



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation A91402

lodged by

the Association of Professional Engineers, Scientists
and Managers, Australia (APESMA)

in respect of

its collective bargaining arrangements

Date: 16 April 2014

Commissioners: Sims
Schaper
Rickard
Cifuentes
Court

Summary

The Australian Competition and Consumer Commission (ACCC) proposes to grant authorisation to the Association of Professional Engineers, Scientists and Managers, Australia (APESMA) to implement collective bargaining arrangements involving current and future members that provide translator and interpreter services as independent contractors. Authorisation is proposed to be granted for a period of five years.

Next steps

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

The application for authorisation

1. On 23 December 2013, APESMA¹ lodged with the ACCC an application for authorisation (A91402) under section 88(1) and (1A) of the *Competition and Consumer Act 2010* (the CCA).
2. APESMA is seeking authorisation to:
 - a. collectively negotiate the terms of engagement for translators² and interpreters³ who operate as independent contractors and provide interpreting and translating services to the various principal contractors and end-users with whom they contract. The authorisation is sought on behalf of current and future members of APESMA's Translator and Interpreter Division, and
 - b. to advise translators and interpreters in relation to what constitutes fair rates of pay and other terms of contracts for service.(the '**Collective Bargaining**').
3. Even though APESMA has sought authorisation for the Collective Bargaining on behalf of translators and interpreters, APESMA submits that the likely outcome of the Collective Bargaining is that individual interpreters and translators will continue to individually contract with the principal contractor or end-user and, if they choose, can rely upon APESMA's general advice as to the terms that may be appropriate to govern their individual contractual relationship with the principal contractor or end-user.
4. APESMA submits that in advising members what may constitute a fair rate of pay, it will provide members with salary survey information including a range of remuneration that professionals are earning, broken down by seniority level, geographical area and type of employer. The expectation is that APESMA members will use this information to arrive at what they consider a fair rate of pay for their individual circumstances and negotiate with their principal contractor accordingly.

¹ In November 2013, APESMA commenced using the registered business name "Professional Australia", and is so known to its members and the industry. Its legal name remains the "Association of Professional Engineers Scientists and Managers, Australia."

² Translator: A translator transfers a source text from one language into another, usually within an extended timeframe to allow for corrections and modifications and without the presence of the participants requiring the translation.

³ Interpreter: An interpreter transfers a spoken or signed language into another spoken or signed language, usually within a limited time frame in the presence of the participants requiring the translation.

5. APESMA will also advise members on factors to take into account when considering an appropriate rate of pay, including taxation, superannuation, professional indemnity insurance, and travel costs.
6. APESMA notes that members will likely settle upon their own agreements with a principal contractor or end user, with the advice of APESMA, on what terms and conditions they see as acceptable, including pay.
7. APESMA is seeking authorisation for five years.
8. 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.⁴ Further details about the authorisation application may be found on the ACCC's Public Register on its website.⁵

Background

APESMA

9. APESMA is a not for profit, member based organisation, registered under the *Fair Work (Registered Organisations) Act 2009* (Fair Work Act). APESMA operates as a union in respect of translators and interpreters.⁶
10. APESMA advises that membership to APESMA is voluntary and the membership fee structure varies according to the income level of the individual applying to become a member.⁷
11. APESMA submits its membership (approximately 200) is in the range of between 0.02 per cent – 4 per cent of the total translator and interpreter population in Australia.
12. APESMA submits that in the 2011 Census data, 3,349 persons nominated interpreting as their 'main job' and 1,382 nominated translating as their 'main job'. APESMA submits that 4 per cent would reflect membership as a proportion of the interpreter and translator population recorded in the Australian Bureau of Statistics 2011 Census data. However, APESMA submits that this number is likely to be lower as it considers that Census data significantly understates the total number of persons operating in the industry. Rather than it being their primary source of income or 'main job', many individuals supplement their income with translating and interpreting work.
13. Other than interpreters and translators, APESMA also represents professionals from a wide variety of disciplines including engineers, scientists, IT professionals, senior managers and executives employed by Telstra, Australia Post, Australian Broadcasting Corporation, architects, pharmacists, managers and professionals employed by the Victorian or Commonwealth governments. APESMA's rules allow for independent contractors who work in any of these professions to be eligible as members.

