



Australian
Competition &
Consumer
Commission

Notice

in respect of notification N94049 lodged by

**Australian Ice Hockey Federation
(trading as Ice Hockey Australia)**

Date: 2 March 2010

Notification no. N94049

Public Register no. C2009/1391

**Commissioners: Samuel
Kell
Schaper
Court
Dimasi
Walker
Willett**

Summary

The Australian Competition and Consumer Commission (ACCC) has decided to revoke the exclusive dealing notification lodged by Ice Hockey Australia.

On 27 July 2009, Ice Hockey Australia (IHA) lodged notification N94049 for a proposal to sanction, through suspension or expulsion, any member of IHA who has participated, or is participating, in a non-sanctioned Australian or international ice hockey game or league. This applies to players and officials, including referees and coaches.

On 4 December 2009, the ACCC issued a draft notice proposing to revoke notification N94049. A pre-decision conference was held on 21 January 2010. IHA, Sydney Ice Arena and Sydney Ice Hockey League participated in the pre-decision conference. The ACCC received further submissions on the issues arising from the draft notice and pre-decision conference.

The ACCC remains of the view that the proposed conduct is likely to substantially lessen competition for the provision of ice hockey competition organisation and administration services by:

- imposing a barrier to the establishment and expansion of rival ice hockey leagues and
- reducing the competitive viability of existing rival leagues.

The consequence of this will be to reduce opportunities for players and officials to participate in ice hockey matches by forcing them to choose between officially sanctioned ice hockey competitions and privately run leagues.

The ACCC also considers that the conduct has the potential to lessen competition in the market for the acquisition of ice time at ice rinks.

The ACCC accepts there may be potential efficiency benefits that will be achieved by having a single governing body administer the health and safety guidelines for ice hockey. However, the ACCC considers that these benefits do not outweigh the anti-competitive effects of the conduct.

The ACCC considers that the notified conduct is not required for IHA to be able to continue with the effective governance of the sport of ice hockey at the national level.

Immunity for the notified conduct automatically came into effect on 27 July 2009. This notice removes the protection from legal action that is afforded by the notification. If no application for review of this notice is made to the Australian Competition Tribunal, the immunity provided by the notification ceases to be in force on 2 April 2010.

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1. Introduction

- 1.1 This document is a notice to revoke notification N94049 lodged by Ice Hockey Australia (IHA) with the Australian Competition and Consumer Commission (the ACCC) on 27 July 2009 in relation to conduct that may raise concerns under section 47 of the *Trade Practices Act 1974* (the Act).
- 1.2 The ACCC is the independent Australian Government agency responsible for administering the Act. A key objective of the Act is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.3 Section 47 of the Act prohibits conduct known as exclusive dealing and, other than third line forcing conduct, it is prohibited where it has the purpose or effect of substantially lessening competition. Generally speaking, exclusive dealing involves one business trading with another person, imposing restrictions on their freedom to choose with whom, or in what, it deals.
- 1.4 Businesses may obtain immunity in relation to conduct that might be at risk of breaching the exclusive dealing provisions of the Act by lodging a 'notification' with the ACCC. Once lodged, immunity for the notified conduct commences automatically upon lodgement, except in the case of third line forcing conduct.
- 1.5 In effect, revoking a notification removes the immunity conferred by the lodging of the notification. The ACCC conducts a comprehensive public consultation process before making a decision to revoke a notification.
- 1.6 Prior to issuing a notice to revoke a notification, the ACCC must first issue a draft notice setting out its reasons and providing an opportunity for interested parties to request a conference.
- 1.7 Once a draft notice is released, the notifying party or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft notice. The ACCC will also invite the notifying party and interested parties to lodge written submissions commenting on the draft notice.
- 1.8 The ACCC then reconsiders the notification taking into account the comments made at the conference (if one is requested) and any further submissions received.

2. Background

Ice Hockey Australia

- 2.1. Ice Hockey Australia (IHA) is the governing body for ice hockey in Australia. IHA is recognised as the sole provider of the sport by the International Ice Hockey Federation (IIHF), and the International and Australian Olympic Committees.
- 2.2. IHA has six affiliated member state ice hockey associations and approximately 3725 members. IHA and its member associations control and regulate all officially sanctioned ice hockey that is played in Australia.
- 2.3. The six member states of IHA are:
 - Ice Hockey Queensland (IHQL)
 - New South Wales Ice Hockey Association (NSWIHA)
 - Australian Capital Territory Ice Hockey Association (ACTIHA)
 - Victorian Ice Hockey Association (VIHA)
 - South Australian Ice Hockey Association (SAIHA)
 - Western Australia Ice Hockey Association (WAIHA)
- 2.4. In order to compete in officially sanctioned competitions, players must first register with their state association. This in turn makes the player a registered member of IHA.

Structure of the Leagues

- 2.5. The official IHA ice hockey competitions in Australia operate at the national level and the state level.
- 2.6. At the national level, state based teams compete in the national championships in the following categories:
 - 11 years & under
 - 13 years & under
 - 15 years & under
 - 18 years & under
 - 25 years & under
 - Men's Open

- Women's Open
- Mixed Open
- 35 & over

2.7. At the state level, locally based teams compete in a range of divisions and age categories that vary between states.

The notified conduct

2.8. IHA proposes to sanction, through suspension or expulsion, any member of IHA who has participated, or is participating, in a non-sanctioned Australian or international ice hockey game or league. The conduct applies to all players, as well as officials, such as referees and coaches.

Non-sanctioned leagues

2.9. IHA is the dominant provider of organised ice hockey competition services in Australia. There are however, some leagues that operate independently of IHA and are not affiliated with IHA or its state associations.

Sydney Ice Hockey League

2.10. The Sydney Ice Hockey League (SIHL) was established in summer 2007-2008 and currently has around 100 members. SIHL games are conducted at the Sydney Ice Arena which is located in Baulkham Hills, Sydney.

