



Australian
Competition &
Consumer
Commission

Determination

Application for authorisation

lodged by

Clubs Australia

in respect of

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

Date: 6 March 2014

Authorisation number: A91381

Commissioners: Sims
Rickard
Schaper
Court
Walker

Summary

The ACCC has decided to grant authorisation for five years to Clubs Australia to collectively bargain and/or enter into agreements on behalf of its current and future members with various suppliers of goods and services to registered clubs across Australia.

The ACCC grants authorisation until 28 March 2019.

On 14 August 2013, Clubs Australia sought authorisation to collectively bargain and/or enter into agreements on behalf of its current and future members with various suppliers of goods and services to registered clubs across Australia.

Clubs Australia proposed to collectively negotiate price, terms of supply, settlement discounts, product development, joint advertising and marketing, and distribution with a number of specific suppliers in the following sectors:

- wagering services
- electronic gaming machines
- collective licences for the public performance and communication rights in musical works
- collective licences for the broadcast, communication or performance of protected sound recordings or music video clips
- subscription broadcast services
- energy services (including energy efficiency products and consultancy services, and energy brokering)
- Automatic Teller Machines (ATMs)
- insurance and insurance related products and services.

The ACCC issued a draft determination on 12 December 2013 proposing to grant authorisation to the arrangements. In response to the draft determination, the ATM Industry Reference Group called a pre-decision conference, which was held on 7 February 2014.

On 13 January 2014, Clubs Australia withdrew its application with respect to electronic gaming machines.

In general, the ACCC considers that the proposed collective bargaining arrangements are likely to result in public benefits in the form of transaction cost savings, by facilitating a single negotiation process instead of multiple negotiation processes, and allowing parties to share contracting costs.

The ACCC also considers that the proposed arrangements are likely to deliver public benefits by allowing Clubs Australia members to have greater input to contracts, compared to a situation where many individual clubs are offered standard form contracts with little or no scope to negotiate.

The ACCC is of the view that the proposed arrangements are likely to result in minimal public detriment since Clubs Australia's members are unlikely to represent a large proportion of purchasers in many of the sectors involved, and any public detriment is likely to be limited by:

- voluntary participation in the collective bargaining arrangements for both Clubs Australia members and target suppliers;
- the absence of boycott activity;
- the current low level of negotiations between many Clubs Australia members and target suppliers; and
- where Clubs Australia members do form a more significant proportion of a market, they are negotiating with monopolist or large multi-national suppliers.

The ACCC is satisfied in all the circumstances that the likely public benefits that will result from proposed collective bargaining arrangements would outweigh the likely detriments and therefore the ACCC has decided to grant authorisation for five years.

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The application for authorisation

1. On 14 August 2013 Clubs Australia lodged an application for authorisation (A91381) with the ACCC. Clubs Australia also requested interim authorisation to enable it to negotiate and enter into agreements with Automatic Teller Machine (ATM) providers, which is a subset of the broader application, while the ACCC considered the substantive application. The ACCC granted interim authorisation on 11 September 2013.
2. Authorisation is a transparent process where the ACCC may grant protection 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 in all the circumstances 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. Before making its final decision on an application for authorisation the ACCC must first issue a draft determination.¹
3. On 12 December 2013, the ACCC issued a draft determination proposing to grant authorisation to allow Clubs Australia to collectively bargain and/or enter into agreements on behalf of its current and future members with various suppliers of goods and services to registered clubs across Australia. A conference was requested in response to the draft determination, and was held on 7 February 2014.

The conduct

4. Clubs Australia seeks authorisation to collectively bargain and/or enter into agreements (predominantly through the use of standard contracts and direct negotiation) with a number of specific suppliers of goods and services to registered clubs across Australia (**Proposed Conduct**).
5. Clubs Australia submits collective negotiations would be conducted by a select group of Clubs Australia staff on behalf of current and future member clubs.
6. The Proposed Conduct is in relation to:
 - price
 - terms of supply
 - settlement discounts
 - product development
 - joint advertising and marketing
 - distribution.

¹ Detailed information about the authorisation process is contained in the ACCC's Guide to Authorisation available on the ACCC's website www.accc.gov.au.

7. Clubs Australia originally applied to negotiate and enter into arrangements with a number of specific suppliers² of:
- wagering services
 - electronic gaming machines
 - collective licences for the public performance and communication rights in musical works
 - collective licences for the broadcast, communication or performance of protected sound recordings or music video clips
 - subscription broadcast services
 - energy services
 - ATMs
 - insurance and insurance related products and services
- (the **target goods and services**).
8. On 13 January 2014, Clubs Australia withdrew its application with respect to electronic gaming machines. For this reason, electronic gaming machines will not be considered within this determination.
9. Authorisation is sought for five years.

