



Australian  
Competition &  
Consumer  
Commission

# Draft Determination

Application for authorisation

lodged by

Queensland Newsagents Federation

in respect of

collective bargaining with Tatts Group  
(including Golden Casket Corporation)

Date: 29 May 2013

Authorisation number: A91353

Commissioners: Sims  
Rickard  
Schaper  
Court  
Dimasi  
Walker  
Willett

# Summary

The ACCC proposes to authorise Queensland Newsagents Federation and its members (QNF) for five years to collectively bargain over certain terms and conditions of agency agreements with Tatts Group (the Collective Bargaining conduct). The ACCC proposes to exclude collective bargaining over the terms and conditions of new outlets from the scope of the authorisation.

The ACCC notes that authorisation of the Collective Bargaining conduct will give Queensland lottery agents who are newsagents a choice of bargaining group because the ACCC has previously granted authorisation to the Lottery Agents Queensland (LAQ) to represent all lottery agents. The ACCC considers that this is likely to lead to a better and more diverse offering of bargaining services to all lottery agents and better representation of the interests of lottery agents who choose not to join LAQ.

The ACCC acknowledges the concerns raised by Tatts Group about the authorisation of a second collective bargaining group. However, the ACCC is satisfied that on balance, the Collective Bargaining conduct (with bargaining over new outlets excluded) is likely to result in a public benefit which outweighs the likely public detriment.

## Next steps

The ACCC will seek further submissions in relation to this draft determination before making its final decision. The applicants and interested parties may also request that the ACCC hold a pre-decision conference to allow oral submissions on the draft determination.

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## The application for authorisation

1. On 4 February 2013, Queensland Newsagents Federation (QNF) lodged an application for authorisation (A91353) with the ACCC. QNF also requested interim authorisation to enable it to engage in the proposed conduct while the ACCC is considering the substantive application. QNF applied for authorisation for five years on behalf of itself, its current members and any future members (the Applicants) to collectively negotiate through QNF with Tatts Group (including Golden Casket) over:
  - commission fees;
  - handling fees;
  - agency application fees;
  - support services levies;
  - freight charges;
  - product ordering fees;
  - equipment hire costs;
  - retail image design and agency subsidy and insurances;
  - changes to the agent's manual;
  - the impact on current lottery agents when new agencies are proposed by Tatts Group; and
  - other issues that may arise from time to time that are currently unforeseen (the Collective Bargaining conduct).
2. The ACCC notes that this application is substantially the same as the authorisation application A91313 previously lodged by QNF in June 2012 and withdrawn in August 2012.
3. The ACCC can authorise anti-competitive conduct, such as the Collective Bargaining conduct, if it is satisfied that the likely public benefits of the conduct will outweigh the likely public detriments.<sup>1</sup> Further details regarding the authorisation application may be found on the ACCC's Public Register on its website.<sup>2</sup>
4. The ACCC granted interim authorisation for the Collective Bargaining conduct on 28 February 2013, although interim authorisation did not extend to collective negotiations over:
  - other issues that may arise from time to time that are currently unforeseen;
  - impact on current lottery agents when new agencies are proposed by Tatts Group;
  - the conditions for new outlets; and
  - fees which are paid only in relation to new outlets.

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<sup>1</sup> The ACCC's Guide to Authorisation (available from the ACCC website) has more details regarding the ACCC's authorisation process and the relevant tests are set out in full at Attachment A.

<sup>2</sup> <http://transition.accc.gov.au/content/index.phtml/itemId/1101220/fromItemId/278039>.