Leagues operated by ice rinks

2.11. The Sydney Ice Arena (SIA) operates two rinks, one located in Sydney and one on the Central Coast of NSW. SIA operates its own ice hockey games and activities in addition to renting ice time to privately run non-sanctioned leagues. Leagues run by SIA include the International Cup, Sydney Non-Contact League and Erina In-house Competition.

2.12. The Penrith Ice Hockey Club runs an in-house ice hockey tournament at the Penrith Palace Ice Rink that is run on Sunday nights during the off-season.

IHA's insurance policy

2.13. IHA has insurance contracts that provide cover for it and its members. This insurance policy does not cover members of IHA when they participate in Australian or international ice hockey games or leagues that have not been sanctioned by IHA.

3. Statutory test

- 3.1. Section 47(1) of the Act provides that a corporation shall not engage in the practice of exclusive dealing. The practice of exclusive dealing includes:
- supplying, or offering to supply, goods or services, including the supply at a particular price, or the giving of a discount, allowance, rebate or credit, on condition that the purchaser will not acquire or resupply goods or services from a competitor of the supplier, where the supplier's conduct has the purpose, effect or likely effect of substantially lessening competition (s 47(2));
 - refusing to supply goods or services, including the supply at a particular price, or the giving of a discount, allowance, rebate or credit, for the reason that the person has acquired or resupplied, or agreed not to acquire or resupply, goods or services from a competitor of the supplier, where the supplier's conduct has the purpose, effect or likely effect of substantially lessening competition (s 47(3));
 - acquiring, or offering to acquire, goods or services, including an acquisition at a particular price, on condition that the supplier will not supply, or will limit the supply of, goods and services to a competitor of the acquirer, where the acquirer's conduct has the purpose, effect or likely effect of substantially lessening competition (s 47(4)); and
 - refusing to acquire goods or services, including an acquisition at a particular price, for the reason the supplier has supplied or has not agreed to not supply goods and services to a competitor of the purchaser, where the purchaser's conduct has the purpose, effect or likely effect of substantially lessening competition (s 47(5)).
- 3.2. Section 93 of the Act provides that a corporation that engages or proposes to engage in conduct of a kind referred to in sections 47(2), (3), (4) and (5), amongst others, may give to the ACCC notice, in the form prescribed, setting out particulars of the conduct or proposed conduct. The effect of lodging such a notification is to afford statutory protection to the corporation for engaging in the said conduct from legal proceedings under the Act.
- 3.3. Under section 93(3), if a corporation has notified the ACCC of conduct or proposed conduct of the kind described in section 47 and the ACCC is satisfied that the conduct or proposed conduct has the purpose or has or is likely to have the effect of substantially lessening competition within the meaning of section 47 and in all the circumstances:
- the conduct has not resulted or is not likely to result in a benefit to the public or
 - any benefit to the public that has resulted or is likely to result from the conduct would not outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from the conduct,

the ACCC may give a notice in writing stating that it is so satisfied and setting out its reasons in this respect. The effect of giving such a notice is to revoke the immunity afforded by lodging the notification.

- 3.4. Before revoking the statutory protection obtained by a notification, the ACCC must issue a draft notice of its intention (section 93A(1)) and give the applicant and interested parties the opportunity to respond and to call a conference (section 93A(2)) in relation to the draft notice.

4. Submissions received

- 4.1. In addition to the information set out in its notification lodged on 22 July 2009, IHA also provided further submissions on 11 September 2009, 5 October 2009 and 21 January 2010.

Initial consultation

- 4.2. The ACCC sought public submissions from approximately 30 parties with an interest in the matter, including ice hockey associations, ice rinks, sport and recreation bodies and government departments.

Submissions from interested parties

Support for the notified conduct

- 4.3. The following parties provided submissions in support of the notified conduct:
- Ice Hockey NSW
 - Ice Hockey Queensland
 - ACT Sport and Recreation Services

Concerns about the notified conduct

- 4.4. The following parties provided submissions outlining concerns about the notified conduct:
- Australian Sports Commission
 - Carole Walsh, Brendan Walsh and Cameron Walsh
 - Cockburn Ice Arena
 - John Corbishley
 - Macquarie Ice Rink
 - Sydney Ice Arena
 - Sydney Ice Hockey League

IHA's response to submissions

- 4.5. The ACCC gave IHA an opportunity to respond to interested party submissions. On 11 September 2009 and 5 October 2009, IHA provided further submissions. The key points from these submissions are discussed in Chapter 5 of this draft notice.
- 4.6. The views of IHA and interested parties are discussed in the ACCC's evaluation of the notified conduct in Chapter 5 of this draft notice.

The pre-decision conference and further written submissions

- 4.7. On 21 December 2009, IHA requested that the ACCC hold a pre-decision conference in relation to the draft notice. The pre-decision conference was held on 21 January 2010 at the ACCC's Sydney office, chaired by ACCC Deputy Chair Peter Kell.
- 4.8. IHA provided the ACCC with a further written submission at the conference. IHA reiterated the claimed public benefits provided by its membership of the IIHF and outlined the detriments that would result if this membership was compromised as a result of the ACCC revoking the notification.
- 4.9. IHA also submitted that if the notified conduct does increase its revenue (which it denies), any funds generated will be used to further develop the sport of ice hockey in Australia, including the provision of training and skill development of players and officials and supervision and management of representative teams.
- 4.10. At the conference, the Sydney Ice Hockey League and Sydney Ice Arena submitted that IHA's membership of the IIHF would not be affected in the event the ACCC revoked IHA's notification. SIA also expressed concern that the notified conduct reduces consumer choice and reduces competition for ice time at ice rinks. Following the pre-decision conference, further written submissions were provided by SIHL and SIA.
- 4.11. The views of IHA, SIHL and SIA are further discussed in Chapter 5 of this notice. These submissions and a record of the pre-decision conference are available on the ACCC's website at: www.accc.gov.au/ExclusiveDealingRegister.

5. ACCC assessment

The relevant markets

- 5.1. To assist with the assessment of the purpose, effect or likely effect of the notified conduct on competition, it is helpful to identify the relevant markets or areas of competition affected.