The applicant

10. Clubs Australia describes itself as the peak industry body for not-for-profit licensed clubs. It has nearly 6,500 member clubs, including sporting and recreation clubs, cultural and religious clubs, and RSL clubs, that provide services to consumers including meals, alcoholic drinks, entertainment and events, and sport and fitness facilities.
11. Clubs Australia advises that the physical location of member clubs is broken down as follows:
- Northern Territory: 65
 - Western Australia: 958
 - South Australia: 1258
 - New South Wales: 1471
 - Australian Capital Territory: 57
 - Victoria: 1197

² Proposed target suppliers are listed at Attachment B.

- Tasmania: 161
- Queensland: 1410

12. Clubs Australia submits there is great diversity as to the commercial size and strength of individual clubs, and that this is to a degree divisible along state boundaries. For example, more than 50% of club industry revenue is generated in New South Wales, which has only 20% of clubs.

13. Clubs Australia has member associations in each of the states and territories of Australia.

Submissions received by the ACCC

14. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.

15. The ACCC sought submissions from 76 interested parties potentially affected by this application, including the proposed targets, industry bodies and government departments. A summary of the public submissions received from Clubs Australia and interested parties follows.

Prior to the draft determination

Clubs Australia

16. Broadly, Clubs Australia submits that the Proposed Conduct will result in a number of public benefits in the form of greater input into contracts for member clubs, transaction cost savings, and enhancement of the supply of goods and services by clubs to consumers. Clubs Australia does not believe the Proposed Conduct will result in any public detriment, as:

- its members will continue to compete with other businesses for the acquisition of the relevant goods or services
- suppliers and member clubs may opt out of the collective bargaining process at any time and negotiate individually
- the size of the bargaining group representing member clubs in negotiations with suppliers will be limited to a select group of Clubs Australia staff
- the application does not extend to collective boycott activity, and
- Clubs Australia undertakes to remind member clubs of their obligations under the Act and to implement a trade practices compliance program.

Interested parties

17. The ACCC received a number of submissions from interested parties in response to its consultation process prior to the draft determination. In brief:

- TABcorp Holdings Limited and a number of its subsidiaries propose the ACCC should impose a condition restricting the size of bargaining groups to members of a single state or territory, and preventing information sharing between states and territories
- a confidential party (**the confidential party**) opposes authorisation in relation to collective bargaining with ATM providers on the basis that the Proposed Conduct will not deliver the claimed benefits and will be detrimental to competition because it will distort the market for the supply of ATMs through the creation of a large buying group
- ATM supplier Banktech has no objection to the ACCC granting interim authorisation to Clubs Australia to negotiate in relation to ATMs to assist with industry compliance with the *National Gambling Reform Act 2012*
- the New South Wales Office of Liquor, Gaming and Racing submits it does not have any specific comments regarding the Proposed Conduct so long as any approved arrangements comply with state-based legislation
- Foxtel submits it is not opposed to the application, but submits the relevant market for its services is the national market for the supply of audiovisual content.

Following the draft determination

18. A pre-decision conference was requested by the ATM Industry Reference Group (**AIRG**) on 7 January 2014. The conference was held at the ACCC's office in Sydney on 7 February 2014. A record of the conference may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.

19. The primary issues raised at the conference related to the ATM industry and included:

- features of the current relationship between ATM suppliers and clubs (such as the extent of negotiations, input into standard contracts, and the revenue split between clubs and suppliers)
- the proportion of ATMs deployed within clubs
- whether in practice the Proposed Conduct is voluntary
- the likely effect of the Proposed Conduct on the market for the supply of ATMs, including profits, the number of competitors, and the deployment of ATMs in remote or less profitable sites

- whether and how benefits of the Proposed Conduct would be passed through to customers
- the way in which collective bargaining would be conducted.

20. The ACCC received further public submissions in response to the draft determination:

- Banktech submitted it did not object to the granting of interim authorisation in relation to ATMs only insofar as this would assist clubs to comply with ATM withdrawal limits under the *National Gambling Reform Act 2012* and that this position did not extend to the application in its entirety.
- the confidential party opposes the application in relation to ATMs as the Proposed Conduct will result in little or no public benefit, and is likely to result in substantial public detriment by disadvantaging clubs' competitors in the acquisition of ATMs, as well as ATM suppliers. Further, the voluntary nature of the conduct and the lack of boycott activity offer only theoretical protection.
- the AIRG opposes the application in relation to ATMs as clubs are a significant purchaser of ATM goods and services, and clubs would likely form a large bargaining group, resulting in distortions in the ATM market and substantial reductions in the margins of ATM companies.
- The Applicant, in response, submitted that, as only 50% of its members use ATM services, any negotiating group in relation to ATMs would never comprise its entire membership. The bargaining group would comprise an insignificant proportion of the overall market, and the Proposed Conduct would be an effective way to redress an imbalance in bargaining power and eliminate unfair terms and conditions.
- Foxtel submits that authorisation should be granted in respect of all suppliers of subscription television services, rather than being limited to only Sky Channel and Fox Sports.