# Background

## Industry

5. Lotteries in Queensland are regulated by the Queensland Office of Liquor, Gaming and Racing (Queensland Gaming). Tatts Group (through its subsidiary Golden Casket) is the only organisation currently licensed to run lotteries in Queensland as it holds an exclusive licence until 2016.
6. Lottery agents in Queensland (including lottery agents who are newsagents) who are members of Lottery Agents Queensland (LAQ) are currently collectively represented by LAQ in negotiations with Tatts Group. LAQ was most recently granted authorisation by the ACCC to collectively negotiate with Tatts Group in 2008 for five years.<sup>3</sup> The lottery agent agreement that results from negotiations with LAQ is applied as a standard across Queensland to all lottery agents, including to lottery agents who are newsagents and lottery agents who are not LAQ members. The lottery agent agreement must be approved by Queensland Gaming.
7. Queensland Gaming regulates many aspects of the standard lottery agent agreement under the *Lotteries Act 1997 (QLD)* and *Lotteries Regulation 2007 (QLD)*, including:
  - (a) the types of locations and businesses in which lotteries may be sold;
  - (b) the allowed method and grounds for termination or suspension of a lottery agent agreement; and
  - (c) the procedures and standards for conducting the lottery and distributing prizes.
8. QNF is a Queensland trade association which represents newsagents. It currently has around 500 members who comprise about 65% of newsagents in Queensland. Many of its members are also lottery agents and some of those are also members of LAQ. QNF wishes to negotiate on behalf of these members the terms and conditions of lottery agent agreements with Tatts Group (including its subsidiaries).<sup>4</sup>
9. There is a significant overlap in actual and potential membership between LAQ and QNF. However, the ACCC considers that standalone lottery agents may have different operational practices and needs compared to newsagents. For example, the number of staff, the size of the premises and the space available for lottery advertising.

## Submissions

10. In summary, in support of its application QNF submits that:
  - (a) Tatts Group has a reputation for not negotiating and the only way that negotiations on behalf of newsagents are likely to arise is if they are collective;
  - (b) there is a clear disparity in bargaining power between Tatts Group and individual QNF members which requires collective negotiation in order for it to be addressed;
  - (c) important issues relevant to newsagents who distribute lottery products but choose not to join LAQ may not necessarily be addressed by LAQ in collective

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<sup>3</sup> See A91101 granted on 19 November 2008.

<sup>4</sup> Application A91353, Attachment A, p.14.

negotiations with Tatts Group. QNF submits this disadvantage has been exploited to the detriment of QNF members; and

- (d) by providing QNF members with a way to collectively bargain with Tatts Group in relation to issues relevant to them, the Collective Bargaining conduct is likely to lead to greater efficiencies.

11. The ACCC tests the claims made by an applicant in support of an application for authorisation through an open and transparent public consultation process.
12. The ACCC received submissions from two interested parties in relation to QNF's request for interim authorisation. One submission is confidential and the other is from Tatts Group. Both parties referred back to, or relied upon, the content of their submissions previously made in relation to application for authorisation A91313 which was subsequently withdrawn by QNF in August 2012.
13. Tatts Group submits that the proposed Collective Bargaining conduct by QNF will not result in any public benefit and may, in fact, be detrimental due to higher transaction costs and because existing agents may have an incentive to deter new entry into the market if they are involved in negotiations regarding new agencies. Accordingly, Tatts Group requests that the ACCC deny authorisation.

## **ACCC assessment**

### **Information considered by the ACCC**

14. In its evaluation of A91353 the ACCC has taken into account:
  - (a) the issues raised in submissions in response to the current authorisation application, authorisation application A91313 and QNF's responses;<sup>5</sup>
  - (b) information available to the ACCC from consideration of previous matters;<sup>6</sup>
  - (c) the likely future without the Collective Bargaining conduct.<sup>7</sup> In particular, the ACCC considers that, absent authorisation, newsagents that are not members of LAQ will continue to be individually offered and sign standard form contracts with Tatts Group that have been negotiated with LAQ.<sup>8</sup> The ACCC notes that this conclusion differs from its consideration of LAQ's application for authorisation A91101. In that case the alternative to authorisation was no collective bargaining group to represent lottery agents to Tatts Group;
  - (d) the relevant areas of competition likely to be affected by the proposed conduct, particularly competition to provide lottery distribution services within Queensland to Tatts Group and competition to supply lottery products to Queensland consumers;<sup>9</sup>
  - (e) the five year authorisation period requested;

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<sup>5</sup> Please see the ACCC's Public Register for more details, including a list of parties consulted.

