



Australian  
Competition &  
Consumer  
Commission

# Draft Determination & Interim Authorisation

Application for authorisation

lodged by

TLS Association Pty Ltd & TLA  
Australia Ltd

in respect of

collective bargaining on behalf of its  
Telstra Licensed Shop members

Date: 18 February 2016

Authorisation number: A91521

Commissioners: Sims  
Rickard  
Schaper  
Cifuentes  
Court  
Featherston  
Walker

## Summary

The ACCC proposes to grant authorisation for ten years to TLS Association Pty Ltd (TLS PL) & TLA Australia Ltd (TLA LG) (collectively, TLA) to engage in collective negotiations on behalf of Telstra Licensed Shops and/or Telstra Business Centres members (Members) with suppliers of products and services to these members. TLA Members are independent small business retailers of telecommunications devices and associated products and services operating in every state and territory in Australia. TLA is comprised of 127 Members (237 outlets) which represents 62 per cent of the Telstra Licensed Outlets nationally.

The ACCC previously authorised similar arrangements in 2011 and this authorisation expires on 18 March 2016 (A91250). The ACCC has also decided to grant interim authorisation to enable TLA to continue to collectively bargain on behalf of its Members while the ACCC completes its assessment. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC revokes interim authorisation.

**Next steps:** The ACCC now seeks submissions in relation to this draft determination before making its final decision.

## The application for authorisation

1. On 24 December 2015, TLS Association Pty Ltd (TLS PL) & TLA Australia Ltd (TLA LG) (collectively, TLA) lodged an application for authorisation (A91521) with the ACCC. TLA is seeking authorisation for a period of ten years to collectively negotiate discounts and rebates on behalf of its Telstra Licensed Shops and/or Telstra Business Centres members with suppliers of products and services to these licensed shops and centres. TLS PL has an existing authorisation for similar arrangements, expiring on 18 March 2016 (A91250).
2. On 12 January 2016, TLA requested interim authorisation to ensure that there is no gap for statutory protection when the authorisation A91250 expires and the final determination by the ACCC in relation to this application.
3. The ACCC is now seeking submissions in response to this draft determination.

## The Proposed Conduct

4. TLA seeks authorisation to collectively negotiate on behalf of its Telstra Licensed Shops and/or Telstra Business Centres members (collectively, Members) with suppliers of products and services to these Members (**Preferred Suppliers**) (the **Proposed Conduct**). TLA provided a list of 60 current Preferred Suppliers with its application. The TLA expects that it will identify new suppliers to negotiate with on behalf of its Members in response to innovation in the telecommunications industry as new products and services emerge. The Proposed Conduct relates to both current Preferred Suppliers and future unnamed suppliers that may become Preferred Suppliers over time.
5. The goods or services supplied to Members by Preferred Suppliers include mobile phones, mobile phone accessories, cordless home phones, computer products, insurance services, shop fit out services, computer software, travel and consulting services.

6. TLA submits that its Members may be encouraged to use a Preferred Supplier because of the discounts offered over usual wholesale rates.
7. The Proposed Conduct will not extend to TLA or its Members engaging in collective boycott conduct. Participation in the Proposed Conduct by suppliers and Members is voluntary.
8. TLA submits that in most cases:
  - the price for the product is negotiated by TLA and the products are then ordered directly from the supplier by the Member or their business
  - the products are dispatched by the supplier directly to Members which are then invoiced by the supplier
  - at the end of a defined sales period, the Preferred Supplier may pay a commission to TLA based on a negotiated percentage of ex-GST sales to Members during that period.
9. However, in some instances the product is purchased from the supplier by TLA who then arranges shipment to a Member and invoices the Member for that product. The price charged to Members by TLA in this case may include a margin to allow for costs and profit.
10. TLA submits that the discount or rebates negotiated with Preferred Suppliers is in consideration of the volume of products sold to Members and for marketing and promotion of the Preferred Supplier's products and services to Members by the TLA.