21. The views of Clubs Australia and interested parties are considered in the evaluation chapter of this determination. Copies of public submissions may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.

ACCC evaluation

22. The ACCC's evaluation of the Proposed Conduct is in accordance with the relevant net public benefit tests³ contained in the Act. In broad terms, under the relevant tests the ACCC shall not grant authorisation unless it is satisfied in all the circumstances that the likely benefit to the public would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.

³ Subsections 90(6) and 90(5A). The relevant tests are set out in Attachment A.

23. In order to assess the effect of the Proposed Conduct and the public benefits and detriments likely to result the ACCC identifies the relevant areas of competition and the likely future with and without the conduct the subject of the authorisation.

The relevant areas of competition

24. Clubs Australia submits the relevant areas of competition are those for the supply of services by clubs to consumers, and for the acquisition of the target goods and services from commercial operators.

25. Foxtel submits that, in relation to subscription broadcast services, the market is more appropriately identified as the national market for the supply of audiovisual content, which includes content across a range of genres and includes free-to-air broadcasters, subscription television providers, internet protocol television providers, download and streaming content services delivered over the internet and DVD sales and rentals, among others.

26. The AIRG considers independent ATMs operate in a different market to bank ATMs. Further, the AIRG and confidential party submit that, in relation to the acquisition of ATMs, clubs should be considered to belong to the gaming and wagering market or market segment, which also includes hotels, casinos and racecourses.

27. Of the other public submissions received in relation to the application, none commented on the relevant areas of competition.

28. The ACCC considers that the following areas of competition are likely to be relevant to its assessment of the Proposed Conduct.

The acquisition of goods and services from commercial operators

29. As noted earlier, Clubs Australia proposes to collectively negotiate with suppliers across Australia in a number of different sectors, specifically:

- wagering services
- collective licences for the public performance and communication rights in musical works
- collective licences for the broadcast, communication or performance of protected sound recordings or music video clips
- subscription broadcast services
- energy services (including energy efficiency products and consultancy services, and energy brokering)
- ATMs
- insurance and insurance-related products and services.

30. The ACCC considers that Clubs Australia members are likely to compete with a wide range of other businesses for the acquisition of insurance, collective licences

for public performance and broadcast, and energy services and are likely to represent a small proportion of purchasers in these areas of competition.

31. In contrast, the information available to the ACCC suggests that Clubs Australia members are likely to represent a greater proportion of purchasers in relation to the acquisition of subscription broadcast services and wagering services. However, the ACCC notes that these industries are supplied largely by monopoly suppliers or large global companies.
32. A number of the target suppliers submit they operate within competitive markets. Foxtel submits it competes in a market for the supply of audiovisual content, in which there are a broad range of suppliers.
33. The ACCC notes that there are differences in the level of competition between suppliers in the various sectors identified by Clubs Australia. For example, certain sectors such as wagering services⁴ are subject to regulatory regimes which limit competition between suppliers from different states.
34. In assessing the public benefits and detriments arising from the Proposed Conduct, the ACCC recognises that the different characteristics of each of these sectors mean that the effect of Clubs Australia's proposed collective bargaining arrangements will vary.

ATMs

35. In relation to ATMs, the AIRG submits that clubs are a significant purchaser of the industry's goods and services, as approximately one quarter of ATMs operated by independent companies are located in clubs, and that, when clubs are considered as part of a gaming and wagering market or market segment, the proportion comprised by clubs is even higher.
36. However, the AIRG also advises that the number of independently operated ATMs has increased significantly in recent years due to an increase in the proportion of ATMs in "convenience" locations (such as petrol stations and supermarkets) operated by independent ATM companies, a trend which is likely to continue. The ACCC considers this indicates that clubs are likely to become a lower proportion of ATM operators' customer base over time.
37. The confidential party submits the market for the supply of ATMs is competitive with more than 18 active deployers and operators, citing increased rebates paid to clubs over recent years.

Supply of services by clubs to consumers

38. Clubs Australia submits its member clubs supply alcohol for on-site consumption, soft drinks, tobacco products, and often electronic gaming machines, wagering and entertainment services. Clubs Australia submits member clubs compete with other members in close proximity and other market participants such as hotels and licensed restaurants in the provision of hospitality services to consumers. However, Clubs Australia considers its members offer a differentiated product due to their member-based and community-oriented services.

⁴ Except in the case of online and telephone gambling which are regulated by the Commonwealth under the *Interactive Gambling Act* (2001).

39. The ACCC considers that Clubs Australia member clubs are likely to compete with one another and, in some respects to a lesser degree, with a range of other market participants including hotels, licensed restaurants and cafes in the provision of hospitality services to consumers in markets differentiated by geographic location. The ACCC notes that the services offered by individual Clubs Australia members are likely to vary according to club type – sporting, cultural, RSL – which may affect the closeness of competition.

