorisation. Make It Cheaper submits that, without the proposed conduct, it is likely that Clubs Australia's members will fail to negotiate supply terms due to the perceived difficulty of engaging with the energy market or confusion regarding the recent introduction of default market offer price caps. Make It Cheaper submits that this would result clubs forgoing potential cost savings.
- 3.9. Wagering and gaming services provider, Tabcorp, did not oppose the authorisation on the basis that the conduct is predicated on voluntary participation by clubs and suppliers, and does not extend to collective boycott activity. However, Tabcorp submits that a term of five years, consistent with the previous authorisation, would be more appropriate than the 10 years sought by Clubs Australia.
- 3.10. The Australasian Performing Right Association Limited and Australasian Mechanical Copyright Owners Society Limited (**APRA AMCOS**) does not oppose the authorisation, and submits that consultation with Clubs Australia for its OneMusic Australia licence scheme for clubs resulted in significant efficiencies for all stakeholders in that consultative process.
- 3.11. Clubs Australia noted the APRA AMCOS submission in the response to submissions as evidence of practical public benefits in the form of contract input and transaction cost savings achieved by the previous authorisation and a lack of public detriments.
- 3.12. The Office of the Australian Information Commissioner (the **OAIC**) supports measures to improve compliance with obligations to protect personal information, and noted that it had not identified any public detriment from Clubs Australia's proposed arrangement. The OAIC provided some guidance to Clubs Australia in its submission, and invited engagement for further guidance.

## 4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. Clubs Australia 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 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 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).

### Areas of competition

- 4.3. To assess the likely effect of the Proposed Conduct, the ACCC will identify the relevant areas of competition likely to be impacted.

### The acquisition of goods and services from commercial operators

- 4.4. Clubs Australia proposes to collectively bargain with suppliers across Australia from several industry categories.<sup>5</sup>
- 4.5. In assessing the public benefits and detriments arising from the Proposed Conduct, the ACCC recognises that the different characteristics of each of these industries mean that the effect of Clubs Australia's proposed collective bargaining arrangements will vary. These characteristics include the proportion of demand represented by clubs relative to other buyers, regulatory oversight, and the presence of large or monopoly suppliers.

### Supply of services by clubs to consumers

- 4.6. Clubs Australia member clubs supply a variety of products and services to members and guests, including food, alcohol for on-site consumption, as well as allied products such as soft drinks and tobacco products. Many members also offer electronic gaming machines, wagering and entertainment services including live music. Clubs Australia submits member clubs compete with other members in close proximity and other market participants such as hotels and licensed restaurants in the provision of hospitality services to consumers. However, Clubs Australia considers its members offer a differentiated product due to their member-based and community-oriented services.
- 4.7. We consider that Clubs Australia member clubs compete with one another and, in some respects to a lesser degree, with a range of other market participants including hotels, licensed restaurants and cafes, in the provision of various hospitality services to consumers in markets differentiated by geographic location. Services offered by individual Clubs Australia members vary according to the club type – sporting, cultural, RSL – which may affect the closeness of competition.

### Future with and without the Proposed Conduct

- 4.8. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.9. The ACCC considers that the likely future without the Proposed Conduct is that clubs will enter into agreements with suppliers on an individual basis, which may mean member clubs are offered standard form contracts and have limited input into the development of terms and conditions.
- 4.10. The ACCC notes that Clubs Australia can, without the need for authorisation, continue to provide services to its members and make representation to major suppliers in relation to issues of concern for its members.

### 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.*<sup>6</sup>

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<sup>5</sup> Listed at 1.9 of this draft determination.

4.12. Clubs Australia submits the Proposed Conduct will deliver public benefits, including:

- greater input into contracts,
- enhanced privacy protections for club patrons,
- transaction cost savings, and
- enhanced service standards and facilities<sup>7</sup>

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

### **Transaction cost savings**

4.14. Generally, there are transaction costs associated with contracting. These transaction costs can be lower where a single negotiating process is employed, such as in a collective bargaining arrangement, relative to a situation where multiple negotiation processes occur.

4.15. The ACCC considers that collective bargaining allows parties to share these costs, which in turn may improve the level of input into negotiations and result in more efficient outcomes.