Submissions by IHA

- 5.2. IHA submits that the relevant market for assessing the notifications is the market for the supply of ice hockey administration services, in particular competition organisation, in Australia.
- 5.3. IHA notes that there is at least one organisation in NSW which is completely independent of IHA and organises ice hockey competitions, some of which involve players from other countries.
- 5.4. IHA considers there are inferior substitutes to the services provided by IHA in the form of many different sporting bodies throughout Australia. IHA suggests that if the provision of sporting services in general is taken to be the market, then it is a marketplace in which there is strong competition.

ACCC's view

- 5.5. IHA describes itself as a provider of ice hockey administration and competition services.
- 5.6. In order to determine the relevant markets or areas of competition in which IHA operates, the ACCC has considered a range of potential substitutes on both the demand side and the supply side.

Organisation and administration of ice hockey competitions

National level

- 5.7. IHA sanctioned leagues operate at three levels in Australia – national, state and local.
- 5.8. IHA is the only provider of ice hockey administration and competition services at the national level. Services provided at the national level include providing eligibility for participation in State Championships, eligibility for selection and participation at National Championships and World Championships.
- 5.9. As the Australian Sports Commission recognises only one national governing body, there are unlikely to be alternative providers of ice hockey administration and competition services at the national level.
- 5.10. The ACCC considers there are few, if any, close supply side substitutes for the services provided by IHA. It is unlikely that a provider of competition services for

another sport could modify their operations to provide ice hockey competition organising services in any format.

- 5.11. Similarly, the ACCC considers that, on the demand side, other national sports associations or bodies are unlikely to be a sufficiently close substitute for ice-hockey players to constrain IHA.
- 5.12. Further, the ACCC notes that players who compete in the State Championships are eligible for selection in the National Championships. As players are likely to seek selection for both championships, the ACCC considers that the sanctioned competitions run at state and national level are likely to be complementary products rather than close demand side substitutes.

Regional or local level

- 5.13. The ACCC understands that leagues may be established at the regional or local levels. These leagues may be conducted outside the auspices of IHA, generally being either privately run or operated by the ice rinks themselves. In some cases in-house tournaments have sought sanctioning from IHA.
- 5.14. The different administrative and organisational requirements for the provision of ice-hockey services at regional and local levels (compared to the national level) suggest that separate consideration of competition at the regional or local level may be warranted.
- 5.15. In addition, there are differences in the regional/local product offering for ice-hockey players given that unsanctioned teams may operate at these levels.
- 5.16. Submissions indicate that generally, greater costs per player apply for participation in sanction leagues, in comparison to the costs applicable for participation in non-sanctioned leagues. Participation in the sanctioned state leagues provides players with eligibility for selection and participation in the AIHF National Championships. Further discussion of submissions on the applicable costs is set out at paragraphs 5.44 – 5.47.
- 5.17. In terms of scheduling, the sanctioned competitions are run on the weekend, while most of the non-sanctioned leagues, including the SIHL, operate on weeknights. Many of the players who participate in the SIHL are also members of IHA and compete in leagues run by both parties.
- 5.18. The ACCC considers that sanctioned and unsanctioned leagues compete for the provision of ice hockey competition organisation and administration services at the regional and local levels.

The acquisition of ice time at ice rinks

- 5.19. Providers of the organisation and administration of ice hockey competition services acquire ice time from ice rinks for the purposes of practices and competitions.
- 5.20. SIA submits that it rents ice time to sanctioned leagues as well as to a very significant number of privately run non-sanctioned games. SIA's submission

indicates that its rinks have reserved ice time for Ice Hockey NSW (a sanctioned league) and taken bookings for privately run non-sanctioned leagues such as SIHL, International Cup, Sydney Non-Contact League, Erina In-House Competition and ice hockey camps. SIA submits that apart from revenue received from ice-hockey, it receives revenue from entry fees from the public to attend general skating sessions. Sydney Ice Arena submits that like all other ice rinks in Australia, it relies heavily on revenue from ice hockey.

- 5.21. The ACCC considers that sanctioned and unsanctioned leagues compete to acquire ice time from ice rinks.

Conclusion

- 5.22. On the basis of the factors outlined above, the ACCC considers that the following markets are relevant to its assessment of the notified conduct:
- the organisation and administration of ice hockey competitions at a national level
 - the organisation and administration of ice hockey competitions at a regional or local level
 - the acquisition of ice time at ice rinks.

The counterfactual

- 5.23. To identify and assess the effects of the notified conduct, the ACCC applies the ‘future with and without test’. Under this test, the ACCC compares the situation in the relevant markets in the future with the notified conduct in place with the situation in the relevant markets without the notified conduct. This requires the ACCC to predict how the relevant markets will react if the notifying parties do not engage in the notified conduct. This prediction is referred to as the ‘counterfactual’.

Submissions by interested parties

- 5.24. No submissions which directly addressed the issue of the relevant counterfactual were provided to the ACCC prior to the draft notice.
- 5.25. In response to the draft notice, SIA submitted that if IHA does not engage in the notified conduct there will continue to be increased interest in ice hockey as a sport in Australia, healthy competition in the ice hockey market at a local level, freedom of choice for players and officials and the appropriate dominance of IHA at a national level.

ACCC’s view

- 5.26. Rule 4.22 of the IHA Sport Regulations 2009 stipulates that IHA members must not participate in ice hockey events that are not sanctioned by IHA. Any member who plays in an unsanctioned event will be suspended or have their IHA membership forfeited.

- 5.27. The ACCC considers that in the absence of the legal protection provided by this notification, it is likely that IHA would cease to enforce Rule 4.22 or will remove it from their Regulations.