<sup>6</sup> Australian Newsagents' Federation Limited – Authorisation – A91349; Lottery Agents' Association of Tasmania Inc – Authorisation A91309; Newsagents Association of NSW and ACT – Authorisation – A91269; Lottery Agents Association of Victoria Inc – Authorisation – A91126; Lottery Agents Queensland Ltd – Revocation and Substitution - A91101.

<sup>7</sup> For more discussion see paragraphs 5.38-5.40 of the ACCC's Authorisation Guide.

<sup>8</sup> Consistent with Application A91353 (Attachment A, p 16, 17) and A91269 Newsagents Association of NSW and ACT Final Determination [4.20-4.24].

<sup>9</sup> Consistent with application A91353 (Attachment A, pp 15-17) and A91269 Newsagents Association of NSW and ACT Final Determination [4.3-4.16].

- (f) that no collective boycott activity is proposed and participation in the Collective Bargaining conduct is voluntary; and
- (g) the existence of LAQ as an alternative bargaining group with some overlap in membership and potential membership with QNF.

## **Public benefits**

- 15. QNF submits that authorisation of the Collective Bargaining conduct will provide QNF members with a choice of bargaining group. QNF further submits that the benefits recognised by the ACCC in its authorisation A91101 of LAQ's collective bargaining arrangements apply equally in relation to the proposed Collective Bargaining conduct and cites the ACCC's findings in that authorisation to support its submission on public benefits.

## **Improved input into the development of contracts, operational manuals and materials**

- 16. QNF submits that the Collective Bargaining conduct will provide its members who are not also members of LAQ with an opportunity to increase their input into the development of the agency agreement and related documents.
- 17. Tatts Group submits that QNF members are already represented through LAQ in negotiations with Tatts Group. This is because all QNF members who are lottery agents can become members of LAQ and many QNF members and QNF directors are also members and/or directors of LAQ. LAQ has the potential to represent all Queensland lottery agents, including newsagents and non-newsagents. Therefore, Tatts Group submits that newsagents are not disadvantaged by QNF being unable to bargain directly with Tatts Group on their behalf.
- 18. In addition, Tatts Group submits that it strongly refutes QNF's statement that it has a reputation of not negotiating. Tatts Group notes that it has a long standing reputation for being consultative and receptive to feedback from lottery agents, including QNF members, by:
  - (a) consultation with LAQ on a range of issues in accordance with LAQ's authorisation;
  - (b) wide consultation on other matters with LAQ and with individual agents; and
  - (c) seeking feedback from lottery agents through several avenues, including via the call centre and through its retail territory managers.
- 19. A further interested party submission expressed the concern that authorisation of the Collective Bargaining conduct could allow Tatts Group to play the two bargaining groups off against each other, leading to less potential input by all lottery agents into the standard form agreement.
- 20. QNF submitted in response to the concerns expressed by the interested parties, that authorisation of its Collective Bargaining conduct will give QNF members a choice of collective bargaining group. In particular, QNF notes that it proposes to seek to negotiate particular aspects of the standard lottery agent agreement that LAQ has not bargained over. In addition, QNF proposes to represent its members in dealings with Tatts Group on an ongoing basis, rather than just during the negotiations period as LAQ currently does. Accordingly, QNF considers that it is well placed to raise and negotiate collective issues of interpretation and application specific to newsagents that arise during the life of the standard agreement.