4.16. The ACCC accepts that the Proposed Conduct is likely to result in transaction cost savings for clubs and suppliers and that this constitutes a public benefit. The ACCC accepts that the extent of these savings may vary where multiple negotiations are conducted with the same supplier to reflect the diversity of Clubs Australia's membership. For example, member clubs serve a variety of distinct purposes<sup>8</sup>, vary in terms of size, and services<sup>9</sup> offered to patrons. We note that for some suppliers, a single national negotiation process will not be appropriate, especially where state and territory regulation diverges. However, even when multiple collective negotiations are necessary, this is likely to result in savings over each party conducting individual negotiations.

### **Better input into contracts leading to improved terms and conditions**

4.17. The ACCC accepts that collective bargaining provides the opportunity for increased input into contracts where suppliers may offer individual standard form contracts with little or no scope to negotiate.

4.18. Clubs Australia submits that various factors may result in clubs entering into unfavourable or inefficient contracts with suppliers, including:

- a) lack of bargaining power to request contract amendments or ability to endure transaction costs,
- b) opportunistic conduct or the exercise of market power by suppliers, and
- c) the use of standard-form contracts by suppliers with minimal opportunity for club input.

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<sup>6</sup> 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.

<sup>7</sup> Clubs Australia's members operate as not-for-profit community hubs. Clubs Australia submits that clubs will pass on any benefit resulting from improved trading terms to consumers or club patrons.

<sup>8</sup> For example, RSL clubs, bowls clubs, leagues clubs, football clubs, sports clubs and workers clubs.

<sup>9</sup> For example, 30.6% of clubs operate EGMs.

- 4.19. Clubs Australia submits that this is especially true for data-related terms, as many clubs do not consider, or actively search for, terms of this kind when reviewing their contracts. Member clubs may be unaware of the prevalence and importance of data-related terms, or suppliers may conceal clauses and/or fail to describe associated value and risk.
- 4.20. Clubs Australia submits that the Proposed Conduct will enable small clubs to redress imbalances in bargaining power, and will reduce the likelihood of manifestly unfair contractual terms and conditions, which Clubs Australia submits often arise when individual clubs engage directly with large-scale or monopoly suppliers. Clubs Australia submits that previous contracts with ATM providers contained an automatic rollover clause of several years, with significant termination fees. Conversely, ATM operators had much greater flexibility as, under most contracts, they could remove an ATM from a club with only 7 days' notice. As a result of collective negotiations under the previous authorisation, Clubs Australia achieved a standard ATM contract with a number of ATM providers that redressed some of these provisions.
- 4.21. The ACCC understands that suppliers may offer many individual clubs standard form contracts with little or no scope to negotiate. The ACCC considers allowing Clubs Australia to negotiate on behalf of its member clubs is likely to allow member clubs to have increased input into contracts. Any cost savings or efficiencies resulting from these negotiations would give rise to a public benefit.
- 4.22. The ACCC notes that member clubs that wish to continue to negotiate individually with suppliers will still be able to do so given the voluntary nature of the proposed collective bargaining arrangements.

### **Enhanced privacy protection for patrons' personal and transaction data**

- 4.23. Clubs Australia submits that licensed clubs often collect or generate sensitive or valuable data regarding their patrons' personal details and purchasing behaviours. This occurs due to clubs' statutory obligations, and through clubs' business activities. Some examples of the kinds of relevant data include members' personal details, records of purchases using membership discounts, and details and records used to administer more sophisticated loyalty schemes.<sup>10</sup>
- 4.24. Clubs Australia submits that many clubs do not consider, or are unaware of, the importance of data-related terms, or are susceptible to the covert inclusion of unfavourable data terms, which can allow for unrestricted access to, and use of, data. As a result, Clubs Australia submits that their patron's privacy may be compromised or their information misused. This may expose clubs to the risk of legal action and reputational damage.
- 4.25. The ACCC accepts that where Clubs Australia negotiates improved data-related terms, club patrons may benefit from improved privacy protection. For example, Clubs Australia submits that it may seek to negotiate with suppliers to remove terms under which the club assigns, or otherwise conveys ownership of, patron information, and remove terms under which the club licenses personal information to the provider, and the provider can use or otherwise deal with the information, in a manner that is not directly connected to the provider carrying out its services.
- 4.26. The ACCC notes clubs must comply with privacy protections contained in the *Privacy Act* (1988) (**Privacy Act**) whether or not the Proposed Conduct is authorised. However, the ACCC accepts that the Proposed Conduct may assist clubs and

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<sup>10</sup> Clubs Australia submits that gaming machine provider commonly operate these sophisticated loyalty programs.

suppliers to meet their obligations under the Privacy Act, and reduce the incidence or risk of compromise or misuse of patron data that does not amount to a breach under the Privacy Act.