Public detriments

Effect on competition

- 5.28. Under section 93 of the Act, the ACCC may revoke a notification where the ACCC is satisfied that the conduct described in the notification has the purpose or has or is likely to have, the effect of substantially lessening competition and where it considers that the conduct is otherwise not in the public interest.
- 5.29. Generally speaking, exclusive dealing conduct will be more likely to have a substantial effect if it is engaged in by a significant market player across a wide section of the market, if there are limited substitute products available or if consumers are forced to buy a product or acquire a second product. It can also have a more detrimental effect on competition if the business engaging in the conduct has significant leverage in other markets or where the conduct impedes entry into a market.
- 5.30. IHA submits that it does not wish to restrict the organisation and provision of ice hockey competitions in Australia; it simply wants to prevent its members from participating in leagues and tournaments which do not or are not able to meet its criteria for sanctioning.
- 5.31. IHA's criteria for sanctioning state leagues or events are:
- The league must be restricted to the borders of the state in which the league resides, and must register through their state associations as an affiliated member of IHA.
 - All league participants must be registered individual members with IHA through their respective state associations.
 - All registered parties must agree to the terms and conditions of their membership in regards to compliance with both IHA and the state association's constitution, and the regulations and policies governing the sport.
- 5.32. IHA acknowledges that the notified conduct has the potential to cause unsanctioned leagues in operation to fail. However, IHA argues that as it will sanction leagues and tournaments that meet objective criteria primarily related to safety, there is nothing to prevent other leagues from satisfying the sanctioning criteria if they are not viable without the participation of IHA members.
- 5.33. SIA submits that if the notified conduct proceeds IHA will be able to reduce or eliminate most of the non-sanctioned ice hockey activities in Australia. SIA considers that:

Ice Hockey Australia will be able to prevent players who have previously participated in a "non-sanctioned" game from playing "sanctioned" hockey ever again. It will also scare many players into

not starting out their hockey playing career with non-sanctioned leagues and will eliminate many non-sanctioned activities and therefore reduce competition.

- 5.34. Though IHA has developed criteria for sanctioning, SIA submits that it has previously applied to have an ice hockey event sanctioned and this request was denied.

ACCC's view

The organisation and administration of a national ice hockey competition

- 5.35. The ACCC notes that:

- the IHA is recognised by the IIHF, IOC, AOC and the ASC as the governing body for ice hockey in Australia
- the ASC will only recognise one national governing body
- the submission of ACT Sport and Recreation Services suggests that a national ice hockey league that is not run by IHA would most likely be unsuitable for government funding.

- 5.36. As a result of these governance issues, there are unlikely to be alternative providers of ice hockey administration and competition organisation services at the national level. The ACCC considers that as IHA is a monopoly provider of these services, it holds a substantial degree of market power in the supply of ice hockey organisation and competition services at the national level.

- 5.37. As IHA is the only provider of these services at the national level, the conduct would have minimal, if any, impact on competition in this market. However, the conduct may constitute IHA leveraging its power at the national level to impact competition in other markets.

The organisation and administration of ice hockey competitions at a regional or local level

- 5.38. The notified conduct effectively restricts all IHA members from playing in events that are administered by third parties, with limited exception, i.e when the third party competition is sanctioned by IHA.
- 5.39. The ACCC notes that there are a number of non-sanctioned leagues and events in operation, including the SIHL and leagues and tournaments run by local ice rinks.
- 5.40. As outlined at paragraph 5.31 above, IHA's criteria for sanctioning leagues or events involve a restriction on the geographical size of leagues to remain within state boundaries; the requirement for league participants to be registered members of IHA which involves payment of associated registration fees; and the requirement to meet all relevant terms and conditions. In addition, SIHL submits that sanctioned leagues generally restrict regular competition to the southern winter.

- 5.41. The ACCC considers that all of the above criteria for sanctioning imposes a significant barrier to the establishment and expansion of rival leagues by existing and future providers of ice hockey competition services.
- 5.42. The ACCC also considers that given the small pool of available players for ice hockey in Australia (IHA has less than 4000 members), the withdrawal of participation by IHA members would be likely to have a significant impact on the ability of rival leagues to attract the critical mass of players necessary to remain viable.
- 5.43. SIHL has indicated that its viability would be severely compromised if IHA members were unable to play in its league.
- 5.44. The ACCC also notes that in terms of costs per player, SIHL submits by way of comparison that the average cost per player to participate in a sanctioned Ice Hockey NSW Senior B League is currently \$830 per season, while the average cost per player to compete in SIHL is \$420. SIA similarly submits that the cost per player to compete in a sanctioned league is \$830, while the cost for players to participate in the Sydney Ice Arena League is \$395.
- 5.45. At the pre-decision conference, IHA indicated that its membership fee is \$80 per player plus insurance costs. IHA noted that any additional costs incurred by players participating in sanctioned competitions are imposed by the state associations and the clubs themselves.
- 5.46. Ice Hockey NSW (IHNSW) indicated that there is no sanctioning fee for leagues that are not operated by IHA, with the only requirement being that players on the ice are registered members of IHA. IHNSW further indicated that it charges senior players \$225 for participation in a winter league, with \$125 provided to IHA and the residual used to cover overheads such as salaries. IHNSW indicated that any remaining cost incurred by a player would be fees imposed by the club.
- 5.47. In contrast, SIA indicated that it had been previously denied an application for sanctioning of an event, and was also advised that if the event was sanctioned certain registration fees would apply including a registration fee of \$242 per Australian player.
- 5.48. The ACCC notes that different costs apply for participation in the various leagues and events. In general, submissions indicate that sanctioning would attract the application of additional costs, involving, at minimum, players being required to pay the IHA membership fee.
- 5.49. Where a non-sanctioned league seeks to attain sanctioning in order to keep its IHA players, all participants in the league will be required to pay the relevant IHA membership fees. This means players and officials who are not currently IHA members are likely to be subject to increased fees.
- 5.50. Such price increases may similarly arise where a non-sanctioned league increases its fees in order to remain viable and recoup any losses it may incur from decreased membership as a result of the notified conduct.

- 5.51. By increasing barriers to entry and reducing the competitive viability of rival leagues, the notified conduct is likely to reduce the output of ice hockey competitions and in turn, reduce consumer choice. Players and officials who wish to participate in ice hockey leagues and events run by alternative providers will be unable to do so while they remain members of IHA. This restriction will also prevent players from participating in training camps and competitions overseas where these are not sanctioned by IHA. This issue is discussed in greater detail below at 5.60 – 5.68.