⁴ 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.

⁵ <http://registers.accc.gov.au/content/index.phtml/itemId/1130021/fromItemId/278039/display/application>.

⁶ Translators and interpreters may also be represented by other unions if they are employed in a specific sector such as health or government.

⁷ APESMA submits that 87% of the members of its Translators and Interpreters Division pay a reduced annual membership fee because they are either unemployed, students, new graduates or because they are earning less than \$50,000 per annum. Students pay \$60 per annum to join APESMA.

14. APESMA aims to:

- a. set up and maintain a series of awards for engineers, scientists and other professionals
- b. provide representation for members at organisation level in enterprise bargaining
- c. provide representation for members where necessary in industrial tribunals and courts in relation to the full range of workplace issues such as industrial disputes regarding both collective and individual subject matter, unlawful terminations and unfair dismissals, enforcement of award and collective agreement conditions and common law contract terms and conditions
- d. provide a collective voice and representation for its members to industry and government inquiries, studies and forums, and
- e. provide advice to members on legally enforceable minimum wages and conditions of employment and basic workplace rights, conditions and entitlements.

15. The other main industry bodies for interpreters and translators include the Australian Institute of Interpreters and Translators (AUSIT) and the National Accreditation Authority for Translators and Interpreters Ltd (NAATI).

16. AUSIT is the national association for the translating and interpreting profession, and seeks to set professional standards, improve public recognition and promote higher levels of competence across the profession.

17. NAATI is the national standards and accreditation body for translators and interpreters in Australia. It is the only agency to issue accreditation for practitioners who wish to work in this profession in Australia.

The interpreting and translating industry

18. The bulk of translator and interpreter services are procured by Federal and State Government departments, including but not limited to those involved in health and medical services, court/legal services, social security/welfare and immigration services.

19. Government departments and agencies previously employed translators and interpreters as full or part time employees, although now typically engage translators and interpreters as casual employees or contractors, often through private or government businesses which tender for this work.

20. 'Agencies' perform a brokering role, entering into principal contracts with the end user (i.e. the government department), for the provision of translation and interpreting services, often in response to a tender process. The agencies in turn enter into agreements with individual translators and interpreters, with the translator or interpreter either becoming the casual employee of the agency or entering into an individual contractor agreement for the provision of services.

21. APESMA submits that agencies compete with each other to win tenders and contracts for work from government departments, and as such the ability to trim labour costs is a key competitive advantage in the tender process. As a result, translators and interpreters are not able to enter into a true negotiation or bargaining process regarding the terms and conditions under which their services are provided. Instead, translators and interpreters are provided with a standard set of rates, terms and conditions by an agency on a 'take it or leave it' basis.

22. APESMA also submits that there is confusion amongst the profession about their status as an employee or contractor, and about the different rights and obligations attached to each method of engagement.
23. A report published by APESMA⁸ (Report) indicates that 95 per cent of the interpreter and translator respondents to the survey were freelancers, a small number also had full time or part time employment as interpreters and nearly 20 per cent also directly serviced clients (i.e. not through an 'agency'). Of those freelancing with agencies, only 8 per cent worked for one agency alone, the majority (52 per cent) worked for 2-4 agencies while 38 per cent worked for 5 or more agencies.⁹
24. APESMA submits that the 2011 Census data reports the median annualised income for translators and interpreters in Australia as being:
 - a. translators: \$31,931, and
 - b. interpreters: \$25,544.
25. APESMA submits that interpreters working as contractors must also pay various other costs/expenses such as taxation, professional registration fees, self-funded training and professional development, insurance, mobile phone and home office expenses etc. APESMA estimates that average annual fixed costs for a translator or interpreter are \$3,600.
26. APESMA's Report also indicated that 86.4 per cent of the respondents were very concerned about the deprofessionalisation of the industry. Factors contributing to this include the use or oversupply of non-accredited translators and interpreters, little differentiation between rates paid to accredited and non-accredited practitioners, perceptions of declining demand/work opportunities and the fact that those purchasing translating and interpreting services are often not informed about trade-offs in quality, turnaround and price.
27. As a result of poor remuneration and other conditions, APESMA submits that there is a high turnover of practitioners. People enter the profession, work for a year or two, and then leave. APESMA submits that practitioners may re-enter the profession at a later date, although it may be difficult for them to maintain a high standard of skill, which in turn may affect quality of service delivery.

