



Australian  
Competition &  
Consumer  
Commission

# **Draft** Determination

## **Application for revocation and substitution of authorisation**

**lodged by**

*Australian Swimmers' Association Incorporated*

**in respect of**

**collective bargaining with Swimming Australia Limited**

**Date: 23 February 2011**

**Authorisation no.:** A91260

**Public Register no.:** C2010/997

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

## Summary

The ACCC proposes to revoke authorisation A40106 and grant authorisation A91260 in substitution. The substitute authorisation is for the Australian Swimmers' Association (ASA) to conduct collective negotiations on behalf of its current and future members with Swimming Australia Limited (SAL) as set out in this determination and has been granted until 30 April 2021.

The ASA has sought re-authorisation to allow it to negotiate collectively on behalf of its members with SAL. The ASA currently has 150 full members and 60 associate members. Full membership to the ASA is restricted to those elite swimmers who form part of the National swimming team known as the Telstra Dolphins Squad as selected by SAL.

SAL is responsible for administering the sport of swimming in Australia. Its functions include receiving and distributing funding from governments, organising swimming events, media coverage and sponsorship and other administrative tasks associated with running the sport of swimming.

The ACCC considers the public benefits likely to result from the proposed conduct include improved bargaining power and the potential for greater input by elite swimmers to the terms and conditions of their agreements with SAL, transaction cost savings and enhanced marketing opportunities.

The ACCC notes that a number of public benefits identified as resulting from the proposed collective bargaining arrangement would be likely to arise without the authorisation and as such the level of benefit accepted by the ACCC should not be overstated. The ACCC considers that the conduct may be on the periphery of the intended application of the Act. In this regard, the ACCC notes that in general, associations are able to undertake certain representations on behalf of members without the need for authorisation.

The ACCC considers that the likely detriments from the proposed conduct are minimal or nil because participation is voluntary and there is currently little rivalry between elite swimmers in their dealings with SAL.

On the basis that there are likely to be some benefits arising from re-authorisation and likely detriments are minimal or nil, the ACCC proposes to revoke authorisation A40106 and grant authorisation A91260 in substitution.

The ACCC will now seek further submissions from the applicant and interested parties in relation to this draft determination prior to making a final decision. The applicant or interested parties may also request a conference be held to make oral submissions on the draft determination.

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## List of abbreviations

The Act	Prior to 1 January 2011, the <i>Trade Practices Act 1974</i> , and as of 1 January 2011, the <i>Competition and Consumer Act 2010</i> . <sup>1</sup>
ACCC	Australian Competition & Consumer Commission
ASC	Australian Sports Commission
ASA	Australian Swimmers' Association Incorporated
SAL	Swimming Australia Limited
SALSA	Swimming Australia Limited Swimmer Agreement
Telstra Dolphins Squad	The highest performing swimmers as selected by SAL

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<sup>1</sup> The title of the relevant trade practices legislation has changed. As of 1 January 2011, the *Trade Practices Act 1974* is now cited as the *Competition and Consumer Act 2010*.

# 1. The application for authorisation

- 1.1. On 5 November 2010 the Australian Swimmers' Association Incorporated (ASA) lodged an application under section 91C(1) of the *Trade Practices Act 1974*<sup>2</sup> for the revocation of authorisation A40106 and the substitution of authorisation A91260 for the one revoked.
- 1.2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (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.
- 1.3. 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. Further information about the authorisation process is contained in Attachment A.
- 1.4. The holder of an authorisation may apply to the ACCC to revoke an existing authorisation and grant another authorisation in substitution for the one revoked (re-authorisation). In order for the ACCC to re-authorise conduct, the ACCC must consider the application for re-authorisation in the same manner as it would consider an application for initial authorisation under section 88 of the Act.
- 1.5. Relevantly, the initial authorisation<sup>3</sup> was made under:
  - section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 1.6. A chronology of the significant dates in the ACCC's consideration of the re-authorisation A91260 is contained in Attachment B.