The acquisition of ice time at ice rinks

- 5.52. IHA administered competitions and independently run leagues compete to acquire ice time from ice rinks. Submissions indicate that IHA competitions are generally conducted in winter, while some of the privately run leagues, such as SIHL, conduct leagues in both summer and winter.
- 5.53. IHA's exclusivity arrangement reduces the number of providers that are competing to acquire ice time during the winter season. To the extent it reduces the number of non-sanctioned competitions in operation, it diminishes the possibility of competition to acquire ice time in summer and winter.
- 5.54. Cockburn Ice Arena submits that the notified conduct will disadvantage both individual ice skating rinks and ice hockey players. As an example, Cockburn Ice Arena suggests that it may prevent rinks from holding summer leagues, which are never run by the associations and IHA.
- 5.55. SIA submits that IHA's proposal will have a significant impact on ice rinks which rely heavily on the revenue it derives from games not sanctioned by IHA. SIA rents ice time to Ice Hockey NSW/IHA affiliated clubs to conduct games and training at both its ice rinks. SIA also rents ice time to a significant number of privately run non-sanctioned games and also operates ice rink controlled non-sanctioned games and activities.
- 5.56. SIA considers that 'the elimination of non-sanctioned leagues and activities may potentially cause the closure of one of our two ice rinks if not both. This as a consequence would cause less competition between ice rinks.'
- 5.57. The ACCC considers that the notified conduct would be likely to restrict the ability of ice rinks to offer competitions in the summer months. A reduction in the number of providers seeking to acquire ice time from the rinks may give rise to ice rinks increasing their general fees, for example, over the summer months to recoup its losses and may also have a detrimental effect on their long term financial viability.

Conclusion on effect on competition

- 5.58. The ACCC considers that:
- IHA holds a substantial degree of market power in the organisation and administration of ice hockey competitions at the national level

- the notified conduct allows IHA to leverage that power into the market for the organisation and administration of ice hockey competitions at a regional or local level
- by imposing barriers to the establishment and expansion of rival ice hockey leagues and reducing the competitive viability of existing rival leagues, the notified conduct has the effect, or is likely to have the effect, of substantially lessening competition in the market for the provision of ice hockey competition organising services at a regional or local level.

5.59. The ACCC also considers that the notified conduct has the potential to substantially lessen competition in the market for the acquisition of ice time at ice rinks.

Reduced consumer choice

5.60. IHA submits that the notified conduct is not intended to deny anyone the opportunity to participate in the sport, but merely to require its members to make a choice as to whether to play in sanctioned or unsanctioned competitions in any particular season.

5.61. IHA notes that if, as a result of its obligations to the IIHF, it is forced to suspend players who participate in unsanctioned competitions overseas, such suspensions would only be for one IHA season.

5.62. IHA advises that it has never prevented school aged members from participating in school-based ice activities/programs, even though school-based activities are not sanctioned by IHA. IHA actively supports school programs and its state association members, players and coaches regularly assist ice venues and school ice skating and hockey programs. The ACCC notes, however, that it would be expected that the administrative functions of national sports organisations generally do not extend to sanctioning the curricular activities and programs arranged by schools or the students' ability to participate in such activities or programs.

5.63. The Australian Sports Commission submits that as a general principle, it would have some difficulty with the notified conduct on the basis that it potentially stifles participation, particularly when it appears to primarily arise from an insurance process issue. The ASC suggested that the focus for national sporting organisations should generally be on finding and developing every opportunity to support increased ways of participating.

5.64. SIA considers that the notified conduct will reduce the number of non-sanctioned ice hockey competitions. SIA submits that as players will be left without alternatives to the official competitions, IHA will be able to increase the cost of player registration.

5.65. SIHL submits that:

There are a great many players who play in sanctioned leagues who would like to play more than the one game a week they [IHA] offer, however they risk lengthy bans if they choose to do so. In addition, a number of players who enjoy playing alongside their adolescent children have in the past been advised by Ice Hockey NSW that their children's state and representative careers are under threat as a result.

- 5.66. John Corbishley submits that the programs offered by IHA (through its state bodies) are inadequate to meet the needs of many players. Mr Corbishley notes that players wishing to participate in more than one ice hockey game a week cannot do so under the current administration.
- 5.67. The ACCC received a submission from an Australian ice hockey player and his family. This player wishes to participate in a development league for junior players in Ontario, Canada – the Greater Metro Hockey League (GMHL). This player submits that he has been informed that if he plays in the 2009/2010 GMHL season, IHA will ban him from all officially sanctioned ice hockey games in Australia, including the national teams, for three years.
- 5.68. In response to the draft notice and issues discussed at the pre-decision conference, SIA submits that if IHA prevents players from participating in a non-sanctioned game whilst being registered for a sanctioned competition, there will be a reduction in:
- the number of people playing ice hockey
 - the frequency of individuals playing hockey games
 - consumer choice between expensive sanctioned leagues (\$830 plus travel costs to away games) versus lower cost non-sanctioned leagues (\$420 for SIHL and \$395 for SIA).

ACCC's view

- 5.69. The ACCC considers that the notified conduct limits the ability of existing and future members of IHA to participate in whichever ice hockey competitions they choose. It will have a particularly detrimental effect on players who wish to participate in more games than are currently offered by IHA, whether for leisure reasons or to improve their standard of play.
- 5.70. Participation in sports activities in general is beneficial for overall health and fitness. The reduced availability of opportunities to participate in ice hockey competitions is likely to reduce overall participation in the sport.

Proposed amendments to the notification

- 5.71. In a submission provided in response to the draft notice, IHA proposes an amendment to the notification in the event that the ACCC is not willing to reconsider its decision to revoke the notification. IHA submits that its amendment proposal would result in the notified conduct being less restrictive through the addition of the following words to the end of the notified conduct:
- unless the operation of that game, league or competition is limited solely to a region or portion of the year where no sanctioned league operates.
- 5.72. IHA submits that such an amendment would allow IHA members to participate in unsanctioned leagues where no sanctioned summer leagues operate in that locality. It

would also allow IHA members to participate in unsanctioned leagues operating in parts of Australia where no IHA sanctioned leagues operate.