- 4.27. The ACCC notes that Clubs Australia may have an incentive to negotiate terms providing suppliers access to, and use of, patron data in return for improved price or non-price terms and conditions. If this were to occur, it may erode privacy protection benefits that would otherwise be expected to arise from the proposed collective bargaining. The ACCC expects Clubs Australia to ensure that any arrangement with suppliers in relation to data is compliant with the Privacy Act and any other statutory obligations, and to clearly inform patrons' as to how it will collect and use their personal information and data and how any third parties may use that information. The ACCC will examine evidence about whether this has been the case when considering any future application for reauthorisation by Clubs Australia.
- 4.28. Clubs Australia notes that it seeks authorisation to negotiate on price terms with the same suppliers for which it seeks to negotiate data-related terms to avoid suppliers increasing prices or fees where Clubs Australia requests improved data terms.
- 4.29. In its submission, the OAIC provided its support for measures to improve compliance with obligations to protect personal information, and noted it did not identify any public detriment from the Proposed Conduct. The ACCC encourages Clubs Australia to engage with the OAIC for guidance in relation to privacy obligations and privacy best practice.

### **Enhanced goods and services supplied by clubs to consumers**

- 4.30. The ACCC considers that where cost savings result from the Proposed Conduct, and competition exists between clubs and other hospitality service providers, this is likely to lead to clubs passing cost savings through to club patrons in the form of improved service standards and facilities.
- 4.31. The ACCC further considers that, as not-for-profit, member-owned entities, clubs would pass through any benefits from collective bargaining accruing to clubs to patrons or members in some form.

### **Public detriments**

- 4.32. 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.<sup>11</sup>

- 4.33. Clubs Australia submits that any detriment to the public from the collective negotiations by member clubs is unlikely because:
- the current level of negotiations between individual clubs and the proposed targets on the matters to be negotiated is low
  - there is no boycott activity and participation in the collective bargaining arrangement is voluntary
  - there are restrictions on the coverage and composition of the bargaining group.

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

## **Competition for acquisition of goods and services from commercial operators unlikely to be significantly affected**

4.34. In the absence of collective bargaining, clubs would operate individually, and in competition with other clubs, in their dealings with suppliers of goods and services across the various sectors for which Clubs Australia has specified targets for collective bargaining.

4.35. However, the ACCC considers the effect of any reduction in competition between club members as a result of acting collectively is likely to be minimal for the following reasons:

- The existing level of negotiation between individual clubs and the suppliers who are proposed targets is low (suppliers offer most clubs standard form contracts), and the voluntary nature of the conduct means that where larger clubs and suppliers have already negotiated, authorisation may not change these arrangements.
- Participation in the Proposed Conduct is voluntary for both Clubs Australia members and the proposed counterparties, and individual Clubs Australia members and the relevant counterparty will only enter collectively negotiated contracts where both consider it to be in their best commercial interest to do so. Clubs Australia submits it will not operate a specific opt-in process for clubs to join, or be bound by the outcome of, collective bargaining.
- Given the diversity of clubs, in many instances it is more likely that collective bargaining will only be relevant to a subset of clubs, for example on state, regional, or other lines of common interest, as this will maximise the efficiency of negotiations. Therefore, in most cases it is unlikely a supplier will face a bargaining group comprised of all clubs.

We note that clubs are a significant customer for electronic sign-in providers, which are relatively small businesses compared to some of the large multinational suppliers that Clubs Australia may negotiate with. Similarly, we note the concerns raised by SGA regarding the significance of purchases by clubs for EGM suppliers. For example, SGA submits that clubs represent at least 51% of the Australian market for the supply of EGMs as a collective.

However, we consider that anticompetitive detriment is unlikely. Participating in collective bargaining would be voluntary for suppliers and clubs, and given the way the collective bargaining is proposed to operate, it is unlikely that Clubs Australia would negotiate with suppliers on the basis that all or most member clubs would join a particular arrangement.

Further, we understand that there is a high level of regulatory oversight regarding the terms and conditions that may be included in EGM contracts, which further mitigates the potential for detriment to arise from collectively negotiated contract terms and conditions.

- The area of competition in which Clubs Australia members provide services to consumers is competitive. Clubs Australia members are part of a wide range of businesses (others include bars, hotels, restaurants and pubs) who acquire the products and services of most of the supplier groups and targets of collective bargaining, including most of the new suppliers as part of this application (i.e. compliance services, food, beverages and related products, point of sale systems, and database management, information technology and digital communications).

