



Australian
Competition &
Consumer
Commission

Determination

Application for Minor Variation of Authorisation A91102

Lodged by

Recruitment and Consulting Services Association Limited

in respect of

amendments to clauses 4.1(b), 4.5(e) and 4.6(a)(vii) of
the Disciplinary & Dispute Resolution Procedures

Date: 2 July 2010

Authorisation no. A91226

Public Register no. C2010/457

Commissioners:

Samuel
Kell
Schaper
Court
Dimasi
Walker
Willett

Summary

The Australian Competition and Consumer Commission (ACCC) has decided to vary authorisation A91102.

The authorisation was granted on 21 January 2009, to Recruitment and Consulting Services Association Limited (the RCSA) to make a contract, arrangement or understanding by which participants agree to adhere to the RCSA's Code of Conduct, administered in accordance with the RCSA's Constitution and its Disciplinary & Dispute Resolution Procedures, which together provide a regime that may impose sanctions upon RCSA members.

The variation to the authorisation amends clauses 4.1(b), 4.5(e) and 4.6(a)(vii) of the Disciplinary & Dispute Resolution Procedures to clarify the complaints process and to provide greater flexibility in resolving complaints, including provisions for undertakings to be accepted, private resolution and delayed intervention by the RCSA, where appropriate.

1 Introduction

1.1 Authorisation is a transparent process where the ACCC may grant statutory protection from legal action for conduct that might otherwise breach the *Trade Practices Act 1974* (the Act). The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not.

Minor variation

1.2 A person to whom an authorisation has been granted may subsequently seek to vary the authorised arrangements. Depending on the nature of the proposed variation, the person may apply to the ACCC for a minor variation to the authorisation. A minor variation is defined in the Act as a single variation that does not involve a material change in the effect of the authorisation. The Act also permits multiple variations to be dealt with together as a single variation where the combined effect of the multiple variations would not result in a material change to the effect of the authorisation.

1.3 The ACCC must, if it is satisfied that the proposed variation is minor, invite submissions from interested parties. After consideration of the application and any submissions received, the ACCC may make a determination varying the authorisation or dismissing the application.

1.4 The ACCC may vary the authorisation where, if it were a new authorisation, subsections 90(5A), (5B), (6) or (7) would apply, and the ACCC is satisfied that the variation will not result in a reduction in the extent to which the benefit to the public of the authorisation outweighs any detriment to the public caused by the authorisation.

2 The application for minor variation

- 2.1 On 4 May 2010, Recruitment and Consulting Services Association Limited (the RCSA) lodged an application for minor variation to authorisation A91102.
- 2.2 Granted on 21 January 2009, authorisation A91102 allows the RCSA to make a contract, arrangement or understanding by which participants agree to adhere to the RCSA's Code of Conduct, administered in accordance with the RCSA's Constitution and its Disciplinary & Dispute Resolution Procedures (DDRP), which together provide a regime that may impose sanctions upon RCSA members (Members).
- 2.3 The application for minor variation relates to clauses 4.1(b), 4.5(e) and 4.6(a)(vii) of the DDRP. The RCSA proposes to vary the DDRP to:
- clarify the chronology of the complaints process
 - allow for matters to be resolved by direct discussions between the complainant and RCSA member within a period of 30 days
 - allow the RCSA to delay its intervention in a complaints process, and
 - provide that Members may give an undertaking to the RCSA Board in satisfaction or partial satisfaction of a disciplinary complaint made against that member.
- 2.4 The RCSA has also sought to correct some minor typographical errors in the DDRP.

3 Submissions received by the ACCC

- 3.1 Summaries of the RCSA's supporting submission and submissions from interested parties are provided below. Copies of these submissions are available from the public register on the ACCC's website (www.accc.gov.au/AuthorisationsRegister).

The RCSA's submission

- 3.2 The RCSA submits that, in its experience, grievances with its Members are more easily resolved when communication between complainants and Members is encouraged in the early stages of a grievance and there is an alternative to the RCSA's hearing and determination process for the handling of complaints.
- 3.3 It submits that the proposed variations will provide additional public benefit by encouraging early resolution of complaints, allowing the RCSA to deal with a greater number of matters, reducing the costs of complaints hearings and resulting in outcomes that are less likely to be challenged under the appeals process.

- 3.4 The RCSA also submits that the proposed variations will reduce or, alternatively, not have any effect on the detriments to the public resulting or likely to result from authorisation A91102 because the proposed variations are limited to enhancements in the procedures for dealing with grievances and disciplinary complaints made against Members.

Interested party submissions

- 3.5 The ACCC invited 15 potentially interested parties to comment on the application for minor variation. The ACCC received one public submission, which supports the minor variation.
- 3.6 Bayside Personnel Pty Ltd submitted that the proposed variations were unlikely to cause any issues.

4 Statutory test

- 4.1 Section 87ZD of the Act defines a minor variation as a single variation that does not involve a material change in the effect of the authorisation. The ACCC notes that section 91A(6) of the Act provides that there is nothing in the Act that prevents a person from applying for two or more variations in the same application.
- 4.2 Section 91A(7) of the Act provides that if a person applies for two or more variations, and the ACCC is satisfied that the combined effect of those variations, if all were granted, would not involve a material change in the effect of the authorisation, the ACCC may deal with all of those variations together as if they were a single minor variation.
- 4.3 Section 91A of the Act provides that the ACCC must, if it is satisfied that the proposed variation is a minor variation, invite submissions from interested parties. After consideration of the application and any submissions received, the ACCC may make a determination varying the authorisation or dismissing the application.
- 4.4 Relevantly, section 91A(4) of the Act provides that the ACCC may grant a minor variation to an authorisation granted under section 88(1) or section 88(1A), where it is satisfied that the variation would not result, or would be likely not to result, in a reduction in the extent to which the benefit to the public of the authorisation outweighs any detriment to the public caused by the authorisation.