Submissions received by the ACCC

28. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.
29. The ACCC sought submissions from approximately 35 interested parties, including interpreter and translator end users such as government departments, agencies, industry associations, and accreditation authorities.
30. The ACCC received submissions from the following interested parties:

⁸ Lost in Translation: Barriers to Building a Sustainable Australian Translating and Interpreting Industry, APESMA, 2012.

⁹ Law Institute of Victoria (2010) Interpreting Fund Scoping Project Final Report (<http://www.liv.asn.au/getattachment/180358a3c-d0d5-460c-bbae-af9dccc3f8/FinalReport-Interpreting-Fund-Scoping-Project.aspx>).

Australian Association of Language Companies (AALC): AALC opposes the authorisation as it considers that translators and interpreters working as independent contractors should not be represented by a union as “any collective bargaining on their behalf would be against the principles of [a] free market economy.”

Commonwealth Department of Immigration and Border Protection (DIBP): The DIBP supports efforts to improve the quality and professionalism of services, however it submits that the increase in rates of pay may put financial pressure on the DIBP which will result in the reduction of translating and interpreting jobs and, as a result, difficulty in the delivery of public and private services to end users.

Victorian Interpreting and Translating Service (VITS): VITS opposes APESMA’s application to collectively bargain on behalf of its members. VITS does not concede that any identified public benefit will flow from the grant of the authorisation sought by APESMA. VITS does not oppose authorisation being granted for APESMA to advise translators and interpreters in relation to what constitutes fair rates of pay and other terms of contracts for service.

VITS also raised concerns regarding the appropriateness of the ACCC assessing an application for collective bargaining authorisation “by associations of employees registered as organisations, or otherwise recognised, under the *Fair Work Act*.”

Australian Institute of Interpreters and Translators (AUSIT): AUSIT submits that the “authorisation ought to be approved as it is the only way to ensure exploitation of interpreters in the public sector is reduced and that quality standards in critical settings including health and legal can be maintained.”

Australian Sign Language Interpreters Association Inc (ASLIA): ASLIA supports the authorisation. ASLIA submits that the translator and interpreter industry has experienced a considerable lack of growth over the past two decades due to the lack of remunerative and non-remunerative incentives for practitioners to extend and develop their skills. For example, a number of employers such as TAFE institutes and other education providers do not differentially remunerate interpreters who have different levels of NAATI accreditation. Further, many skilled and experienced practitioners have become disenfranchised with the industry and have left to pursue other more gainful employment opportunities.

Oncall Interpreters and Translators (Oncall): Oncall does not oppose the application for authorisation. Oncall submits that the Collective Bargaining arrangement will have negligible effects on its business or its capacity to engage freely in the market. Oncall submits that its preference is not to negotiate with individuals as this is time consuming, further, individual negotiations rarely if ever lead to vastly different overall engagement terms.

National Accreditation Authority for Translators and Interpreters Ltd (NAATI): NAATI submits that Professionals Australia (APESMA) is an important stakeholder in the Australian translation and interpreting industry. It brings industry research and analysis capabilities to this field which are valuable.

31. The views of APESMA and interested parties are considered in the evaluation section of this draft determination. Copies of the public submissions may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.