## Balance of public benefit and detriment

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

## Length of authorisation

- 4.37. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>12</sup> 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.
- 4.38. In this instance, Clubs Australia seeks authorisation for 10 years. Clubs Australia notes that the ACCC has granted 10-year terms where authorisations have operated well and stakeholders have not raised concerns. Clubs Australia submits that its previous collective bargaining has been effective as evidenced by the outcomes of contracts with ATM suppliers, Tabcorp and APRA AMCOS. This also supports its request for a 10-year term.
- 4.39. Tabcorp submits that in light of the material differences between the current application and previous authorisation, the application is not a true re-authorisation and that a term of five years would be more appropriate.
- 4.40. The ACCC acknowledges that Clubs Australia is seeking authorisation to negotiate with a wider range of suppliers and to include data-related terms in its negotiations. However, the ACCC considers that the operation of Clubs Australia's collective bargaining is substantially the same as previously authorised.
- 4.41. The ACCC has not received any submissions opposing authorisation from the target suppliers who Clubs Australia negotiated with under the previous authorisation.
- 4.42. Given the assessment of public benefits and detriments likely to result from the Conduct, including the evidence that the previous authorisation appears to have resulted in public benefits and few if any detriments, the ACCC proposes to authorise Clubs Australia to collectively bargain on behalf of its current and future members with the targets specified in Attachment A, and Attachment B for data-related terms, for 10 years.

## 5. Draft determination

### The application

- 5.1. On 4 June 2019, Clubs Australia lodged application AA1000444 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. Clubs Australia seeks authorisation to collectively bargain with a number of suppliers of goods and services to registered clubs across Australia.
- 5.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

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<sup>12</sup> 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 Proposed 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 Proposed Conduct.
- 5.5. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed 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 Proposed Conduct, including any lessening of competition.
- 5.6. Accordingly, the ACCC proposes to grant authorisation.

## Conduct which the ACCC proposes to authorise

- 5.7. The ACCC proposes to grant authorisation AA1000444 to enable Clubs Australia to collectively negotiate on behalf of its current and future members<sup>13</sup> with suppliers listed at Attachment A in relation to:
- price of product,
  - terms of supply,
  - settlement discounts,
  - product development,
  - joint advertising and marketing, and
  - distribution.
- 5.8. The ACCC also proposes to grant authorisation AA1000444 to enable Clubs Australia to collectively negotiate on behalf of its current and future members in relation to data related terms with the suppliers of:
- gaming systems,
  - point of sale systems,
  - electronic sign-in or ID-scanning services, and
  - database management, information technology and digital communication services
- as specified at Attachment B.
- 5.9. Clubs Australia submits that the Proposed 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.
- 5.10. The ACCC proposes to grant authorisation AA1000444 for 10 years.
- 5.11. This draft determination is made on 14 August 2019.

## 6. Interim authorisation

- 6.1. At the time of lodging the application, Clubs Australia requested interim authorisation to collectively negotiate on behalf of its members regarding:
- price of product

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<sup>13</sup> Subsection 88(2), *Competition and Consumer Act 2010* (Cth)

- terms of supply
- settlement discounts
- product development
- joint advertising and marketing
- distribution

with the same targets that it was previously specified in authorisation A91381.

6.2. Clubs Australia seeks interim authorisation on the basis that:

- The need may arise for Clubs Australia to collectively bargain on behalf of its members before the ACCC can make its final determination on the application for authorisation.
- The ACCC previously examined the targets for which it seeks interim authorisation.

## Consultation

6.3. The ACCC received one submission in relation to the request for interim authorisation. Make It Cheaper supported the grant of interim authorisation. Make It Cheaper submitted that due to introduction of default market offer price caps, Clubs Australia's member clubs may be confused and choose not to seek cheaper market offers where it would be efficient for them to do so. Make It Cheaper submitted that in the absence of interim authorisation for energy brokers to collectively negotiate with Clubs Australia, it is likely many Clubs Australia members will not actively engage with the market at all.

## Interim Decision

6.4. The ACCC has decided to grant interim authorisation to enable Clubs Australia to collectively negotiate and/or enter into agreements on behalf of its current and future members<sup>14</sup> in relation to the supply of:

- price of product
- terms of supply
- settlement discounts
- product development
- joint advertising and marketing
- distribution

With the suppliers listed at Attachment C.<sup>15</sup>

6.5. Interim Authorisation does not extend to data-related terms.

6.6. Given the reasons set out in this draft determination, and that the ACCC has previously authorised Clubs Australia to collectively bargain with the suppliers proposed under the request for interim authorisation, the ACCC considers it is appropriate to allow Clubs Australia to commence negotiations with these suppliers on the same terms while the ACCC continues to consider the substantive application for authorisation.