The future with and without

40. To assist the assessment of the proposed conduct against the authorisation tests the ACCC compares the likely future with the conduct that is the subject of the authorisation to the likely future without the conduct that is the subject of the authorisation.⁵
41. The ACCC compares the public benefits and detriments likely to arise in the future where the proposed conduct is in place against the future in which it is not.
42. The applicant's submissions have not addressed the issue of the likely future without the Proposed Conduct.
43. The ACCC considers that, absent the Proposed Conduct, clubs are likely to enter into agreements with suppliers on an individual basis, which may mean member clubs are offered standard form contracts and have limited input into the development of the terms and conditions. However, the ACCC notes that Clubs Australia can, without the need for authorisation, provide services to its members and make representations to major suppliers in relation to issues of concern for its members.

Public benefit

44. 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.⁶
45. The submissions of the applicant and interested parties are considered in the following assessment of the likely public benefits from the Proposed Conduct.
46. Clubs Australia submits the Proposed Conduct will deliver public benefits, including:
- Transaction cost savings;
 - greater input into contracts; and

⁵ See *Re Medicines Australia Inc* [2007] ACompT 4 at [120].

⁶ *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.

- enhancement in the supply of goods and services by clubs to consumers.

Transaction cost savings

47. Clubs Australia considers these will be achieved as member clubs acquire better information and negotiating skills, pool their resources or outsource some of the functions that generate transaction costs.
48. The confidential party submits that, with regard to ATMs, Clubs Australia's claim in relation to transaction cost savings is unsubstantiated, and that Clubs Australia can achieve benefits without the need for collective bargaining on behalf of its members, through ensuring members have access to appropriate services and making representations to major suppliers on behalf of its members.
49. The AIRG submits standard contracts are already used within the ATM industry, and the development of a further standard contract would not add any further public benefit, and that contracts for the supply of ATMs are generally re-negotiated every three to five years, which the AIRG believes does not impose a significant administrative burden upon clubs. Further, the AIRG submits it would no longer be possible for ATM suppliers to deploy ATMs to all locations at the same price, and therefore multiple negotiations would need to be undertaken, reducing the transaction cost savings resulting from the Proposed Conduct.
50. The ACCC has previously recognised that there are transaction costs associated with contracting and these transaction costs can be lower where a single negotiation process is employed, such as in a collective bargaining arrangement, relative to a situation where negotiation occurs between each individual purchaser and supplier. The ACCC considers that, even where multiple negotiations may be necessary due to different needs of various customer groups within the Clubs Australia membership, a series of collective negotiations is nonetheless likely to be more efficient than each party conducting individual negotiations.

Greater input into contracts

51. Clubs Australia submits that "manifestly unfair contractual terms and conditions" often arise when individual clubs negotiate with large-scale or monopoly suppliers, and that there is little power for individual clubs of any size to negotiate customised supply agreements with suppliers. However, Clubs Australia acknowledges that its larger member clubs may currently negotiate directly with suppliers.
52. TABCorp submits that the standard form contracts used by TABCorp businesses have been developed over time as a result, in part, of significant consultation and negotiation with industry bodies such as the Australian Hotels Association, and their terms are commercially reasonable.

ATMs

53. The confidential party and the AIRG submit that ATM providers currently negotiate with Clubs Australia members individually, due to the competitiveness of the ATM supply market. The AIRG advised at the PDC these negotiations generally centre around details such as price (or size of rebate payable) and restocking fees.

However, the confidential party and AIRG also advise that the terms relevant to the supply of an ATM are mostly standard and uncontroversial, and therefore there is no need to undertake negotiation on these.

54. Clubs Australia submits that, while non-price terms of ATM supply contracts are fairly standard, it does not consider these to be uncontroversial but rather that onerous terms are forced on some clubs by ATM suppliers.

ACCC view

55. The ACCC understands that many individual clubs may currently be offered standard form contracts with little or no scope to negotiate. The ACCC considers allowing Clubs Australia to negotiate on behalf of its member clubs is likely to allow member clubs to have increased input into contracts. Any cost savings or efficiencies resulting from these negotiations would give rise to a public benefit.
56. The ACCC notes that some individual clubs may already negotiate with various suppliers, in which case, given the voluntary nature of the proposed collective bargaining arrangements, there may be no change to those negotiating arrangements as a result of the authorisation.