ACCC evaluation

Ability for the ACCC to consider the application

32. Some concerns have been raised regarding the appropriateness of the ACCC to assess APESMA's application for authorisation given it is an organisation registered under the Fair Work Act, and is able to facilitate collective bargaining by interpreters and translators engaged as employees.

33. APESMA submits that the *Fair Work Act* provides that modern awards can only cover employees and certain outworkers¹⁰ and therefore the Fair Work Commission (FWC) does not have the power to make an award that covers independent contractors. Further, the FWC's role in facilitating collective bargaining and its powers to approve enterprise agreements are confined to agreements that cover the relationship between employers and their employees (not independent contractors).

34. The ACCC is satisfied that it is able to consider APESMA's application as:

- the conduct for which APESMA seeks authorisation is specific to translators and interpreters that operate as independent contractors and not employees
- independent contractors or freelancers are subject to the CCA and/or the Competition Code of the relevant State or Territory
- collective bargaining by independent contractors or freelancers can breach the CCA and/or the Competition Code of the relevant State or Territory, and
- the ACCC is able to consider an application for authorisation under both the CCA and the Competition Code of the relevant State or Territory.

Statutory test

35. The ACCC's evaluation of APESMA's collective bargaining arrangements is in accordance with the relevant net public benefit tests¹¹ contained in the CCA. While there is some variation in the language of the tests, in broad terms, the ACCC is required to identify and assess the likely public benefits and detriments, including those constituted by any lessening of competition and weigh the two. In broad terms, the ACCC may grant authorisation if it is satisfied that the benefit to the public would outweigh the public detriments.

36. In order to assess the effect of the proposed Collective Bargaining arrangements and the public benefits and detriments that are likely to result, the ACCC identifies the relevant areas of competition and the likely future should authorisation not be granted.

¹⁰ Contractors who perform work at residential premises in the textile clothing and footwear industry.

¹¹ Subsections 90(5A), 90(5B), 90(6), and 90(7). The relevant tests are set out in Attachment A.

The relevant area of competition

37. Although APESMA represents professionals from a wide range of disciplines (see paragraph 13), the application for authorisation only relates to interpreters and translators.
38. APESMA submits that interpreting and translating services are mostly provided at a state or local level, with some exceptions such as work done for the DIBP which may require more extensive travel (for example to asylum seeker facilities that may be off-shore or remote).¹² APESMA submits that most of its members are located in Victoria.
39. As discussed above at paragraph 18, the bulk of translator and interpreter services are procured by Federal and State Government departments. An example is the Translating and Interpreting Service (TIS National) which is a unit of the DIBP, and procures translator services via a tender process. In Victoria, 80 per cent of language services are provided by VITS to Government.¹³ Similar agencies (owned and/or operated by state government departments) exist in each state.
40. As noted above, the majority of interpreters and translators working in the sector are freelancers, either dealing directly with clients or through agencies. Agencies, such as Oncall, VITS and others, submit tenders to Government and commercial end-users, for the right to provide interpreter and translator services. Translators and interpreters working as contractors for one agency may be contracted by multiple agencies.
41. APESMA is the only industrial association representing translators and interpreters in a union like capacity. APESMA represents up to 4 per cent of the interpreter and translator industry (see paragraph 11). The ACCC is aware that translators and interpreters employed in sectors with union representation, such as health and government, may choose to hold membership with those industry unions rather than APESMA.
42. For the purpose of assessing the application for authorisation, the ACCC considers that the primary area of competition affected is the provision of interpreting and translating services, at the state level. The ACCC does not consider it necessary to precisely identify the relevant areas of competition to assess APESMA's application for authorisation.

The future with and without

43. To assist in its assessment of the 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. The ACCC will compare the public benefits and detriments likely to arise in the future where the conduct occurs against the future in which the conduct does not occur.
44. APESMA submits that the likely outcome of the Collective Bargaining will be that individual contractors will continue to contract with end-users as individuals and will rely upon APESMA's advice, if they wish to do so, as to what may constitute appropriate terms and conditions for their contractual relationship with the end-user, thereby increasing efficiency in the industry.