5 ACCC assessment

- 5.1 The ACCC considers the proposed variations are minor since they act merely to improve the operation of the DDRP, based on the RCSA's experience in administering the DDRP since the last version was authorised in 2009.

- 5.2 The ACCC notes that the Code of Conduct, the Constitution and the remaining clauses of the DDRP remain unchanged by the proposed variations and will continue to be available for use by the parties. The proposed variations will not remove any of the disciplinary options in the dispute resolution procedure (including pecuniary penalties, suspension and expulsion) and the DDRP will continue to provide for appeal of decisions to the RCSA and to an agreed arbitrator.
- 5.3 The ACCC considers the proposed variations sought by the RCSA, including the addition of undertakings as a new option for dealing with complaints, are likely to allow greater flexibility for complainants, Members and the RCSA in handling complaints and greater likelihood of expedited resolution of complaints. Staff consider the proposed variations are also likely to provide greater public understanding of the complaints process.
- 5.4 Based on the information before it and for the reasons noted above, the ACCC considers that the combined effect of the proposed variations to the DDRP is unlikely to result in a material change to the effect of authorisation A91102. The ACCC considers the proposed variations are likely to be minor.
- 5.5 Further, the ACCC considers the proposed variations are likely to provide additional public benefits without increasing public detriments or reducing the public benefits flowing from the initial authorisation.

6 Determination

- 6.1 On 4 May 2010, the RCSA lodged an application for minor variation to authorisation A91102. Authorisation A91102 was granted by the ACCC on 21 January 2009.
- 6.2 Section 91A(7) of the Act provides that if a person applies for two or more variations, and the ACCC is satisfied that the combined effect of those variations, if all were granted, would not involve a material change in the effect of the authorisation, the ACCC may deal with all of those variations together as if they were a single minor variation.
- 6.3 In this case, the ACCC is satisfied that it can consider the proposed variations together as a single variation. The ACCC is also satisfied that the variation is minor.
- 6.4 The ACCC is satisfied that the public benefit test in section 91A(4) of the Act is met – that is, the variation which is the subject of this application is unlikely to result in a reduction in the extent to which the benefit to the public of the authorisation outweighs any detriment to the public caused by the authorisation.
- 6.5 Pursuant to section 91A(3) of the Act, the ACCC makes this determination varying authorisation A91102 by replacing clause 4.1(b), of the DDRP with the following:

4.1 (b) Upon notification of a Grievance the Ethics Registrar;

- (i) Checks that the Member Company/person against whom the Grievance is raised (“the Respondent”) is a Member;**
- (ii) Will record and acknowledge the time and date of receipt as well as brief details sufficient to describe the nature of the Grievance.**
- (iii) Before taking further steps, may require the Complainant to raise the Grievance in writing directly with the Respondent and allow up to 30 days for a response.**
- (iv) Request from the Complainant an email or letter with supporting documentation outlining the Grievance raised with the names of the parties involved, date and the Country, State or Territory where the Grievance arose.**
- (v) Seeks approval from the Complainant for information about the Grievance to be forwarded to the Respondent.**

and inserting the following clauses at 4.5(e):

4.5 (e) Undertaking in satisfaction or partial satisfaction of a Matter in respect of which a Complaint may be made

- (i) A Member, at any time before a Complaint has been determined by the Ethics Committee, may tender, confidentially and without prejudice subject to sub-paragraph (iii), to the Board a written undertaking in whole or partial satisfaction of the Matter in respect of which the Complaint has been or may be made (“the Matter”).**
- (ii) The Board may accept the undertaking in satisfaction of the Matter or such part thereof as the Board may determine.**
- (iii) The CEO will advise the Respondent, the Complainant and any person who has been granted leave to participate in the Complaint of any undertaking that is accepted by the Board pursuant to sub-paragraph (ii).**
- (iv) If a written undertaking has been tendered confidentially and without prejudice to the Board, the conditions upon which it is tendered shall operate, so far as the law allows, to prevent access to, or disclosure of, the terms and extent of any written undertaking that has been rejected by the Board except insofar as the same may be implied from notification given under sub-paragraph (iii).**
- (v) The Member may withdraw or vary the written undertaking at any time, but only with the consent of the Board.**
- (vi) If the Board considers that the Member who gave the written undertaking has breached any of its terms, the Board may immediately impose such sanctions (including sanctions by way**

of a direction that the Member do, or refrain from doing, something, or make a payment) as the Board thinks fit.

(vii) A decision of the Board:

- to accept, or not to accept, a written undertaking tendered in accordance with this provision;**
- to consent or not to consent to the withdrawal or variation written undertaking accepted by the board in accordance with this provision**

is subject to the provisions providing for arbitration in the Constitution and in rules 4.11(b); (e); and (f) of these procedures. The arbitrator's award will be binding on the parties.

(viii) A decision of the Board to impose sanctions under subparagraph (vi) is subject to the provisions providing for arbitration in the Constitution and in rules 4.11(b); (e); (f); and (g) of these procedures.

and inserting the following clause at 4.6(a)(vii):

4.6 (a)(vii) that the Board has accepted a written undertaking from the Member in whole or partial satisfaction of the Matter.

6.5 This determination is made on 2 July 2010. If no application for a review of the determination is made to the Australian Competition Tribunal in accordance with section 101 of the Act, it will come into effect on 24 July 2010.