Enhancement in the supply of goods and services by clubs to consumers

57. Clubs Australia submits that clubs operate as not for profit community hubs and therefore any benefit resulting from improved trading terms will be passed on to consumers or club patrons in the form of enhanced service standards and facilities.
58. The confidential party submits that it is unlikely such benefits would be uniform across all clubs and therefore it would be impossible to monitor or assess whether such benefits had been realised.
59. The AIRG submits that no evidence has been provided by Clubs Australia to show how the benefits would flow through to club patrons.
60. In response, Clubs Australia noted that clubs were non-profit entities owned by their members and therefore any benefit to clubs would benefit its members.
61. To the extent that clubs are able to achieve cost savings as a result of the Proposed Conduct, and competition exists between clubs and other hospitality service providers, the ACCC considers that this is likely to lead to the cost savings being passed through to club patrons in the form of improved service standards and facilities. Further, as not-for-profit, member-owned entities, the ACCC expects that any benefits accruing to clubs as a result of the Proposed Conduct would be passed through to patrons or members in some form.

Public detriment

62. 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.⁷

63. Clubs Australia submits that the lack of variation in terms and conditions of the supply contracts of different clubs indicates that the level of competition between clubs in the acquisition of goods and services from suppliers is low. In terms of the supply of services to consumers, Clubs Australia does note that there is some level of competition between clubs that are in close proximity to each other. Overall, however, Clubs Australia believes that the Proposed Conduct will not result in any public detriment.

64. TABcorp notes the Proposed Conduct potentially involves negotiations on behalf of approximately 6,500 clubs nationally and submits that this:

- presents significant risks to confidentiality obligations contained within current agreements
- significantly reduces the incentive for a TABcorp supplier to offer special terms to individual clubs, as this would result in calls for those terms to be made available far more widely than is commercially justifiable;
- reduce the level of competition between clubs for the acquisition of services provided by the TABcorp suppliers; and
- significantly increase the risk of collusive conduct across a substantial proportion of the industry.

65. The confidential party and the AIRG also note that the Proposed Conduct would create a potential 6,500 strong member buying group, a position not enjoyed by any other customer group in the ATM machine market, and this would lead to distortions in the market and decreased profit margins for ATM suppliers, resulting in only one or two remaining suppliers providing services to clubs.

66. In response, Clubs Australia submits:

- only around 50% of clubs use the services of ATM deployers, and therefore that a bargaining group would never comprise all 6,500 members in relation to ATMs
- other ATM providers have already expressed an interest in collectively bargaining with Clubs Australia
- clubs compete with numerous other businesses and sectors in the acquisition of ATMs
- clubs do not constitute a homogenous consumer group in relation to the acquisition of ATM goods and services
- it expects the Proposed Conduct to appeal to smaller clubs
- revenue from clubs is returned to members and the community

⁷ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- the Proposed Conduct is not seeking to reduce the margins of ATM companies.

67. Generally speaking, competition between individual businesses generates price signals which direct resources to their most efficient use. This is often referred to as allocative efficiency. The ACCC notes that collective agreements to negotiate terms and conditions can interfere with these price signals and accordingly lead to allocative inefficiencies. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.

68. The ACCC considers the anti-competitive effects of collective bargaining arrangements are likely to be limited when the following four features are present:

- the current level of negotiations between individual members of the group and the proposed counterparties 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.

Current level of negotiation between Clubs Australia members and suppliers

69. Where the current level of individual bargaining between members of a proposed bargaining group and the target is low, the difference between the level of competition with or without the collective arrangements may also be low.

70. Clubs Australia submits that suppliers in many cases offer clubs standard form contracts with minimal opportunity for input.

71. The AIRG submits ATM suppliers negotiate with clubs in relation to price and other issues such as maintenance and restocking. However, the AIRG seems to acknowledge that not all aspects of ATM supply contracts are negotiated, noting these are settled and uncontroversial.

72. The ACCC considers that there is likely to currently be a low level of negotiation between individual clubs and some suppliers, with most clubs being offered standard form contracts. The ACCC notes that some larger individual clubs may already negotiate with various suppliers, but considers that, given the voluntary nature of the proposed collective bargaining arrangements, there may be no change to those negotiating arrangements as a result of authorisation.

Voluntary participation in the collective bargaining arrangements

73. Where participation in collective bargaining arrangements is voluntary, those businesses who consider that they will be able to negotiate a more commercially attractive arrangement individually are free to do so. Consequently, incentives for

businesses to compete on price, to innovate, or to improve their quality of service are not reduced to the extent that they otherwise might be. This provides an element of ongoing competition and as such lessens the anti-competitive impact of the arrangements.

74. The ACCC notes that participation in the Proposed Conduct is voluntary for both Clubs Australia members and the proposed counterparties. Individual Clubs Australia members remain free to negotiate directly with a counterparty, if that is their, or the counterparty's wish, and collectively negotiated contracts will only be entered into where both the individual Clubs Australia member and the relevant counterparty consider it to be in their best commercial interest to do so.