21. The ACCC, in its consideration of LAQ's application for authorisation, accepted that a public benefit was likely to result from improved input into the development of contracts, operational manuals and materials for the lottery agents. Individual lottery agents often have very little input into such arrangements because of their weak bargaining position. Collective negotiations may increase the input that lottery agents have into such arrangements and therefore create greater opportunities for the negotiating parties to identify and achieve business efficiencies.<sup>10</sup>
22. The ACCC notes that, given Tatts Group's opposition to a second collective bargaining group and the voluntary nature of the proposed Collective Bargaining conduct, Tatts Group may refuse to negotiate with QNF. However, it is likely that Tatts Group would seek to negotiate with QNF if such negotiation would result in more efficient contracts. The ACCC considers that the Collective Bargaining conduct by QNF would provide an alternative method for newsagents to have their interests represented to Tatts Group and reflected in the standard lottery agent agreement. In particular, the ACCC notes that there may be newsagents who do not wish to join LAQ and newsagents may not necessarily have identical interests to other lottery agents.
23. Given the voluntary nature of the collective negotiations by both LAQ and QNF, and the significant overlap in potential members, the ACCC does not accept that either collective bargaining group has an incentive to allow itself to be used strategically against the other. Rather, the ACCC considers that competition between the bargaining groups for membership is likely to lead to better representation of lottery agents in collective negotiations, further increasing agents' input into terms and conditions.
24. The ACCC considers that the Collective Bargaining conduct is likely to lead to public benefits in the forms of more efficient terms and conditions.

### **Transaction cost savings**

25. Tatts Group submits that the Collective Bargaining conduct by QNF is likely to lead to greater overall transaction costs and is unlikely to lead to transaction cost savings, compared to the current situation where it negotiates with LAQ and then offers this agreement to non-members. For example, Golden Casket may have to meet separately with QNF and LAQ and potentially negotiate more than once on the same matters.
26. QNF has not directly addressed the issue of transaction costs other than to assert that the Collective Bargaining conduct will have a net public benefit, indicating that it considers that any increase in transaction costs would be outweighed by other benefits.
27. In general, when the ACCC has previously considered the public benefits of collective bargaining by lottery agents, the ACCC has accepted that there would be transaction cost savings due to a single negotiation process rather than a series of individual negotiations.<sup>11</sup> In this case the ACCC considers that collective bargaining by both QNF and LAQ with Tatts Group may lead to higher transaction costs compared to the future without the Collective Bargaining conduct. However, the ACCC considers that the parties involved in any collective bargaining have the

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<sup>10</sup> Consistent with application A91353 (Attachment A, pg 16-17) and A91269 Newsagents Association of NSW and ACT Final Determination [4.38-4.49].

<sup>11</sup> Consistent with application A91353 (Attachment A, pg 10) and A91269 Newsagents Association of NSW and ACT Final Determination [4.30-4.37].

means and the incentive to minimise transaction costs. In addition, competition between LAQ and QNF may provide incentives for each bargaining group to seek to minimise bargaining costs, leading to improved efficiencies in bargaining outcomes.

28. Finally, the ACCC notes that the collective bargaining in the case of LAQ and as proposed by QNF is voluntary for all parties. This means that the parties will only incur the higher transaction costs if benefit to all the parties involved in any collective negotiations is expected to outweigh these higher costs.
29. Accordingly, the ACCC considers that any higher transaction costs as a result of the Collective Bargaining conduct would be a consequence of negotiations which achieve more efficient contracts and would not outweigh the public benefits of such efficiencies. Therefore, although the ACCC does not consider that the Collective Bargaining conduct is likely to lead to transaction cost savings, it does not consider that any increased transaction costs are likely to constitute a net detriment.

### **More informed markets**

30. The ACCC has previously found that collective bargaining by lottery agents may result in more informed markets.
31. Neither the QNF nor interested parties directly address the issue of whether the Collective Bargaining conduct is likely to lead to more informed markets. Tatts Group's submission that the Collective Bargaining conduct is likely to lead to confusion suggests that it considers that a more informed market is unlikely.
32. The ACCC considers that it is unclear whether authorisation of the Collective Bargaining conduct would lead to greater sharing of information amongst lottery agents (including lottery agents who are newsagents) and a more informed market. This is likely to depend upon the form that the overall collective negotiations take.
33. In the absence of further supporting evidence, the ACCC has not accepted this as a potential public benefit.