- 5.73. In addition, IHA considers that the amendment would ameliorate the harm that the ACCC expressed concern about in its draft notice; namely that the notified conduct prevents the viable formation of summer leagues and leagues in regions that are not serviced by IHA. IHA would also be able to demonstrate that it is substantially complying with Article 17 of the IIHF Statutes and By-laws.
- 5.74. SIHL considers that IHA's suggestion that the scope of the notification be reduced indicates that IHA's underlying motive is the prevention of direct competition with existing and/or proposed leagues.
- 5.75. SIA submits that IHA's proposed amendment will not have any effect on the notified conduct. SIHL considers that if there is a sanctioned league operating in one ice rink in Sydney in summer, IHA will claim that they retain the right to ban or suspend their members who participate in a non-sanctioned league at one of the other ice rinks in Sydney.

ACCC's view

- 5.76. The ACCC considers that IHA's proposed amendment would not address the competition concerns outlined in the ACCC's draft notice.
- 5.77. While the amendment would enable players and officials to play in a non-sanctioned league where/when no IHA competition is offered, the ACCC remains concerned that the notified conduct would still:
- create barriers to the establishment and expansion of rival ice hockey leagues and reduce the competitive viability of existing rival leagues that operate at the same time or in the same geographic region as a sanctioned league
 - reduce consumer choice and overall participation in ice hockey by:
 - restricting the ability of players and officials to switch between sanctioned and non-sanctioned competitions that are run at the same time of year/in a similar geographic location,
 - reducing the frequency of playing time that would otherwise be available to ice hockey players.
- 5.78. It should also be noted that the *Trade Practices Act 1974* (the Act) does not provide for an exclusive dealing notification to be amended after it is lodged, nor does it provide for the ACCC to impose conditions on the operation of the notified conduct. This means that neither an applicant, by amendment, nor the ACCC, by condition, can modify the conduct the subject of a notification after it is lodged.

Conclusion on public detriments

- 5.79. The ACCC considers that the notified conduct will result in the following public detriments:
- the effect, or likely effect, of substantially lessening competition for the provision of ice hockey competition organisation and administration services
 - potential substantial lessening of competition in the market for the acquisition of ice time at ice rinks
 - reduced consumer choice
 - lower participation in sporting activities overall, through a reduction in participation in ice hockey.

Public benefits

Submissions by IHA

- 5.80. The public benefits claimed by IHA can be summarised as follows:
- economies of scale in the provision of ice hockey services
 - adequate risk management practices and lower insurance premiums
 - ability to effectively discipline players
 - need to comply with its obligations as a member of the International Ice Hockey Federation (IIHF).

Economies of scale in the provision of ice hockey services

- 5.81. IHA submits that there are possible economies of scale in the provision of ice hockey services. In particular, these can be seen in the development and continuous updating of health and safety guidelines and enforcement of rules and regulations.
- 5.82. IHA is continuously reviewing and updating its risk management program and considers the costs involved in such a process will not vary substantially with changes in membership or player numbers in a particular competition. As a result, IHA submits there is a public benefit in avoiding duplication in the development of health and safety guidelines. IHA contends that, as it has prior experience in this field, it is the most suitable body to administer these guidelines.
- 5.83. IHA considers that there is no public benefit that will be achieved through the creation of unsanctioned separate leagues. IHA suggests that it is desirable to have all ice hockey players within one league, as this will increase the number of teams in any division, the level of competition and the opportunity to play for all competitors.

ACCC's view

- 5.84. The ACCC accepts that there may be some efficiencies achieved by having a single governing body administer a sport's health and safety guidelines. In this case, however, the ACCC considers that these benefits are outweighed by the significant anti-competitive detriment that arises from the notified conduct.

Adequate risk management practices and lower insurance premiums

Submissions by IHA

- 5.85. IHA submits that the notified conduct forms part of its risk management program, which delivers public benefits in the form of lower insurance costs to its members and reduced risk of injury to players.
- 5.86. IHA considers that its risk management program and its insistence that all on-ice officials and coaches at sanctioned events are properly trained and certified significantly reduces the risk of injury to players, officials and spectators.
- 5.87. IHA is of the view that if its members are participating in unsanctioned leagues and events as well as IHA sanctioned leagues, difficulties will arise in the case of injury and insurance claims/litigation. This includes situations where an IHA member, player or official's involvement in an unsanctioned league makes it difficult to satisfy the insurer that an injury was not caused in a non-sanctioned league.
- 5.88. IHA is also concerned that if its members participate in unsanctioned leagues its risk management program may no longer satisfy the requirements of its insurers. As a result, it is likely IHA would have to raise its membership fees to prohibitive levels to cover increased insurance costs, thereby affecting its ability to retain current members or attract new members to the sport.

Submissions by interested parties

- 5.89. ACT Sport and Recreation Services (SRS) submits that IHA has an extensive risk management plan which provides a safe environment for participants.
- 5.90. SRS considers it important that sport in Australia be governed in an efficient manner. SRS submits that a non-sanctioned National Ice Hockey League could not rely on the support provided by IHA, including an internationally approved risk management model, comprehensive insurance and well-established pathways for participants.
- 5.91. Ice Hockey NSW considers that unless it is able to ensure that minimum standards of coaching and officiating are adhered to by preventing its members from participating in non-sanctioned events, the entire membership will be exposed to increased costs through higher insurance premiums.
- 5.92. Ice Hockey Queensland submits that IHA and its State Associations are required to provide a safe and risk free environment to its members, insurers, sponsors and the general public. IHQ is concerned that if these bodies do not have any governance

over unsanctioned leagues then there is no obligation on such leagues to meet these requirements.