<sup>14</sup> Subsection 88(2), *Competition and Consumer Act 2010* (Cth)

<sup>15</sup> A91381 previously authorised collective bargaining with each of the suppliers listed at attachment C.

- 6.7. Interim authorisation will commence immediately and 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, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.

## Attachment A – Targets of the Proposed Conduct

### Wagering services

- Tabcorp Holdings Limited and its subsidiaries
- GVC Australia Pty Ltd t/a Ladbrokes Au
- Beteasy Pty Ltd
- Sportsbet Pty Ltd
- Hillside (Australia New Media) Pty Ltd t/a Bet 365

### Electronic gaming machines and related services

- Aristocrat Leisure Limited
- Ainsworth Game Technology Limited
- International Game Technology
- Scientific Games Australia Pty Ltd
- Konami Gaming Australia Pty Ltd
- Aruze Gaming Australia Pty Ltd
- Atlas Gaming Holdings Pty Ltd
- Interblock Asia Pacific Pty Ltd
- Tabcorp Holdings Limited and its subsidiaries
- Independent Gaming Pty Ltd
- Paltronics Australasia Pty Ltd
- The Trustee for Wymac Gaming Solutions Unit Trust

### Music rights and related products

- SBA Music Pty Ltd
- Phonographic Performance Co of Australia Limited
- Rock Video World Pty Ltd t/a Visual Sounds
- Australasian Performing Right Association Limited
- Nightlife Music Pty Ltd

### Subscription broadcast services

- Sky Channel Pty Ltd
- Foxtel Management Pty Ltd and its subsidiaries
- Singtel Optus Pty Ltd

### Energy services

- E P & T Pty Ltd
- Energy Brokers.COM.AU Pty Ltd t/a Energy Brokers
- Illum-a-Lite Pty Ltd
- Forum Enviro Pty Ltd (formerly PowerPerfector Australia Pty Ltd)
- Simons Green Energy Pty Ltd
- Green Connection Group Pty Ltd
- NUS Consulting Group Pty Ltd

- Skycool Pty Ltd
- Aussie NRG Pty Ltd
- Make It Cheaper Pty Ltd
- The Trustee for Practical Sustainability Trust t/a Practical Sustainability

#### Automatic teller machines and cash-handling products

- Cardtronics Australasia Pty Ltd (formerly DC Payments Australasia Pty Ltd)
- First Data Network Australia Limited t/a Cashcard Australia Limited
- The Banktech Group Pty Ltd
- JCM American Corporation
- Ecash Holdings Pty Ltd

#### Insurance and insurance-related products and services

- Cartwright Insurance Brokers Pty Ltd
- Warren Saunders Insurance Brokers
- The Procure Group Pty Ltd

#### Compliance services

- Initialism Pty Ltd
- PKF Australia Limited
- Allied Risk Solutions Pty Ltd
- Barrington Group Australia Pty Ltd
- CHD Partners Pty Ltd
- Trojan Corporate Pty Ltd
- Martin Safety Pty Ltd t/a Lighthouse Safety and Compliance

#### Food, beverages and related products

- Lion-Beer Spirits and Wine Pty Ltd
- CUB Pty Ltd t/a Carlton and United Beverages Limited
- Robert Oatley Vineyards Pty Ltd
- Asahi Holdings (Australia) Pty Ltd
- Coca-Cola Amatil Limited
- Treasury Wine Estates Limited
- Fonterra Brands (Australia) Pty Ltd t/a Anchor Food Professionals
- The trustee for Berman Retail Trust t/a Good Nuts
- Mrs Mac's Pty Ltd
- Andale Beverage Systems
- Bevcon Beer and Beverage Systems Pty Ltd (including related entity, Esass Pty Ltd)

#### Gaming systems

- Aristocrat Leisure Limited
- International Game Technology

- Tabcorp Holdings Limited, conducted through its subsidiary, Ebet Gaming Systems Pty Ltd
- Scientific Games Australia
- Independent Gaming Pty Ltd
- Utopia Gaming Systems Pty Ltd