### **Public detriments**

34. The ACCC considers that, in general, the Collective Bargaining conduct proposed by QNF is likely to result in limited public detriment since:
  - (a) Queensland Gaming will continue to regulate most aspects of the retail supply of lottery products;
  - (b) participation in the Collective Bargaining conduct is voluntary for both Tatts Group and QNF members; and
  - (c) no collective boycott activity is proposed.
35. The two interested party submissions have expressed concerns in relation to three main areas of potential public detriment which may arise from the Collective Bargaining conduct:
  - (a) greater transaction costs;
  - (b) that Tatts Group may use QNF and LAQ strategically against each other in its negotiations with lottery agents leading to less input by all lottery agents into their terms and conditions; and

(c) the incentive for QNF to bargain to raise the barriers to entry for new lottery agents.

36. The concerns at (a) and (b) have been addressed above, while consideration of (c) follows.

### **Bargaining over the terms and conditions of new entry**

37. Tatts Group notes that QNF wishes to conduct negotiations on behalf of members in relation to the impact on current lottery agents when new agencies are being proposed by Tatts Group. The ACCC notes that such negotiations also have the potential to affect the terms and conditions applied to new outlets. Tatts Group submits that authorisation of this conduct will lead to substantial public detriment and may provide an avenue for existing lottery agents to use their influence to deter new entry by opposing the establishment of new agencies.

38. The ACCC notes the concerns raised by Tatts Group that existing lottery agents (including those who are newsagents) have the incentive to use collective negotiation of fees and terms and conditions in relation to new outlets to raise the barriers to entry for new lottery agents. For example, the level of agent fees is likely to influence decisions made by market participants as to whether to enter the market (including opening new outlets). Further, any new lottery outlets are likely to have some competitive impact upon existing outlets, particularly those located in close geographic proximity to the entrant. Therefore, lottery agents with existing outlets have an incentive to raise the entry fees or otherwise negotiate terms and conditions which make opening new outlets (particularly by new agents) difficult.

39. After a new outlet commences operations any fees which apply only to new outlets, or difficulties in overcoming terms and conditions which hinder new entry, constitute sunk costs. Therefore, from this point, any owner of a new outlet has the same incentives as the previously existing agents to try and deter any further new entry. Further, the ACCC considers that there are unlikely to be efficiencies available from collective bargaining over the terms and conditions of new outlets given the small proportion of QNF's members and potential members who are likely to be considering new entry at any particular time. Therefore, many of the benefits from collective negotiation (which depend upon commonality of shared interests) would not arise. Any increase in barriers to entry would constitute a potentially significant competitive detriment.

40. Given the concerns raised in relation to the collective negotiation of new outlet related fees, terms and conditions and the lack of clear benefits likely to arise from authorisation of this aspect of the conduct, the ACCC proposes to exclude negotiation in relation to these terms from the scope of the authorised Collective Bargaining conduct.

41. The ACCC notes that QNF has stated that its listed heads of bargaining are not exclusive and that it proposes to collectively negotiate 'other issues [that] may arise from time to time that are currently unforeseen.'<sup>12</sup> The ACCC notes that this head of bargaining is undefined and would result in an undesirably broad and uncertain scope for the collective negotiations. For example, such a head of bargaining could allow discussions relating to new entry. Accordingly, the ACCC also proposes to exclude from the authorisation, collective negotiation over other issues that may arise from time to time that are currently unforeseen.

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<sup>12</sup> Application A91353 (Attachment A, p. 13)

42. This is consistent with the terms of the interim authorisation which excluded these terms from the scope of the conduct for the same reasons. No submissions have been received since the ACCC's decision to grant interim authorisation.