- 5.93. In the past IHQ has asked that its members who wish to participate in unsanctioned competitions or events also seek IHA accreditation as a safety net against litigation and injury. IHQ found that a great majority of organisations staging unsanctioned events were not registered association bodies and had no safeguards (policies and regulations) or insurances in place to protect players/participants.
- 5.94. SIHL and SIA submit that it is hard to see how the public benefits claimed by IHA in its notification can be substantiated. SIHL submits that it is operated to the same standards as the sanctioned leagues, following a well documented set of rules and having games officiated by experienced referees.
- 5.95. SIA notes that it has implemented risk management practices which make its non-sanctioned games as safe as the official IHA games. In particular:
- many of the non-sanctioned games are non-contact, which reduces the possibility of injury
 - a Senior First Aid Officer is required to be at all games.
- 5.96. SIA has obtained insurance cover for players registered in its non-sanctioned competitions from the same provider as IHA, Sportscover. SIA notes that the policies appear to be identical in content.
- 5.97. John Corbishley does not agree with IHA's claim that it may face increased insurance costs if it cannot prevent its members from participating in non-sanctioned competitions. Mr Corbishley submits that IHA's insurance costs will be determined by their claim rates and their risk management program.
- 5.98. John Corbishley concedes that in some cases it may be difficult for an insurer to determine whether an injury was contributed to or caused by an incident which occurred at an unsanctioned hockey event rather than an unsanctioned event. However, Mr Corbishley suggests that:

[i]t would be equally difficult for an insurer to determine if any injury was not caused or contributed to by an incident that occurred in a rugby game that morning or a soccer game or a basketball game or walking down the stairs in his house that day, or in fact any one of a number of activities.

ACCC's view

- 5.99. The ACCC recognises the importance of having adequate risk management practices in place, particularly in relation to a high contact sport such as ice hockey. However, the ACCC considers that preventing IHA members from participating in unsanctioned leagues is unlikely to result in improved safety or reduce the risk of injury when compared to ice hockey events run by alternative providers. The ACCC notes the submissions of interested parties that suggest that rink operated tournaments and privately run leagues observe safety standards that are at least comparable to, if not superior than, those provided by IHA.

- 5.100. The ACCC does not have any evidence to suggest that absent the notified conduct, IHA's members would face increased insurance premiums.
- 5.101. IHA's insurance provider, Sportscover, has stated that:
- IHA is not required to have these sanctioning rules in order to obtain insurance from Sportscover and
 - if IHA did not have these rules its current insurance policy would not be affected.
- 5.102. The ACCC considers that players are in the best position to determine whether the IHA sanctioned competitions offer them the best value in terms of game time, quality of offering, insurance and safety at the price offered.

Ability to effectively discipline players

Submissions by IHA

- 5.103. IHA considers there is a high risk of severe injury which results from ice hockey players engaging in conduct not within the rules of the game. The primary sanction IHA uses to deter players from engaging in such conduct is suspension from competition.
- 5.104. IHA submits that if it cannot prevent members from participating in non-sanctioned competitions, the deterrent effect of suspensions will be greatly reduced, as a player suspended by IHA could continue to play in an unsanctioned league during the period of their suspension from IHA sanctioned matches.
- 5.105. IHA considers that if it can prevent its members from participating in unsanctioned leagues/events this will significantly reduce the risk of injury to its members and the likelihood of catastrophic injury to a player, official or spectator that would receive media attention and deter parents from allowing their children to participate in the sport of ice hockey.

Submissions by interested parties

- 5.106. NSW Ice Hockey, Ice Hockey Queensland and ACT Sport and Recreation Services consider that the notified conduct gives IHA a useful deterrent against dangerous play, as players who are suspended in one competition are prevented from participating in others.

ACCC's view

- 5.107. The notified conduct may provide IHA with an effective deterrent against dangerous play, but it achieves this at the expense of competition and consumer choice. The ACCC considers that IHA's ability to prevent members from participating in Australian and International championships is likely to be an effective disciplinary measure on its own. In addition, there may be a less restrictive means of delivering the same public benefit.

IHA's obligations as a member of the International Ice Hockey Federation

Submissions prior to the draft notice

- 5.108. IHA submits that if one of its members plays in an unsanctioned league and this is reported to the IIHF, IHA would be in breach of Clause 17 of IIHF's Statutes & By-laws, which states:

The member associations of IIHF shall recognise each other as being solely empowered to control ice hockey and/or inline in their respective countries; therefore, they undertake that neither they nor any of their members will in any way have relations with non-associated bodies or one of their members, except as permitted by the Statutes and By-laws or with special permission of the IIHF.

- 5.109. John Corbishley notes that the United States, which is the second largest ice hockey country in the world, operates numerous leagues, programs and tournaments outside USA Hockey.

- 5.110. Mr Corbishley submits that to the best of his knowledge, there is no system in the U.S. that verifies whether a player can participate in a non-sanctioned hockey program.

ACCC's view in the draft notice

- 5.111. In the draft notice, the ACCC noted IHA's submissions and the possibility of implications for IHA's membership of the IIHF if IHA did not implement the notified conduct.
- 5.112. The ACCC noted that the largest ice hockey leagues in the world operate in Canada and the United States respectively and both are members of the IIHF. USA Hockey does not impose sanctions on members who participate in leagues that are privately operated or organised by ice rinks. In Canada, players are free to participate in any league they chose until 30 September each year. At this point they must elect to participate in either competitions run under the auspices of Hockey Canada or in an independent league. This policy does not apply to ice hockey tournaments run in the summer months.
- 5.113. The ACCC also noted that those policies did not appear to have compromised either USA Hockey or Hockey Canada's long standing membership of IIHF. The ACCC welcomed further submissions on the issue.

Further submissions and the pre-decision conference

- 5.114. As part of its written submission provided to the ACCC on 21 December 2009, IHA attached a letter it had received from the General Secretary of the IIHF. The General Secretary advised that while it could not provide IHA with a final position on the matter, the opinion of the IIHF General Secretary was that if the ACCC revokes IHA's notification, this will heavily affect IHA's ability to govern the sport of ice hockey in Australia. The General Secretary considered that:

If IHA loses the control over ice hockey in Australia this would most likely have a serious impact on IHA's membership with the IIHF. IHA would no longer be in a position to comply with the

requirements set by the IIHF Statutes & By-laws and would also no longer fulfill the membership requirement of being in a position to control ice hockey within the country.