ATMs

75. The confidential party and the AIRG submit that participation in the proposed bargaining by ATM suppliers will not truly be voluntary as suppliers will be required to engage in collective bargaining or risk being seen to offer their services on sub-optimal terms because they lack the recommendation of Clubs Australia. The AIRG also argues participation is only theoretically voluntary, as suppliers would be required to agree to match the terms provided by collective bargaining participants. This may result in unsustainable discounts being offered by some suppliers to increase their market share, which other participants are unable to match, resulting in some businesses withdrawing from the market.
76. The ACCC notes that any of the named targets are free to engage in collective bargaining with Clubs Australia, and that any ATM provider is free to negotiate with individual clubs, and with other acquirers of ATMs. To the extent the Proposed Conduct may prompt ATM suppliers to compete in their offerings to clubs, the ACCC does not consider this to be detrimental. The role of the ACCC is to promote competition generally, not to protect the commercial interests of individual industries or businesses.

Size/composition of bargaining group

77. The ACCC considers that where the size of bargaining groups is restricted, any anti-competitive effect is likely to be smaller having regard to the smaller area of trade directly affected and having regard to the competition provided by those market participants outside the group.

Wagering services

78. Clubs Australia acknowledges a number of different businesses operated by TABcorp are structured differently between jurisdictions and have different tax rates and various other conditions and that this would prevent a single national approach to collective bargaining. The ACCC considers this may apply to a number of target goods and services.
79. As noted at paragraph 64, TABcorp submits that collective bargaining on behalf of all 6,500 Clubs Australia members has significant potential for anti-competitive detriment and significantly increases the risk of collusive conduct across a substantial proportion of the industry.
80. More specifically, TABcorp notes that with discussions on behalf of around 6,500 clubs across eight types of key inputs and involving a large number of suppliers,

there is a significant risk of wide-ranging information exchange and “spill-over” beyond the scope of the authorisation. TABcorp proposes a condition limiting the proposed conduct to bargaining groups comprised of clubs from only the same state or territory, and preventing information sharing between bargaining groups.

ATMs

81. In relation to the provision of ATMs, the confidential party and the AIRG submit that the creation of a 6,500 strong member buying group will unfairly distort the existing market in favour of Clubs Australia members, giving rise to conditions which could favour Clubs Australia members and prejudice ATM suppliers. The AIRG submits that 25% of ATMs operated by independent companies are located in clubs.
82. In response, Clubs Australia submits that, in relation to the acquisition of ATMs, Clubs Australia members are not a homogeneous consumer group with uniform ATM requirements. Any bargaining group formed by Clubs Australia members in relation to ATMs would not consist of the full 6,500 member clubs.

ACCC view

83. In principle, the ACCC considers that where proposed collective bargaining arrangements involve only a small proportion of participants in relevant markets, or a target which is much larger than the bargaining group, there is likely to be little risk of anti-competitive detriment.
84. The ACCC notes that clubs are likely to be a small proportion of purchasers in respect of insurance and related products and services, collective licences for public performance and broadcast, and energy services.
85. In relation to ATMs, the ACCC considers that ATM suppliers have a sufficient volume of non-club customers to effectively constrain a Clubs Australia buying group and as such it would not have or be able to exercise undue market power. The ACCC also notes the AIRG’s submission that the market for independent ATMs has grown in recent years and is expected to continue growing, as a result of the withdrawal of bank ATMs from “convenience” locations. The ACCC expects as a result that clubs will form an increasingly lower proportion of independent ATM providers’ customers.
86. In the case of wagering services and subscription broadcast services, clubs may comprise a larger proportion of purchasers; however the ACCC notes that almost all targets in these industries are monopoly suppliers or global companies with a dominant market position. As a result it is unlikely that the Proposed Conduct will result in detriment in these industries.
87. Further, while the ACCC notes the Proposed Conduct creates potential for a 6,500-strong member buying group, the ACCC does not expect negotiations would always, or often, occur on behalf of all Clubs Australia members. The ACCC notes a collective bargaining group will be most effective when its members share a commonality of significant issues.
88. Given the diversity of clubs, the ACCC considers it will in many instances be in the best interests of all parties to the negotiations for clubs to form smaller bargaining groups, on state, regional, or other lines of common interest, to maximise the efficiency of negotiations. Therefore it is unlikely a supplier will face a bargaining

group comprised of all member clubs, unless this is in the interests of all parties to the negotiations.

Boycott activity

89. Collective boycotts can remove the discretion of the target to participate in collective bargaining and to accept the terms and conditions (including price) offered by the collective bargaining group. This is because a party, faced with the threat of withdrawal of supply/acquisition, will be under increased pressure to accept the terms and conditions offered by the collective bargaining group.
90. Clubs Australia has not applied for authorisation to engage in collective boycott activity and submits it does not intend to do so. The ACCC notes that any such conduct, should it occur, would not be protected from legal action under the Act.