## The applicant and target

- 1.7. The ASA was established in 2003 to provide a single point of contact for all matters affecting the interests of past and current Australian swimming team members. The main objective of the ASA is to provide its members with a representative body dedicated to the promotion and advancement of members' interests and the sport of swimming.
- 1.8. The ASA currently has 150 full members and 60 associate members. Full membership to the ASA is restricted to those elite swimmers who form part of the Telstra Dolphins

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<sup>2</sup> The title of the relevant trade practices legislation has changed. As of 1 January 2011, the *Trade Practices Act 1974* is now cited as the *Competition and Consumer Act 2010*.

<sup>3</sup> On 24 July 2009, amendments to the Act, contained in the Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009, commenced operation. All authorisations in effect on that date, including the ASA's authorisation, are deemed to provide statutory protection from legal action under the cartel provisions (s.88(1A)) of the Act.

Squad as selected by Swimming Australia Limited (SAL). The Telstra Dolphins Squad is comprised of the highest performing swimmers in Australia. Membership of the ASA is not compulsory and members can terminate their membership at any time.

- 1.9. The ASA has sought re-authorisation to allow it to negotiate collectively on behalf of its members with SAL.
- 1.10. SAL is responsible for administering the sport of swimming in Australia. Its functions include receiving and distributing funding from governments, organising swimming events, media coverage and sponsorship and other administrative tasks associated with running the sport of swimming.

## **The proposed conduct**

- 1.11. The re-authorisation sought by the ASA to allow it to negotiate collectively on behalf of its members with SAL. On behalf of its members, the ASA negotiates a SAL Swimmer Agreement (SALSA) which is the mechanism by which swimmers receive payments from SAL. The ASA's negotiations with SAL are also likely to include:
  - the use of swimmers' images for marketing and licensed products and promotional activities
  - payments to be made by SAL to swimmers
  - development of a code of conduct which will regulate the behaviour of swimmers and grievance procedures
  - education and training opportunities for swimmers.
- 1.12. The ASA seeks re-authorisation for a period of ten years.

## **Previous authorisations**

- 1.13. The re-authorisation sought by the ASA is substantially similar to authorisation A40106 which is due to expire on 1 May 2011. The ASA sought a period of re-authorisation of ten (rather than five) years.

## **Other parties**

- 1.14. The ASA seeks authorisation to extend to current and future members of the ASA.
- 1.15. Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party or proposed party to the conduct.

## **2. Background to the application**

### **Swimming – the elite level**

- 2.1. The 2010–11 Telstra Dolphins Squad is comprised of 169 of the highest performing swimmers in Australia as selected by SAL. The ASA represents 150 of these 169 elite swimmers in the Telstra Dolphins Squad, in addition to 60 associate members. Associate members are either former elite swimmers or current swimmers not selected to be part of the Telstra Dolphins Squad.
- 2.2. SAL receives around three quarters of its funding from State and Federal Governments and corporate sponsorship. SAL is responsible for administering the sport of swimming in Australia, including the remuneration of elite swimmers.
- 2.3. Elite swimmers compete in at least one major international meet each year as well as in state and national competitions. They are required to train in long ‘blocks’ to prepare for these meets. Such training typically includes at least 10 sessions in the pool per week in addition to training in a gym, additional cardio fitness sessions and rehabilitation such as physiotherapy and massage.
- 2.4. Elite swimmers receive quarterly payments from SAL via the ASA. They have the option to remit 10 per cent of their funding to the ASA for administrative purposes. Elite swimmers may also receive prize money at some events and incentive payments from bodies such as the Australian Olympic Committee. The SALSA requires swimmers to be available for at least six promotional appearances.
- 2.5. The ASA submits that there is minimal rivalry between swimmers and their dealings with SAL, with the level of funding dependent on their performance in the pool and whether they qualify for various representative teams. The ASA also submits that elite swimmers compete for private sponsorship money with athletes from other sporting codes.

### **3. Submissions received by the ACCC**

- 3.1. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. To this end the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application.

#### **Applicant's supporting submission**

- 3.2. The ASA submits that the overarching benefit of the proposed collective bargaining is that it will assist in allowing Australia's professional swimming athletes to realise their sporting potential which will have flow on effects for Australia's well being, tourism and the economy in general.
- 3.3. Among other things, the ASA submits that the collective bargaining dialogue improves the balance of relative strength of the parties to the agreement which gives ASA members the ability to have greater input to their relationship with SAL. The ASA submits that there are likely to be benefits arising from transaction cost savings and a more productive and efficient use of resources generally.
- 3.4. The ASA also submits that there is likely to be no public detriment as a result of the collective bargaining arrangement because it is voluntary and is unlikely to affect competition, nor the price or quality of any goods or services supplied to SAL or the Australian public in general.