- 5.115. The General Secretary of the IIHF also expressed concern that the ACCC's draft notice 'questions fundamental principles of governance in sport.' The letter states that it is widely accepted that:

national and international [sporting] associations cannot be fully subject to antitrust/competition laws and that the sports model, the specificity and autonomy of sport must always be respected and thus taken into consideration.

- 5.116. In a further written submission provided at the pre-decision conference, IHA submits that should the ACCC's final decision be substantially the same as the draft notice, IHA is likely to suffer significant sanctions from the IIHF including potential loss of IIHF membership. IHA submits that potential loss of IIHF membership would give rise to various detrimental effects. IHA provides a list of these effects in its submission, which includes the loss of the right to represent Australia and the loss of rights and funding support to participate in various events such as competitions and development symposiums.
- 5.117. SIHL submits that IHA has not produced evidence of any representations they have made to the IIHF in relation to the obtaining of 'special permission.' Article 17 of the IIHF Statutes and By-laws states that a member nation will not have relations with non-sanctioned bodies, except as permitted by the Statutes and By-laws or with special permission of the IIHF President for limited time periods.
- 5.118. SIHL considers that Australia's position as a summer sports nation, relatively small population, geographical size, lack of available ice rinks and isolation from the major winter sports centres make the challenge of growing ice hockey in Australia unique. Under these circumstances it is reasonable to assume that special permission could be sought by IHA with strong prospects for success.
- 5.119. SIA submits that for over 100 years, non-sanctioned games and locally organised ice hockey leagues have existed in Australia without affiliation with the national or international ice hockey federations.
- 5.120. SIA suggests that IHA's membership will not be in jeopardy as the IIHF has set a precedent by allowing players to enter non-sanctioned games for many years in various member countries. SIA notes that in major hockey playing nations, including Canada and the USA, players are free to play in non-sanctioned games.
- 5.121. SIA notes that the first section of Article 17 of IIHF Statutes and By-laws requires other member associations of IIHF to recognise IHA 'as being solely empowered by IIHF to control ice hockey' in Australia. SIA submits that this is not in dispute as there is no other national federation that is purporting to control ice hockey in Australia. IHA is the only organisation in Australia running a national league, organising state representation and interstate competitions and operating national training camps.

5.122. SIA suggests that the reference in Article 17 to ‘unsanctioned bodies’ means national organisations not officially recognised by IIHF which might claim to represent hockey players on a national basis.

ACCC’s view

5.123. The ACCC recognises that there are certain public benefits associated with IHA’s membership of the IIHF, including rights to participate in qualification tournaments for international events and funding that is provided for ice hockey development camps.

5.124. The General Secretary of the IIHF has expressed concern about IHA losing control over ice hockey in Australia. The ACCC considers that its decision to revoke IHA’s notification does not affect IHA’s ability to govern the sport of ice hockey in Australia at the national level. As such, the ACCC does not see any legitimate basis for IIHF to exclude IHA from its membership and remove any associated benefits as a result of this decision. The ACCC considers that IHA would be able to continue with the effective governance of the sport of ice hockey at the official level without engaging in the notified conduct.

5.125. In addition, the ACCC also notes that the information currently available does not indicate that IIHF would necessarily terminate IIHF’s membership as a consequence of the notification being revoked. The ACCC notes that:

- the letter received from the IIHF on 21 December 2009 indicates that the views contained therein are not the concluded position of the IIHF
- there appears to be some flexibility on the matter of relationships with non-sanctioned bodies, with the possibility of special permission from the IIHF President provided for in the IIHF Statutes and By-laws (Article 17)
- it is not apparent that the IIHF automatically disqualifies member organisations on the basis that registered players are permitted to participate in both official and independently run ice hockey competitions.

5.126. The ACCC is responsible for administering the *Trade Practices Act 1974* (the Act), the relevant statute for competition law in Australia. The decision in this notice is made in accordance with Australia’s competition law regime and the statutory test for exclusive dealing conduct set out in section 93(3) of the Act.

Balance of public benefits and detriments

5.127. Under section 93(3) of the Act, the ACCC may revoke a notification where the notified conduct has the purpose, effect or likely effect of substantially lessening competition and the benefit to the public from the notified conduct does not outweigh the detriment to the public caused by any lessening of competition that has resulted or is likely to result from the conduct.

5.128. Based on the information available, the ACCC does not consider that the notified conduct is likely to deliver the public benefits claimed by IHA.

- 5.129. The ACCC considers that the notified conduct has the effect, or is likely to have the effect, of substantially lessening competition for the provision of ice hockey competition organisation and administration services at the regional/local level. The ACCC also considers that the notified conduct has the potential to substantially lessen competition in the market for the acquisition of ice time at ice rinks and result in reduced choice for consumers.
- 5.130. On balance, the ACCC considers that the substantial anti-competitive detriments outweigh any public benefits resulting from the notified conduct.

6. Notice

- 6.1 For the reasons identified the ACCC considers that the notified conduct has the purpose, effect or likely effect of substantially lessening competition and the public benefits do not outweigh the public detriments.
- 6.2 Accordingly, the ACCC issues a notice to revoke notification N94049 lodged by Ice Hockey Australia on 27 July 2009.

Attachment A – Chronology

| DATE | ACTION |
|-------------------|--|
| 22 July 2009 | Exclusive dealing notification N94049 lodged with the ACCC. Immunity conferred by the notification commences from this date. |
| 3 August 2009 | ACCC commences consultation with interested parties. |
| 21 August 2009 | Closing date for submissions from interested parties in relation to the notified conduct. |
| 4 September 2009 | Late submissions received from interested parties in relation to the notified conduct. |
| 11 September 2009 | Submission received from IHA in response to issues raised by interested parties. |
| 5 October 2009 | Further submission received from IHA. |
| 4 December 2009 | Draft notice issued. |
| 21 December 2009 | IHA request that the ACCC hold a pre-decision conference in relation to the draft notice. |
| 21 January 2010 | Pre-decision conference held in relation to the draft notice. |
| 29 January 2010 | Closing date for submissions in response to the draft notice. |
| 2 March 2010 | Final notice issued. |