#### Point of sale systems

- Sharp Electronics Newcastle Unit Trust t/a Senpos
- Business Electronics Holdings Pty Ltd t/a Bepoz Retail Solutions
- Sanyo Office Machines Pty Ltd
- MSL Solutions Limited and subsidiary, Infogenesis Pty Ltd
- Swiftpos Pty Ltd
- Jensen Data Systems Pty Ltd
- Idealpos Solutions Pty Ltd
- Cashpoint Payment Solutions Pty Ltd, also t/a Mypos
- Starrtec Pty Ltd
- Task Retail Technology Pty Ltd
- Innquest Australia Pty Ltd

#### Electronic sign-in or ID-scanning services

- Circle Solutions Pty Ltd
- Clubnet International Pty Ltd t/a Clubnet
- Infosign Pty Ltd
- Scannet Pty Ltd
- Group Security Solutions Pty Ltd t/a PatronScan
- Scantek Solutions Pty Ltd
- Qikid Pty Ltd

#### Database management, information technology and digital communications

- King Street Computers Pty Ltd
- Postpact Pty Ltd t/a Computer Magic
- Prodocom Pty Ltd
- JEM Computer Systems Pty Ltd
- The Trustee for Conekt Unit Trust t/a Conekt Australia
- Brennan VDI Pty Ltd and related companies, including Brennen IT Pty Ltd, Brennan Voice and Data Pty Ltd and Brennan Telephony Pty Ltd
- Tecala Group Limited Pty Ltd
- Secom Technology Pty Ltd

## Attachment B – Targets of data-related term negotiations

### Gaming Systems

- Aristocrat Leisure Limited
- International Game Technology
- Tabcorp Holdings Limited, conducted through its subsidiary, Ebet Gaming Systems Pty Ltd
- Scientific Games Australia
- Independent Gaming Pty Ltd
- Utopia Gaming Systems Pty Ltd

### Point of sale systems

- Sharp Electronics Newcastle Unit Trust t/a Senpos
- Business Electronics Holdings Pty Ltd t/a Bepoz Retail Solutions
- Sanyo Office Machines Pty Ltd
- MSL Solutions Limited and subsidiary, Infogenesis Pty Ltd
- Swiftpos Pty Ltd
- Jensen Data Systems Pty Ltd
- Idealpos Solutions Pty Ltd
- Cashpoint Payment Solutions Pty Ltd, also t/a Mypos
- Starrtec Pty Ltd
- Task Retail Technology Pty Ltd
- Innquest Australia Pty Ltd

### Electronic sign-in or ID-scanning services

- Circle Solutions Pty Ltd
- Clubnet International Pty Ltd t/a Clubnet
- Infosign Pty Ltd
- Scannet Solutions Pty Ltd
- Group Security Solutions Pty Ltd t/a PatronScan
- Scantek Solutions Pty Ltd
- Qikid Pty Ltd

### Database management, Information technology and digital communications

- King Street Computers Pty Ltd
- Postpact Pty Ltd t/a Computer Magic
- Prodocom Pty Ltd
- JEM Computer Systems Pty Ltd
- The Trustee for Conekt Unit Trust t/a Conekt Australia
- Brennan VDI Pty Ltd and related companies, including Brennen IT Pty Ltd, Brennan Voice and Data Pty Ltd and Brennan Telephony Pty Ltd
- Tecala Group Limited Pty Ltd
- Secom Technology Pty Ltd

## Attachment C – Authorised targets of interim authorisation

### Wagering services

- Tabcorp Holding Limited and its subsidiaries

### Music rights and related products

- Phonographic Performance Co of Australia Ltd
- Rock Video World Pty Ltd t/a Visual Sounds
- Australasian Performing Right Association Limited

### Subscription broadcast services

- Sky Channel Pty Ltd
- Foxtel Management Pty Ltd and its subsidiaries

### Energy services

- E P & T Pty Ltd
- Energy Brokers.COM.AU Pty Ltd t/a Energy Brokers
- Illum-A-Lite Pty Ltd
- Forum Enviro Pty Ltd (formerly PowerPerfector Australia Pty Ltd)
- Simons Green Energy Pty Ltd
- Green Connection Group Pty Ltd
- NUS consulting Group Pty Ltd
- Skycool Pty Ltd

### Automatic teller machines and cash-handling products

- Cardtronics Australia Pty Ltd (formerly DC Payments Australasia Pty Ltd)
- First Data Network Australia Limited t/a Cashcard Australia Limited
- The Banktech Group Pty Ltd

### Insurance and insurance-related products and services

- Cartwright Insurance Brokers Pty Ltd
- Warren Saunders Insurance Brokers

### Point of sale systems

- Cashpoint Payment Solutions Pty Ltd, also t/a Mypos