¹² In these cases some compensation for travel is provided.

¹³ VITS is a Victorian Government owned business enterprise which competes with other commercial providers for the provision of translating and interpreting services.

45. APESMA submits that if authorisation is not granted, the current high turnover of practitioners within the industry will become exacerbated. The low earnings and poor conditions for practitioners will continue to result in translating and interpreting no longer being seen as a viable profession or career, with the risk being that capable individuals will not invest the time and money in professional development to obtain initial qualifications or ongoing professional development.

46. The ACCC is of the view that absent authorisation of the Collective Bargaining arrangement the status quo is likely to continue where interpreters and translators are offered take it or leave it contracts, with limited ability for input. The ACCC notes that without authorisation, APESMA may still provide general advice and/or assistance to its members as to the relevant factors to consider when negotiating their contractual terms and conditions.

Public benefit

47. APESMA submits that its Collective Bargaining arrangements will lead to public benefits, including, but not limited to:

- a. a reduction in transaction costs for participants to the bargaining process
- b. improved quality of information to translators and interpreters throughout the bargaining process, and
- c. the retention of skilled practitioners in the industry.

48. The ACCC's assessment of the likely public benefits from the proposed conduct follows.

Transaction costs savings

49. APESMA submits that the Collective Bargaining arrangement is likely to reduce the transaction costs as a result of:

- a. conducting a single negotiation process rather than a series of individual negotiations between interpreters, translators, agencies and end users, and
- b. sharing the costs of obtaining professional advice in relation to collective negotiations.

50. Oncall advises that its preference is not to negotiate with individuals as this is time consuming, further, individual negotiations rarely if ever lead to vastly different overall engagement terms.

ACCC view

51. Generally, transaction costs can be lower where a single negotiating process is utilised, such as a collective bargaining arrangement, relative to a situation where multiple negotiation processes are necessary. This can especially be the case when the bargaining group consists of small business or self-employed individuals such as translators or interpreters.

52. In a circumstance where APESMA undertakes a single negotiation process with agencies and end-users on behalf of member translators and interpreters, the administrative costs associated with negotiation could be shared amongst the bargaining group and are likely to be lower.

53. A single process may also lead to more efficient outcomes regarding the terms of contracts for translators and interpreters relative to the current situation where they are offered individual contracts on a 'take it or leave it' basis. By pooling their resources in a single negotiation, the incentive to invest in negotiating a more efficient contract is increased.
54. As discussed in paragraph 44, APESMA submits that the likely outcome of the Collective Bargaining is that individual interpreters and translators will continue to individually negotiate their terms of engagement with agencies and end-users. In these circumstances, there are still likely to be some transaction cost savings resulting from collective bargaining. For example, access to relevant industry information and increased input into contractual negotiations provides a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their businesses, such as addressing common contractual issues in a more streamlined and effective manner (this is discussed in greater detail in the subsequent public benefit).
55. The ACCC considers that there are likely to be some transaction cost savings in a scenario where APESMA would undertake a single negotiation process on behalf of its members, although the likelihood of continued individual negotiation may limit these savings.

Improving access to information leading to better input into contracts

56. APESMA submits that currently, translators and interpreters are not able to enter into a true negotiation or bargaining process with either agencies or end-users, regarding the terms and conditions under which their services are provided. Instead, translators and interpreters are provided with a standard set of rates, terms and conditions on a 'take it or leave it' basis.
57. APESMA submits that pursuant to the Collective Bargaining arrangements, APESMA will be providing members with salary survey information including a range of remuneration that professionals are earning, broken down by seniority level, geographical area and type of employer, to assist members in considering what the fair rate of pay may be in their individual circumstances.
58. APESMA will also advise members on what factors to take into account when considering an appropriate rate of pay, including taxation, superannuation, professional indemnity insurance, and travel costs.
59. APESMA submits that providing interpreters and translators with such information will lessen the risk of this vulnerable group's "exploitation", and result in enhanced efficiencies in the contractual conditions negotiated by interpreters and translators.