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

43. The ACCC considers that the Collective Bargaining conduct will provide Queensland lottery agents, who are newsagents, a choice of which bargaining group can potentially represent them in negotiations with Tatts Group. The ACCC considers that public benefits are likely to arise from better representation of the interests of lottery agents, including newsagents which are lottery agents, leading to better input into contracts. This is likely to be facilitated by competition between the LAQ and QNF to attract and represent members and better representation of newsagents.

44. The ACCC acknowledges that transaction costs may potentially increase as both LAQ and QNF will seek to negotiate with Tatts Group, however it is likely that Tatts Group would only seek to negotiate with QNF if such negotiation would result in more efficient contracts. Therefore the ACCC does not consider that public detriment is likely to arise from any increase in transaction costs.

45. The ACCC considers that some detriment may arise from the Collective Bargaining conduct if QNF is permitted to bargain in ways which could increase the barriers to entry by new outlets. The potential detriment is addressed by the proposed exclusion of bargaining over the terms and conditions (including fees) by which new outlets may be established.

46. On balance, the ACCC considers that the Collective Bargaining conduct (with bargaining over new entry excluded) is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.

## **Draft determination**

### **The application**

47. On 4 February 2013, Queensland Newsagents Federation (QNF) lodged an application for authorisation (A91353) with the ACCC.

48. Application A91353 was made using Form B Schedule 1, of the Competition and Consumer Regulations 2010. The application was made under subsection 88(1) and 88(1A) of the Act. In particular, QNF seeks authorisation to make and give effect to an agreement between itself and its members, by which it will represent them in collective bargaining with Tatts Group (including Golden Casket).

49. Section 90A(1) of the Act requires that before determining an application for authorisation the ACCC shall issue a draft determination.

### **The net public benefit test**

50. For the reasons outlined in this draft determination, the ACCC considers that in all the circumstances the proposed Collective Bargaining conduct (absent the excluded terms of negotiation regarding new entry) is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening

of competition arising from the conduct. Accordingly, the ACCC is satisfied that the tests in sections 90(5A), 90(5B), 90(6) and 90(7) of the Act are met.<sup>13</sup>

51. The ACCC therefore **proposes to grant** authorisation to application A91353.

### **Conduct which the ACCC proposes to authorise**

52. The ACCC proposes to grant authorisation A91353 for five years to the Applicants to collectively negotiate with Tatts Group (including Golden Casket Corporation) over the following terms and conditions of agency agreements:

- (a) commission fees;
- (b) handling fees;
- (c) agency application fees;
- (d) support services levies;
- (e) freight charges;
- (f) product ordering fees;
- (g) equipment hire costs;
- (h) retail image design and agency subsidy and insurances; and
- (i) changes to the agent's manual.

53. Under section 88(10) of the Act, the ACCC proposes to extend the authorisation to future participants in the collective group that also distribute lottery products for Tatts Group and are members of QNF.

54. This draft determination is made on 29 May 2013.

### **Conduct not proposed to be authorised**

55. Due to concerns regarding the likely detriments associated with collective bargaining in relation to new entry, the ACCC does not propose to authorise collective bargaining with Tatts Group in relation to:

- (a) the impact on current lottery agents when new agencies are proposed by Tatts Group;
- (b) the conditions for new outlets; and
- (c) fees which are paid only in relation to new outlets.

56. For the reasons discussed at paragraph 41, the ACCC also proposes to exclude from the scope of authorisation other issues that may arise from time to time that are currently unforeseen.

### **Interim authorisation**

57. At the time of lodging the application, QNF requested interim authorisation to engage in the Collective Bargaining conduct. With some exclusions (see paragraph 4), the ACCC granted interim authorisation under subsection 91(2) of the Act on 28 February 2013.

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<sup>13</sup> See Attachment A.

58. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

### **Further submissions**

59. 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 - Summary of relevant statutory tests

**Subsections 90(5A) and 90(5B)** provide 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 subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 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 subsection 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.

**Subsections 90(6) and 90(7)** state 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 subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 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 subsection 90(7) has resulted or is likely to result from giving effect to the provision.