## Background

11. TLA is a buying, marketing and advertising group comprised of members who are licensees under individual agreements with Telstra Corporation Limited to operate outlets known as Telstra Licensed Shops and/or Telstra Business Centres.
12. TLA is not a part of the Telstra Corporation and hence cannot leverage its size and power for collective bargaining negotiations.
13. Telstra Licensed Outlets supply telecommunications devices and associated products and services in every State and Territory in Australia.
14. Membership of TLA is voluntary. TLA's 127 Members represent 237 Licensed Outlets or 62% of the total number of Telstra Licensed Outlets nationally.
15. The Proposed Conduct was previously authorised under Authorisation A91250 for TLS PL on 24 February 2011 for five years. Authorisation A91250 expires on 18 March 2016 and TLS PL wishes to continue the authorised conduct.
16. TLS PL is undergoing a corporate restructure which will result in its members being represented by a new entity, TLA LG, which will conduct the collective bargaining that is currently authorised under A91250. Members of TLS PL will be migrated to TLA LG as part of the restructure.

## ACCC assessment

17. The ACCC's assessment of the Proposed Conduct is in accordance with the relevant net public benefit tests<sup>1</sup> contained in the *Competition and Consumer Act 2010* (the **CCA**).

18. The ACCC has taken into account:

- the application and submissions received from the applicants;
- other relevant information available to the ACCC, including information from consideration of previous matters<sup>2</sup>;
- the likely future without the Proposed Conduct<sup>3</sup>. In particular, the ACCC considers that, without the Proposed Conduct, it is likely TLA Members would negotiate and purchase goods and services separately;
- the relevant areas of competition impacted by the Proposed Conduct: being those for each of the products (goods or services) over which TLA would negotiate, particularly the wholesale acquisition of telecommunications related items by TLA Members in every State and Territory in Australia. In addition, the Proposed Conduct may impact the retail supply of telecommunications devices and associated items to consumers;
- that TLA has requested authorisation for ten years; and
- that TLA is not proposing collective boycotts and Members and suppliers can decide whether or not to participate in the Proposed Conduct.

## Public benefits

19. The ACCC considers that the Proposed Conduct is likely to result in the public benefits, including:

- **Transaction cost savings:** An individual TLA member negotiating with a supplier will incur transaction costs, such as the time taken to negotiate and from obtaining legal and other expert-advice. The supplier will also incur transaction costs in negotiating with individual customers. Individual negotiations will stop when the costs of continued negotiation outweigh the expected benefits for either party. At this point, it is likely that the contract will not fully capture the potential mutual benefits from trade. It may in fact mean that no negotiation occurs at all and customers are effectively provided with a standard-form contract prepared by a supplier. Collective bargaining is likely to result in public benefits from transaction cost savings, including the sharing of advisor costs for TLA members. By reducing the costs of negotiating for all parties, it is likely that more contractual issues can be addressed, because each party can obtain the benefit from negotiating these issues at less cost to itself, resulting in

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<sup>1</sup> Subsections 90(5A), 90(5B), 90(6) and 90(7) of the CCA.

<sup>2</sup> See A91513 (2016) for The Australian Hotels Association State and Territory Divisions (draft determination), A91250 (2011) for TLS Association Pty Ltd, A91488 (2015) for Liquor Stax Australia Pty Ltd and A91407 (2014) for Australian Newsagents Federation. See also, for example, A91467 (2015) for Tasmanian Farmers and Graziers Association (collective negotiation of growing contracts).

<sup>3</sup> For more discussion see paragraphs 5.20-5.23 of the ACCC's Authorisation Guidelines.

more comprehensive and efficient contracts of greater benefit to all parties.

- **Improved input into contracts:** individual negotiations between small businesses and large suppliers can result in standard form contract terms weighted in the supplier's favour. When negotiating with large suppliers, small businesses can be at a disadvantage in terms of resources and negotiating experience. One way in which a small business can seek to redress such disadvantage is to bargain collectively. Collective bargaining may allow for more effective negotiation, where the negotiating parties have a greater opportunity to identify and achieve business efficiencies that better reflect the circumstances of TLA Members, in relation to common issues. Collective bargaining is also likely to enable members of the bargaining group to become better informed of relevant market conditions, which is likely to improve their input into contractual negotiations with suppliers to achieve more efficient outcomes.
- **Increased retail competition and lower prices for consumers:** TLA is likely to have more bargaining power than an individual Member, and may therefore be able to negotiate better terms and conditions of supply on behalf its Members. As a result of the collective negotiations, Telstra Licensed Shops may be able to acquire their telecommunications products and general business services at lower prices. To the extent that the savings to Members are passed on to consumers in the form of lower prices, discounts and/or free products there is likely to be an increase in competition at the retail level which would also be a public benefit.