#### **Interested party submissions**

- 3.5. The ACCC sought submissions from 14 interested parties potentially affected by the application, including government, state-based swimming associations, major sponsor Telstra and the target of the proposed collective bargaining, SAL.
- 3.6. Apart from a further submission by the applicant, the ACCC received only one submission which was from the target, SAL. SAL submits that it neither supports nor opposes the ASA's application for re-authorisation and considers that it is misconceived because it purports to enable the ASA to represent swimmers in relation to labour and employment matters while swimmers are not employees of SAL. SAL also submits that the relationship between SAL, the ASA and swimmers is adequately dealt with under the SAL Constitution and By-Laws.<sup>4</sup>
- 3.7. In response, the ASA submits that collective bargaining is not restricted to the relationship of employee/employer as may be inferred by the SAL submission. The ASA also notes that:<sup>5</sup>

...the SAL constitution cannot possibly be regarded as sufficient for the purposes of the ASA's continued collective representational involvement in its negotiations with SAL on behalf of its members with respect to collective bargaining where [the] Australian legislative regime has

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<sup>4</sup> Swimming Australia Limited, *Submission*, 10 December 2010, p.1.

<sup>5</sup> Australian Swimmers' Association Incorporated, *Request for further information and response to interested party submission*, 19 December 2011, p.1.

regard to an activity which may have the effect of lessening competition (even where it is beneficial).

- 3.8. The ACCC notes that the proposed collective bargaining is not restricted to employer/employee matters. The ASA perceives that there is a risk that its proposed collective bargaining and representation of its members may be considered to be in breach of the Act. Accordingly, the ASA is entitled to seek authorisation of this conduct pursuant to the Act to address this risk.
- 3.9. In general, associations are able to undertake certain representations on behalf of members without the need for authorisation.<sup>6</sup> In this regard, the ACCC considers that the conduct may be on the periphery of the intended application of the Act.
- 3.10. Copies of public submissions may be obtained from the ACCC's website ([www.accc.gov.au/AuthorisationsRegister](http://www.accc.gov.au/AuthorisationsRegister)) and by following the links to this matter.

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<sup>6</sup> See section 2.28 of the ACCC's Determination of 22 March 2006 in relation to authorisation number A40106.

## 4. ACCC evaluation

- 4.1. Broadly, under section 91C(7) the ACCC must not make a determination revoking an authorisation and substituting another authorisation unless the ACCC is satisfied that the relevant statutory tests are met.
- 4.2. The ACCC's evaluation of the proposed conduct is in accordance with the test found in the following sections of the Act:
- sections 90(5A) and 90(5B) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:
    - the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public and
    - that benefit, in the case of section 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.
  - sections 90(6) and 90(7) of the Act which states that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
    - the provision of the proposed contract, arrangement or understanding in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public and
    - that benefit, in the case of section 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision.
- 4.3. For more information about the tests for authorisation and relevant provisions of the Act, please see [Attachment C](#).

### The relevant area of competition

- 4.4. The first step in assessing the effect of the conduct for which re-authorisation is sought is to consider the relevant area of competition affected by that conduct.
- 4.5. The ASA submits that SAL operates in a monopsonistic market as the only source of demand in the industry for the elite swimming services provided by the ASA's members. The ASA distinguishes SAL's demand for elite swimming services from the ability of elite swimmers to promote a product which is relevant to sponsorship contracts. The re-authorisation relates to collective negotiations concerning elite

swimming services rather than product promotion and sponsorship contracts. The ASA notes that there is no body in Australia other than SAL to which elite swimmers could offer their swimming services.<sup>7</sup>