Increased potential for collective activity beyond that authorised

91. The exchange of certain information among competitors, particularly in relation to prices, fees and costs, may facilitate collusion or otherwise reduce competition, resulting in increased prices or reduced quality and availability of goods or services. Outcomes of this nature are associated with significant public detriment.
92. Nonetheless, the ACCC accepts that to some degree, information sharing is an inherent aspect of collective bargaining because in order to collectively negotiate terms and conditions with a supplier or customer, the members of a collective bargaining group must discuss their desired outcomes from negotiations and how these can best be achieved. It is difficult to imagine a collective bargaining arrangement that does not involve some form of information sharing between the members of the particular collective bargaining group.
93. The ACCC notes that clubs are generally geographically dispersed and do not often compete directly with each other, and will continue to be subject to competition from other service providers within their local area in the provision of hospitality and other services to consumers.
94. Further, the ACCC notes that the likelihood of collusive activity beyond that authorised is reduced where participants are made aware of their obligations under the Act.
95. In this matter, Clubs Australia proposes its members be reminded of their obligations under the Act each time they commence collective negotiations and that a trade practice compliance program be implemented.

Effect on businesses outside the arrangements

96. Clubs Australia submits the conduct will not have detrimental effects on suppliers other than those it proposes to collectively bargain with. Clubs Australia considers that the buying choices made by clubs will continue to be driven by consumer demand and that it is likely that clubs will continue to purchase goods and services

for which there is consumer demand. Clubs Australia submits that the voluntary nature of the Proposed Conduct will not prevent negotiations between individual clubs and non-target suppliers to meet demand.

97. The ACCC notes the competitive nature of the market in which Clubs Australia members provide services to consumers, and the voluntary nature of the Proposed Conduct for all parties. The ACCC considers the Proposed Conduct is unlikely to have a significant negative impact on businesses outside the arrangements.

Confidentiality risks and reduced incentive to offer special terms

98. TABcorp submits the Proposed Conduct, authorised on a national basis, poses a risk to confidentiality obligations within its existing supply agreements with clubs and reduces its incentive to offer special terms to individual clubs, as this would result in calls for those terms to be made more widely available.

99. The AIRG submits the Proposed Conduct would vastly reduce the number of special terms that ATM companies could offer individual clubs because clubs would be able to legally communicate with each other about those terms and ATM companies could not afford to offer them more widely.

100. The ACCC notes that authorisation does not override or negate any private contractual obligations existing between the parties, and that such obligations could continue to protect confidentiality around any special terms offered to individual clubs. Further, the ACCC notes that under the proposed arrangements suppliers remain free to deal with individual clubs should they wish to do so, and that individual clubs are free to deal with suppliers separately (and presumably will do so if this is in their best interests).

Condition proposed by TABCorp

101. The ACCC notes TABCorp's proposed condition limiting the composition of bargaining groups to member clubs from the same state or territory, and preventing information sharing between bargaining groups.

102. The ACCC considers any detriments to competition arising from a national bargaining group are largely ameliorated by the factors discussed above, specifically:

- the voluntary nature of the conduct for all parties
- the Proposed Conduct does not extend to boycott activity
- the relative size and strength of the parties to the negotiations

103. Further, as discussed at paragraphs 87-88 above, the ACCC does not expect bargaining groups comprising the entire Clubs Australia membership will be formed unless this is in the best interests of all parties to a negotiation, where there is a commonality of significant issues among members of the bargaining group. The ACCC notes that Clubs Australia considers a single national approach to collective bargaining will not be possible for particular products or services which are structured differently between jurisdictions and have different tax rates and various

other conditions. For TABCorp, this means that in relation to wagering services, for example, bargaining groups are likely to be comprised of clubs from the same state or territory due to the different issues arising in each jurisdiction due to regulatory regimes.

104. The ACCC considers that limiting the size of bargaining groups to clubs from the same state or territory is likely to unnecessarily limit the benefits arising from the arrangements, by not allowing for national groups where genuinely national issues affecting clubs arise, or where bargaining groups could more efficiently be divided along other lines due to commonality of significant issues (for example, a bargaining group comprising all bowling clubs nationally.)
105. The ACCC therefore considers that the imposition of a condition limiting bargaining groups to members from the same state or territory is unnecessary to mitigate the likely detriments, and may unnecessarily limit the public benefits arising from the arrangements.

Balance of public benefit and detriment

106. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the Proposed Conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
107. The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of transaction cost savings and greater input to contracts for Clubs Australia members.
108. The ACCC considers that the Proposed Conduct is likely to result in minimal public detriment because Clubs Australia's members comprise a relatively small proportion of purchasers or are negotiating with large targets in the sectors involved. Any detriment is likely to be limited by the voluntary nature of the arrangements, the absence of boycott activity and the current low level of negotiations between many Clubs Australia members and target suppliers.