ACCC view

60. Where there is information asymmetry, the party that is less informed may accept or contemplate different terms than it would if more information was available to it. Market outcomes may not, therefore, promote efficiency and welfare. Information asymmetry can often be addressed by improving the transparency of market information. If collective bargaining improves the availability and use of information, it has the potential to enable contracts to be negotiated that better reflect the needs of members of the bargaining group.
61. The ACCC accepts that translators and interpreters operating as independent contractors may have limited access to industry information, for example rates of pay

commensurate with their experience, and have little input into negotiations with agents and end users concerning their contractual terms and conditions, including fees.

62. The ACCC notes that APESMA intends to make the information afforded to its members publically available. Greater availability of information is likely to lead to a better understanding by agencies and end users about the factors affecting the future of the industry and may lead to more investment in the training and development of practitioners and recognition of experience and quality.
63. The ACCC also considers that more quality information provided to translators and interpreters by APESMA is likely to address the confusion amongst the profession about the rights and obligations associated with their engagement as either employees or contractors.
64. The availability of market information pursuant to the proposed Collective Bargaining arrangement is likely to improve the negotiating process by leading to a better understanding by the parties to the negotiations of the issues facing the sector. The proposed Collective Bargaining arrangement does not limit the ability of agencies or end users to tailor collectively negotiated contracts to individual circumstances where appropriate, to offer standard terms or conditions, or to deal directly with individual translators or interpreters.

Retention of skilled practitioners in the industry

65. APESMA submits that translators and interpreters perform vital services for the community, including:
 - a. maintaining the integrity of our courts and justice system
 - b. ensuring access to health care services and medical information
 - c. providing access and equity in relation to the delivery of human and immigration services
 - d. underpinning extensive commercial activity in a diverse range of business settings both domestically and internationally,

and that the retention of skilled practitioners is imperative to ensure a public benefit of high quality service.

66. APESMA submits that there are potential risks associated with less qualified practitioners providing interpreter and translator services, for example:
 - a. In a medical setting: lives may be endangered, families and individuals may experience severe stress and trauma, quality of life may be significantly reduced and additional unnecessary burden may be imposed on the health care system.
 - b. In the legal context: miscarriages of justice in the form of aborted trials, wrongful convictions, inappropriate sentencing, misunderstood bail conditions, community orders and/or charges.
 - c. In the immigration setting: protection visas and refugee applications may be wrongly granted, refused or cancelled.

67. AUSIT supports APESMA's concerns regarding the risks associated with the inability to retain skilled workers and submits that this "puts end-users such as patients in hospitals, plaintiffs and defendants in court, refugees in detention centres and others at risk of receiving inferior services with no avenue for redress."
68. AUSIT and Oncall submit that individual translators and interpreters have virtually no market power, and that their inability to negotiate appropriate terms will lead to ever decreasing remuneration and worsening conditions. Specifically, AUSIT submits that "interpreters have born[e] the bulk of so-called cost savings, both in monetary terms as well as conditions in public sector interpreting for the last 15 years [and] has led to interpreters being unable to upkeep their professionalism."
69. Oncall agrees that the Collective Bargaining arrangements may mean that conditions across the industry become more attractive for a skilled individual to enter the industry and will ensure higher quality of service delivery long term for the community.

ACCC view

70. As noted above, the ACCC accepts that the Collective Bargaining conduct is likely to result in more efficient outcomes, which may contribute to the development and retention of qualified interpreters and translators. This is likely to result in public benefit by ensuring that the services provided to the community are of a high standard, and will assist in minimising the risks outlined by APESMA.
71. The ACCC considers that the Collective Bargaining arrangements may enhance the bargaining power of interpreters and translators contracting with agencies and end-users. Ordinarily, this may not amount to a public benefit but rather a redistribution of revenue between the negotiating parties. However in these circumstances, enhanced bargaining power may promote more competitive outcomes. For example, the negotiation of more appropriate terms and conditions for practitioners may lead to greater investment in professional development and higher quality service provision, and ultimately a greater ability to attract and retain qualified practitioners in the industry.