## Public detriments

20. The ACCC considers that in some cases collective bargaining could lessen competition and efficiency. However, the ACCC considers that the Proposed Conduct in this case is likely to result in limited public detriment for the following reasons:

- Collectively TLA Members represent only a small proportion of buyers of the relevant goods and services.
- TLA members face significant competition at the retail level for the sale of telecommunications devices and associated products.
- Participation in the arrangements is voluntary for Preferred Suppliers and Members.
- The composition of the bargaining group is limited to Members.
- The arrangements do not involve any collective boycott activity.

21. Overall, the ACCC considers that the Proposed Conduct is unlikely to result in significant public detriments.

## Balance of public benefit and detriment

22. The ACCC considers that the Proposed Conduct is likely to result in public benefits from transaction cost savings and improved contract terms than would be the case if Members negotiated with suppliers individually. Given the level of competition at the retail level these savings may be passed on to consumers

which would also be a public benefit. The ACCC does not consider that there will be significant public detriment from the Proposed Conduct.

23. Therefore the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit that would outweigh the likely public detriment, including the detriment constituted by any lessening of competition likely to result.

24. Accordingly, the ACCC is satisfied that the relevant net public benefit test is met and the ACCC proposes to grant authorisation to the Proposed Conduct.

## **New suppliers and TLA Members**

25. TLA is seeking authorisation to enable it to collectively bargain with current and future Preferred Suppliers. It has identified a current list of 60 Preferred Suppliers but indicated that this may change over time. TLA submits that when it seeks to negotiate with new suppliers it will explain the collective bargaining process and the nature of any ACCC authorisation under which it operates and will seek the supplier's consent to deal with TLA on a collective basis.

## **Length of authorisation**

26. TLA is seeking authorisation for ten years. It has submitted that:

- the conduct has already been authorised for five years with no issue
- the existing authorisation (A91250) has delivered 'comparative success'
- ten years would provide TLA with a viable period in which to further develop and sustain TLA as an effective buying group and allow TLA to enter into long-term agreements with prospective suppliers.

27. Where arrangements have already been in place for a period of time, as is the case here, the ACCC may consider it appropriate to grant authorisation for a longer period. Given the ACCC's conclusion on the balance of public benefits and public detriments, the ACCC is proposing to grant authorisation for ten years.

## **Draft determination**

### **The application**

28. Application A91521 was made using Form B, under subsection 88 (1 and 1A) of the CCA, for the Proposed Conduct.

29. TLA has sought authorisation for provisions that might otherwise be cartel provisions and/ or might have the purpose or effect of substantially lessening competition. Subsection 90A (1) of the CCA requires that, before determining an application for authorisation, the ACCC shall prepare a draft determination.

## **The net public benefit test**

30. For the reasons outlined in this draft determination, the ACCC is satisfied, pursuant to sections 90(5A), 90(5B), 90(6) and 90(7) of the CCA, that in all the circumstances the Proposed Conduct is likely to result in a public benefit that would outweigh any likely public detriment, including the detriment constituted by any lessening of competition likely to result.

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

31. The ACCC proposes to grant authorisation to TLA for ten years to collectively negotiate on behalf of its Telstra Licensed Shops and/or Telstra Business Centres members with current and future 'Preferred Suppliers' for provision of products and services to these members.
32. The ACCC notes that TLA will:
- seek any new supplier's consent to deal with TLA on a collective basis, and
  - explain the collective bargaining process and the nature of any ACCC authorisation under which it operates to the future suppliers.
33. The ACCC does not propose to grant authorisation for the Applicants to engage in collective boycott activity.
34. This draft determination is made on 18 February 2016.

## **Interim authorisation**

35. TLA has sought interim authorisation in the event that the ACCC does not finalise the current authorisation process by the time the existing authorisation expires on 18 March 2016.
36. The ACCC has decided to grant interim authorisation to the Proposed Conduct. The ACCC notes:
- for the reasons identified in this draft determination, the Proposed Conduct appears likely to result in public benefit that would outweigh any likely public detriment
  - granting interim authorisation is unlikely to permanently alter the competitive state of the market if the ACCC later denied final authorisation
  - there is unlikely to be harm to any party if interim authorisation is granted because participation in the Proposed Conduct is voluntary.
37. 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.

## **Next steps**

38. The ACCC now seeks submissions in response to this draft determination. In addition, consistent with section 90A of the CCA, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.