Length of authorisation

109. The Act allows the ACCC to grant authorisation for a limited period of time.⁸ This allows the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
110. In this instance, the applicant seeks authorisation for five years.
111. The AIRG submits the application should be rejected but, if granted, the duration of authorisation should be not more than one year, given the ATM industry's concerns.

⁸ Subsection 91(1).

112. The ACCC generally grants authorisation to collective bargaining arrangements for a five year period, to give sufficient time for the benefits of the arrangements to be realised and avoid unnecessary costs in parties having to go through the authorisation process more regularly. Given the assessment set out above, , the ACCC considers five years to be an appropriate time for which to grant authorisation to the Proposed Conduct, and has decided to grant authorisation for five years.

Determination

The application

113. On 14 August 2013 Clubs Australia lodged application for authorisation A91381 with the ACCC. Application A91381 was made using Form B, Schedule 1, of the Competition and Consumer Regulations 2010. The application was made under subsection 88(1) and (1A) of the Act to negotiate and/or enter into agreements on behalf of its current and future member clubs.

The net public benefit test

114. For the reasons outlined in this determination the ACCC is satisfied pursuant to sections 90(5A), 90(5B), 90(6), and 90(7) of the Act⁹ that in all the circumstances the Proposed Conduct for which authorisation is sought 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.

115. The ACCC therefore **grants** authorisation to application A91381 for a period of five years.

Conduct for which the ACCC grants authorisation

116. The ACCC grants authorisation to Clubs Australia to collectively negotiate and/or enter into agreements on behalf of its current and future members with the following suppliers of

- wagering services
 - TABcorp Holdings Limited
 - Jupiters Gaming
 - Keno – ClubKeno Holdings
 - Winning Ways Racing t/a WWRacing
 - ARA Security Services

⁹ See attachment A

- collective licenses for the public performance and communication rights in musical works, and collective licenses for the broadcast, communication or performance of protected sound recordings or music video clips:
 - ClubMUSIC
 - Phonographic Performance Company of Australia
 - Visual Sounds
 - Australasian Performing Rights Association (APRA)
- subscription broadcast services:
 - Sky Channel Pty Ltd
 - Premier Venue Entertainment t/a Fox Sports Venues
- energy services:
 - EP&T Pty Ltd
 - Energy Brokers
 - Illum-a-Lite Pty Ltd t/a Illum-a-Lite
 - PowerPerfactor Australia Pty Ltd
 - Simons Green Energy
 - Genesis Solar Group
 - Green Connection Group Pty Ltd
 - NUS Consulting Group
 - Skycool Pty Ltd
- Automatic Teller Machines:
 - Cashpoint ATM
 - DC Payments
 - Cashcard
 - Banktech
 - Customers ATM
- insurance and insurance related products and services:
 - Club Employers Mutual
 - Cartwright Insurance Brokers Pty Ltd
 - Warren Sanders Insurance Brokers (Aust) Pty Ltd

in relation to:

- price
- terms of supply

- settlement discounts
- product development
- joint advertising and marketing
- distribution.

117. This determination is made on 6 March 2014.

Conduct not authorised

118. The authorisation does not extend to Clubs Australia or its members to engage in collective boycott activity.

Interim authorisation

119. At the time of lodging the application, Clubs Australia requested interim authorisation to negotiate and enter into agreements with ATM providers on behalf of its members. The ACCC granted interim authorisation under subsection 91(2) of the Act on 11 September 2013.

120. 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.

Date authorisation comes into effect

121. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), this determination will come into force on 28 March 2014.

Attachment A - Summary of relevant statutory tests

Subsection 90(5A) provides 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 would result, or be likely to result, in a benefit to the public; and
- that benefit 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.

Subsection 90(6) 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 would result, or be likely to result in a benefit to the public; and
- that benefit 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.

Attachment B – Proposed target suppliers

Wagering Services

TABcorp Holdings Limited
Jupiters Gaming
Keno – ClubKeno Holdings
Winning Ways Racing t/a WWRacing
ARA Security Services

ATMs

Cashpoint ATM
DC Payments
Cashcard
Banktech
Customers ATM

Energy

EP&T Pty Ltd
Energy Brokers
Illum-a-Lite Pty Ltd t/a Illum-a-Lite
PowerPerfactor Australia Pty Ltd
Simons Green Energy
Genesis Solar Group
Green Connection Group Pty Ltd
NUS Consulting Group
Skycool Pty Ltd

Music Licensing

ClubMUSIC
Phonographic Performance Company of Australia
Visual Sounds
Australasian Performing Right Association (APRA)

Subscription Broadcast Services

Sky Channel Pty Ltd

Premier Venue Entertainment t/a Fox Sports Venues

Insurance

Club Employers Mutual

Cartwright Insurance Brokers Pty Ltd

Warren Saunders Insurance Brokers (Aust) Pty Ltd