ACCC conclusion on public benefits

72. The ACCC considers that the Collective Bargaining arrangements are likely to deliver some transaction cost savings for practitioners and end users, although these may be greater if APESMA negotiates terms of engagement on behalf of its translator and interpreter members.
73. The ACCC accepts that the Collective Bargaining arrangement is likely to provide translators and interpreters as well as end-users and agencies with improved access to information. This is likely to enable more effective input into contractual negotiations, resulting in more efficient outcomes.
74. To the extent that negotiated contracts better reflect the issues relevant to the industry, it is more likely that skilled and experienced practitioners will be attracted to and remain in the industry.

Public detriment

75. APESMA submits that little, if any public detriment or impact on competition is likely to result from the Collective Bargaining arrangement. APESMA submits that it is not a public detriment if the Collective Bargaining results in improved conditions for independent contractor interpreters and translators, such that they are engaged on terms

and conditions no less favourable than those contained in Federal or State awards, enterprise agreement or industrial instrument. Although end users may experience an increase in their expenses and costs, APESMA argues that this would be commensurate with improvements in conditions, such as minimum hours, and rates of pay for interpreters and translators, resulting in the public benefits outlined above.

76. The DIPB and VITS both submit that an increase in rates paid to interpreters and translators may put financial pressure on their agencies at a time where the government is under significant budgetary pressure to reduce expenditure. Any increased pay rates may result in the reduction of jobs being available to interpreters and translators, reducing services provided by the agencies to the community and business.
77. Further, DIPB and VITS submit that, due to their existing long term contractual obligations, they will be at a competitive disadvantage as they will be unable to pass through the additional cost from the Collective Bargaining arrangements to the end-user for the term of the contract.
78. Conversely, Oncall submits that the 4500 translators and interpreters on its books are free to operate for any agency, or directly supply their services to any end user. Therefore, Oncall submits it is difficult to see how the proposed Collective Bargaining arrangement could reduce competition. Further, Oncall submits that the capacity for practitioners to engage with Oncall collectively will have negligible effects on its business or its capacity to engage freely in the market.
79. The ACCC's assessment of the likely public detriments from the proposed Collective Bargaining arrangement follows.

ACCC view

80. In certain situations, collective bargaining arrangements can arguably reduce competition between members of the group - in this case competition for contracts to perform work as an interpreter or translator. However, arrangements that reduce competition can lead to increased prices to final consumers and reductions in quality or service delivery. However, the ACCC considers that the public detriments, including any anti-competitive effect, from APESMA's Collective Bargaining arrangement is likely to be limited.
81. The ACCC considers that the proposed conduct has the potential to give rise to limited public detriments, as:
 - a. participation in the collective bargaining is voluntary for APESMA members
 - b. there is no proposed boycott activity
 - c. there is limited scope of the bargaining group, and
 - d. the current level of negotiations between individual APESMA members and end-users are low.

Participation is voluntary

82. Participation in the Collective Bargaining is voluntary for both APESMA members and end users.

83. Further, the information provided by APESMA on relevant terms and conditions is for the guidance and assistance of members and they are free to negotiate and accept contract terms that suit their individual circumstances.

No boycott activity

84. APESMA has not sought authorisation to engage in collective boycott activity and the proposed arrangements do not impact on the ability for agencies and end users to negotiate directly with individual translators and interpreters.

85. The ACCC notes that APESMA members who consider themselves able to negotiate a more suitable commercial arrangement, irrespective of APESMA's input, are free to do so, and incentives for members to compete on price or quality of service will not be minimised. The ACCC considers that collectively negotiated contracts will only be entered into where both the individual APESMA member and the target consider it to be in their best commercial interest to do so.