- 4.6. The ACCC considers that the proposed collective bargaining generally relates to the contracting of elite swimming services to SAL rather than any sponsorship negotiations which concern the ability of elite swimmers to promote a product. However, the ACCC also notes that a significant amount of SAL's revenue is sourced through corporate sponsorship and that the collective bargaining dialogue is expected to include matters relating to the use of swimmers' images and promotional appearances.
- 4.7. While SAL itself does not offer sponsorship contracts to swimmers, it is nonetheless an intermediary through which corporate sponsorship flows. In return for funding, SAL Qualifying Sponsors<sup>8</sup> have the right to use four swimmers to promote their association with the sport for commercial purposes. Further, elite swimmers are prohibited from entering into a commercial arrangement with a competitor of a SAL Qualifying Sponsor. However, the ACCC understands that sponsorship agreements that provide funding to SAL are ultimately agreements between SAL and the sponsor and do not directly concern individual swimmers.<sup>9</sup>
- 4.8. The ASA's members received funding from SAL based on their performance in the pool. The ACCC understands that the level of funding SAL is able to distribute to elite swimmers in a given year is largely fixed. Therefore, in theory, negotiations by individual elite swimmers would be for a greater share of available funding than their peers. However the ASA submits that there is little rivalry between swimmers in their dealings with SAL. The ACCC considers that this view is more likely to hold true where swimmers are driven by motivators other than financial reward. This appears to be the case and the ASA has reported that its members, with the exception of *tier one*<sup>10</sup> swimmers, receive income lower than the Australian adult minimum wage.<sup>11</sup>
- 4.9. For the purpose of assessing this application, the ACCC considers the relevant area of competition affected by the proposed conduct is in relation to the provision of elite swimming services by the ASA's members to SAL.

## The counterfactual

- 4.10. The ACCC applies the 'future with-and-without test' established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.<sup>12</sup>

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<sup>7</sup> ASA supporting submission, sections 4.1 – 4.2 and 5.

<sup>8</sup> A SAL Qualifying Sponsor is defined in the SALSA as 'a person that has an agreement with Swimming Australia as a sponsor whereby it contributes at least \$250,000 gross per annum to Swimming Australia in cash and/or value in kind, including without limitation broadcasters, and nominates a category of product for which it is sponsoring Swimming Australia'.

<sup>9</sup> ASA supporting submission, section 5.

<sup>10</sup> There are five tiers or categories of elite swimmers. Payment levels are the highest at the tier one ranking.

<sup>11</sup> ASA supporting submission, section 10.1.

<sup>12</sup> *Australian Performing Rights Association* (1999) ATPR 41-701 at 42,936. See also for example: *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 at 48,556; *Re Media Council of Australia* (No.2) (1987) ATPR 40-774 at 48,419.

- 4.11. Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.
- 4.12. The ASA does not explicitly state what it considers to be the counterfactual. Similarly, the submission by the target, SAL, does not state a view about the counterfactual.
- 4.13. The ACCC considers that, in the absence of the legal protection afforded by authorisation, the most likely counterfactual to the proposed arrangements would be that elite swimmers would negotiate with SAL on an individual basis. In this environment the ASA may still provide ancillary services to its members during the individual negotiation process.

## **Public benefit**

- 4.14. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.<sup>13</sup>

- 4.15. Broadly, the ASA submits the proposed collective bargaining will deliver public benefits, including:
- improved bargaining power for elite swimmers
  - transaction cost savings from a single negotiation process
  - improved marketing opportunities, particularly through the use of group images
  - benefits for the wider community, including promotion of a healthy lifestyle and tourism.
- 4.16. The ACCC’s assessment of the likely public benefits from the proposed conduct follows.

## **Improved bargaining power**

- 4.17. The ASA submits that relative to a scenario involving individual negotiations, collective bargaining would result in:<sup>14</sup>
- greater flexibility in the terms and conditions of swimming payments
  - greater input in how the sport is administered via the code of conduct
  - greater input in how the sport is promoted

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<sup>13</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677. See also Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242.

<sup>14</sup> ASA supporting submission, section 8.1.

- more aggressive marketing of group images of swimmers
  - the potential for a greater share of SAL revenue to be distributed directly to swimmers and away from administration costs.
- 4.18. The ASA also provided some examples of achievements arising from improved bargaining power during the term of the current authorisation. Such achievements include:
- greater certainty of swimmer funding
  - clarity of rights and obligations through a code of conduct
  - greater commitment to programs to support swimmers transition to life after elite swimming
  - more equitable obligations regarding promotional appearances which may also lead to better opportunities for swimmers to build their profile and potentially attract private sponsorship and endorsements.
- 4.19. The ACCC also notes that on the basis of the sample of member comments provided to the ACCC, the ASA appears to have strong support from its members who are the primary beneficiaries of the collective bargaining negotiations.<sup>15</sup>
- 4.20. The ACCC is not aware of any evidence to suggest that improved bargaining power has resulted in ASA members receiving a greater share of SAL revenue or a reduction in SAL's administration costs. Nonetheless, the ACCC considers that the improved bargaining power has resulted in benefits from the other areas outlined by the ASA during the term of the current authorisation. The ACCC also considers that these benefits are likely to continue if the conduct is re-authorised.