Limited scope of the bargaining group

86. The ACCC notes that the coverage and composition of the bargaining group is small relative to the overall size of the industry - APESMA's membership comprises an estimated maximum of 4 per cent¹⁴ of all interpreters and translators Australia-wide (see paragraph 11). As such, the majority of practitioners fall outside the proposed Collective Bargaining conduct, and therefore competition amongst interpreters and translators is unlikely to be significantly affected.

The current level of negotiations are low

87. The ACCC accepts that the current level of negotiations between individual members of APESMA and end-users is low, such that members currently accept contracts on a take it or leave it basis. The difference between the level of competition with or without collective arrangements may also be small.

Competition outside the bargaining group

88. As noted above, agencies tender for work from Government and commercial end-users for the right to provide interpreter and translator services. Agencies will allocate work to fulfil their obligations under the tender, to interpreters and translators pursuant to individual contracts for service. If authorisation is granted, competition between agencies in tendering for interpreter and translator service contracts will remain unchanged.

ACCC conclusion on public detriments

89. APESMA's members currently comprise a very small proportion of interpreters and translators that operate in the industry. The ACCC considers that the Collective Bargaining arrangements are likely to result in minimal public detriment. Participation in the Collective Bargaining arrangement is voluntary and does not involve a collective boycott. As such an agreement will only be reached where both sides of the negotiation agree it is in their interests to do so.

Balance of public benefit and detriment

90. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, that the Collective Bargaining arrangement is likely to result in a public

¹⁴ Please see paragraph 11 for information on the size of APESMA's membership.

benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.

91. The ACCC considers that the Collective Bargaining arrangement is likely to result in public benefits in the form of improved quality of market information for interpreters and translators, and more effective input into their contractual negotiations, resulting in more efficient outcomes, and is likely to provide incentives for skilled and experienced practitioners to remain in the industry, reducing the risk of deficient service in critical areas. There is also likely to be some transaction cost savings.
92. The ACCC considers that any detriment is likely to be limited due to the voluntary nature of the conduct and the absence of boycott activity, APESMA's members comprising a very small proportion of the market, and the current low level of negotiations between APESMA members and their targets meaning that members are currently likely to accept contracts from end users on unfavourable conditions.
93. The ACCC considers that the public benefit would outweigh the limited public detriment including any lessening of competition that would be likely to result. Accordingly, the ACCC is satisfied that the relevant public benefits tests are met.

Length of authorisation

94. The ACCC considers it is appropriate to grant authorisation to APESMA for five years as requested by the applicant.

Draft Determination

The application

95. On 23 December 2013, the Association of Professional Engineers, Scientists and Managers, Australia (APESMA) lodged an application for authorisation (A91402) with the ACCC.
96. Application A91402 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 CCA. In particular, APESMA seeks authorisation to collectively negotiate the terms of engagement for its translator and interpreter members who operate as independent contractors, and to advise translators and interpreters in relation to what constitutes fair rates of pay and other terms of contracts for service.
97. Section 90A(1) of the CCA requires that before determining an application for authorisation the ACCC shall issue a draft determination.

The net public benefit test

98. For the reasons outlined in this draft determination, the ACCC considers that in all the circumstances the proposed Collective Bargaining conduct 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 CCA are met.¹⁵

99. The ACCC therefore **proposes to grant** authorisation to application A91402.

Conduct which the ACCC proposes to authorise

100. The ACCC proposes to grant authorisation A91402 for five years to APESMA to:

- a. collectively negotiate the terms of engagement for translators and interpreters who operate as independent contractors and provide interpreting and translating services to the various principal contractors and end-users with whom they contract, and
- b. to advise translators and interpreters in relation to what constitutes fair rates of pay and other terms of contracts for service.

101. The ACCC proposes to grant authorisation to current members of APESMA's Translator and Interpreter Division as well as to members that may join APESMA's Translator and Interpreter Division in the future.¹⁶

102. The authorisation does not extend to APESMA or its members engaging in boycott activity.

103. This draft determination is made on 16 April 2014.

Further submissions

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

¹⁵ See Attachment A.

¹⁶ Under section 88(10) of the CCA.

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.