### **Transaction cost savings**

- 4.21. The ASA submits that it expects its collective representation of its members to result in transaction cost savings:<sup>16</sup>
- Where SAL only has to negotiate with one representative body, the process must be regarded as more efficient and accordingly, more cost effective than if SAL was required to deal with more than 90 separate individuals and their management in order to secure agreement.
- 4.22. The ACCC also notes that collective negotiations have streamlined the administration associated with promotional appearances while also spreading the workload across a broader range of elite swimmers. In addition, it is likely that the clarity of rights and obligations through the code of conduct has resulted in reduced incidence of dispute thereby lowering transaction costs.
- 4.23. The ACCC accepts that the proposed collective bargaining arrangements have resulted and will continue to result in a range of transaction cost savings and greater efficiency which is of benefit to SAL, the ASA and its members.

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<sup>15</sup> Australian Swimmers' Association Incorporated, Request for further information and response to interested party submission, 19 December 2011, pp. 7–8.

<sup>16</sup> ASA supporting submission, section 8.2.

## **Improved marketing opportunities**

- 4.24. The ASA submits that continued collective bargaining allows for group images of swimming team members to be used for marketing purposes. It is expected that such group images will increase publicity for the sport and will increase the competition for sponsorship between swimmers and groups of athletes from rival sporting codes. This in turn may increase or further develop an income stream for elite swimmers that is independent of government funding and prize money.
- 4.25. The ACCC notes that the ASA's view is that SAL believes it only drives commercial value from around 10 elite swimmers. The ACCC considers that in the absence of collective representation, SAL would be likely to distribute remuneration to a significantly wider group than just 10 elite swimmers. However, the ACCC considers that collective negotiation has likely served to preserve the interests of all swimmers subject to an agreement with SAL. This is achieved by provisions in the SALSA that:
- ensure an undue burden of promotional activity is not placed on any elite swimmer (particularly relevant for the top 10 who drive commercial value for SAL)
  - provide greater opportunities for elite swimmers to build their profile through promotional activity (particularly relevant to elite swimmers who may be outside the top group of 10).
- 4.26. While not necessarily a prerequisite, the ACCC considers that the collective bargaining dialogue may facilitate the use of group images for marketing and sponsorship purposes. The ASA submits that its advocacy has produced a doubling in swimmer funding from \$650,000 per annum, fixed, in 2006 to \$1.5 million in 2009–10. However, it is not clear how much of this increase is directly attributable to increased marketing opportunities and the use of group images in particular.

## **Benefits for the wider community**

- 4.27. To the extent that collective bargaining has enabled greater marketing and promotion of the sport, this may have resulted in some benefits to the wider community through an increase in tourism and healthier lifestyle. However little evidence has been provided that links the collective bargaining of the ASA to these benefits.

## Public detriment

4.28. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...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>17</sup>

4.29. Collective bargaining refers to an arrangement under which two or more competitors in an industry come together to negotiate terms and conditions, which can include price, with a supplier or customer. Anti-competitive detriment may arise where collective bargaining arrangements result in an increased price to consumers or less choice or lower quality products for consumers.

4.30. The ACCC has previously identified that the anti-competitive effect of collective bargaining arrangements constituted by lost allocative efficiencies is likely to be more limited where the following four features are present:

- the current level of negotiations between individual members of the group and the proposed counterparty(s) on the matters to be negotiated is low
- participation in the collective bargaining arrangement is voluntary
- there are restrictions on the coverage and composition of the bargaining group
- there is no boycott activity.

4.31. In respect of the proposed collective bargaining arrangements, the ASA submits that there is no public detriment and that all four of these features are present.

4.32. As noted above, the ACCC considers that elite swimmers are likely to be motivated primarily by factors other than the income received from SAL and on this basis, accepts the assertion by the ASA that there is little rivalry between elite swimmers in their dealings with SAL.

4.33. Participation in the collective bargaining arrangement is voluntary. ASA members are not required to be represented by the ASA and may opt out at any time and negotiate individually with SAL.

4.34. The proposed collective bargaining does not affect the capacity for individual swimmers to compete both with each other and with athletes from other sporting codes for corporate sponsorship.

4.35. The ASA has not sought authorisation to engage in boycott activity. Accordingly, any such conduct, should it occur, would not be protected from legal action under the Act.

4.36. The ACCC also notes that no concerns have been raised regarding the effect of the conduct during the initial period of authorisation.

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<sup>17</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

4.37. Accordingly, the ACCC considers that to the extent that public detriment arises from the proposed re-authorisation, it is likely to be minimal.

## **Balance of public benefit and detriment**

4.38. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed collective bargaining is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.

4.39. For the reasons outlined in this chapter the ACCC considers the public benefits likely to result from the proposed conduct include improved bargaining power and the potential for greater input by elite swimmers to the terms and conditions of their agreements with SAL, transaction cost savings and enhanced marketing opportunities. The ACCC considers that the likely detriments from the proposed conduct are minimal or nil.

4.40. Accordingly, the ACCC considers the public benefit that is likely to result from the conduct is likely to outweigh the public detriment, including the detriment from any lessening of competition that would result. The ACCC is therefore satisfied that the tests in sections 90(5A), 90(5B), 90(6) and 90(7) are met.

4.41. As noted previously however, associations are generally able to undertake certain representations on behalf of their members without the need for authorisation. In this regard, the ACCC notes that a number of public benefits identified as resulting from the proposed collective bargaining arrangement could arise without the authorisation and as such the level of benefit accepted by the ACCC should not be overstated.

## **Length of authorisation**

4.42. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>18</sup> The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

4.43. In this instance, the ASA seeks authorisation for a period of ten years.

4.44. No interested parties made a submission regarding the length of the authorisation period.

4.45. The ASA submits that a longer period of authorisation is justified on the basis of the following:

- the current authorised arrangements have been successful
- a longer term will provide a better balance of power between the ASA and SAL
- the collective bargaining arrangements have the support of the target and other industry participants

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<sup>18</sup> Section 91(1).

- there is potential for the balance of public benefit and detriment to remain for the longer duration (ten years)
- a period of ten years would provide for greater alignment for swimmers with the long term contractual nature of commercial sponsorship.

4.46. The ACCC notes that the collective bargaining arrangements are not explicitly supported by SAL. Rather SAL submits that it neither supports nor opposes the application for re-authorisation.<sup>19</sup> The ACCC accepts however that the current arrangements have been successful and that a longer term arrangement may provide benefits in the form of greater certainty to underpin commercial sponsorship negotiations. Further, the ACCC considers that there is minimal expected detriment associated with the re-authorisation, but that if circumstances change the ACCC could initiate an earlier review of the authorisation.

4.47. As such, the ACCC proposes to grant authorisation for the ASA to negotiate on behalf of current and future members with SAL until 30 April 2021.

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<sup>19</sup> Swimming Australia Limited, *Submission* 10 December 2010, p.1.

## 5. Draft determination

### The application

- 5.1. On 5 November 2010 the Australian Swimmers' Association (ASA) lodged an application for the revocation of authorisation A40106 and the substitution of authorisation A91260 for the one revoked.
- 5.2. Application A91260 was made under section 91C(1) of the Act. Relevantly, the initial authorisation was made under subsection 88(1).
- 5.3. In particular, the ASA seeks authorisation to conduct collective negotiations on behalf of its current and future members with Swimming Australia Limited (SAL).
- 5.4. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

### The net public benefit test

- 5.5. For the reasons outlined in Chapter 4 of this draft determination, the ACCC considers that in all the circumstances the arrangements for which the re-authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.
- 5.6. The ACCC therefore **proposes to revoke** authorisation A40106 **and grant** authorisation A91260 in substitution.

### Conduct for which the ACCC proposes to grant authorisation

- 5.7. The ACCC proposes to revoke authorisation A40106 and grant authorisation A91260 in substitution.
- 5.8. The ACCC proposes to grant authorisation under section 91C(4) of the Act to the ASA to conduct collective negotiations on behalf of its current and future members with SAL.
- 5.9. The ACCC proposes to grant authorisation until 30 April 2021.
- 5.10. This draft determination is made on 23 February 2011.
- 5.11. The attachments to this determination are part of the draft determination.

### Further submissions

- 5.12. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

## **Attachment A — the authorisation process**

The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Competition and Consumer Act 2010* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.

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. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.

After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.

Once a draft determination is released, the applicant 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 determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.

The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

## **Attachment B — chronology of ACCC assessment for application A91260**

The following table provides a chronology of significant dates in the consideration of the application by Australian Swimmers' Association Incorporated (ASA).

<b>DATE</b>	<b>ACTION</b>
5 November 2010	Application for revocation and substitution lodged with the ACCC
2 December 2010	Closing date for submissions from interested parties in relation to the substantive application for authorisation
10 December 2010	Late submission received from Swimming Australia Limited
20 January 2011	Submission received from ASA in response to interested party submission
23 February 2011	Draft determination issued

# Attachment C — the tests for authorisation and other relevant provisions of the Act

## Competition and Consumer Act 2010

### Section 90—Determination of applications for authorisations

- (1) The Commission shall, in respect of an application for an authorization:
  - (a) make a determination in writing granting such authorization as it considers appropriate; or
  - (b) make a determination in writing dismissing the application.
- (2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (4) The Commission shall state in writing its reasons for a determination made by it.
- (5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:
  - (a) that the provision would result, or be likely to result, in a benefit to the public; and
  - (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
    - (i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and
    - (ii) the provision were given effect to.
- (5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:
  - (a) that the provision has resulted, or is likely to result, in a benefit to the public; and
  - (b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.
- (6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to

the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

- (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
- (b) the proposed covenant were given, and were complied with; or
- (c) the proposed conduct were engaged in;

as the case may be.

(7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.

(8) The Commission shall not:

- (a) make a determination granting:
  - (i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
  - (ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
  - (iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
  - (iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- (b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

(9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

(9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):

- (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
  - (i) a significant increase in the real value of exports;

- (ii) a significant substitution of domestic products for imported goods; and
- (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

## Variation in the language of the tests

There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).

The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.<sup>20</sup>

However, the Tribunal has previously stated that regarding the test under section 90(6):

[the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.<sup>21</sup>

Consequently, when applying either test, the ACCC can take most, if not all, public detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7). Further, as the wording in sections 90(5A) and 90(5B) is similar, this approach will also be applied in the test for conduct that may be a cartel provision.

## Conditions

The Act allows the ACCC to grant authorisation subject to conditions.<sup>22</sup>

## Future and other parties

Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

- persons who become party to the contract, arrangement or understanding at some time in the future<sup>23</sup>

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<sup>20</sup> *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

<sup>21</sup> *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

<sup>22</sup> Section 91(3).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>24</sup>

## **Six- month time limit**

A six-month time limit applies to the ACCC’s consideration of new applications for authorisation.<sup>25</sup> It does not apply to applications for revocation, revocation and substitution, or minor variation. The six-month period can be extended by up to a further six months in certain circumstances.

## **Minor variation**

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation.<sup>26</sup> The Act limits applications for minor variation to applications for:

... a single variation that does not involve a material change in the effect of the authorisation.<sup>27</sup>

When assessing applications for minor variation, the ACCC must be satisfied that:

- the proposed variation satisfies the definition of a ‘minor variation’ and
- if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the arrangements.

## **Revocation; revocation and substitution**

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.<sup>28</sup> The ACCC may also review an authorisation with a view to revoking it in certain circumstances.<sup>29</sup>

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.<sup>30</sup> The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.<sup>31</sup>

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<sup>23</sup> Section 88(10)  
<sup>24</sup> Section 88(6)  
<sup>25</sup> Section 90(10A)  
<sup>26</sup> Subsection 91A(1)  
<sup>27</sup> Subsection 87ZD(1)  
<sup>28</sup> Subsection 91B(1)  
<sup>29</sup> Subsection 91B(3)  
<sup>30</sup> Subsection 91C(1)  
<sup>31</sup> Subsection 91C(3)