



Draft Determination

Application for revocation of AA1000435 and the substitution of
authorisation AA1000663

lodged by

The Recruitment, Consulting and Staffing Association Limited

in respect of

its Professional Conduct Regime

Authorisation number: AA1000663

24 April 2024

Commissioners: Lowe
Carver

Summary

The ACCC proposes to grant authorisation to The Recruitment, Consulting and Staffing Association Limited to enable it to continue to operate parts of its professional conduct regime (as defined in paragraph 1.4) which sets out professional standards for, and regulates the conduct of, its members in relation to the provision of recruitment and human resources services.

The ACCC previously granted authorisation to RCSA in 2019 for similar conduct. This authorisation is due to expire on 8 August 2024.

The ACCC considers the conduct will continue to result in public benefits by improving professional standards in the industry and reducing information asymmetry among market participants. The ACCC considers the conduct is likely to result in minimal public detriments.

The ACCC proposes to grant authorisation for 10 years.

The ACCC invites submissions in relation to this draft determination before making its final decision.

1. The application for authorisation revocation and substitution

- 1.1. On 18 March 2024, the Recruitment, Consulting and Staffing Association Limited (**RCSA**) lodged an application with the Australian Competition and Consumer Commission (the **ACCC**) to revoke authorisation AA1000435 and substitute authorisation AA1000663 for the one revoked. RCSA is seeking authorisation for the conduct for 10 years.
- 1.2. This application for revocation and substitution was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). If granted, an authorisation provides businesses with protection from legal action under the competition provisions in Part IV of the Act. The ACCC has a discretion to grant authorisation but must not do so unless it is satisfied in all the circumstances that the conduct would result in benefit to the public that would outweigh any likely public detriment (ss 90(7) and 90(8) of the Act (the **authorisation test**)).

The Conduct

- 1.3. In general terms, RCSA is seeking authorisation for parts of its professional conduct regime, which sets out the professional standards for, and regulates the conduct of, its members in relation to the provision of recruitment and human resources services (the **Professional Conduct Regime**). At a high level, these professional standards relate to the manner in which recruitment agencies and other service providers deal with job seekers and employers, and the ways in which RCSA members interact with each other in providing those services.

- 1.4. The documents RCSA is seeking authorisation to give effect to are as follows:¹
- RCSA's Code of Professional Conduct (the **Code**), which specifies and guides standards for ethics, probity, and professional conduct
 - RCSA's Professional Conduct and Grievance Intervention Guidelines (**Professional Conduct Guidelines**)
 - Specific clauses of RCSA's Constitution, identical to those previously authorised²
 - Specific clauses of RCSA's By-Laws, identical to those previously authorised³
- (the **Conduct**).
- 1.5. The ACCC notes that RCSA maintains a competition law policy to assist its members in understanding and complying with their obligations under the Act and requires a competition law compliance statement to be read out at the commencement of any meetings or discussions between RCSA members related to or formed under the Conduct. The ACCC understands that RCSA will continue these measures for the duration of the authorisation, if granted.
- 1.6. RCSA is seeking authorisation to continue to enter into arrangements pursuant to the Professional Conduct Regime which give rise to exclusionary conduct and third line forcing conduct may involve breaches of the Act, namely:
- Agreements between competitors, which may result in restricting the supply of services. For example, restricting membership to persons compliant with the Code and imposing sanctions for breaches of the Code.
 - A requirement that RCSA members supply sponsorship and franchise services to other parties, on condition that those other parties also obtain RCSA membership.

2. Background

- 2.1. RCSA describes itself as the peak industry body for recruitment, staffing and workforce solutions in Australia and New Zealand. RCSA represents thousands of companies and brands as corporate members.⁴
- 2.2. RCSA submits that it promotes and facilitates professional practice within the recruitment and staffing industry and that it sets the benchmark for industry standards through representation, education, research and business advisory support to its member organisations and accredited professionals who are bound by RCSA's Code through membership.

¹ RCSA's Code, Professional Conduct Guidelines, Constitution and By-Laws are available on the [ACCC's public register](#).

² Specifically, clause 2.1 (Classes of Membership), clause 2.2 (Criteria for Membership), clause 2.8 (Exclusion or Suspension or other sanctions), clause 8.3 (By Laws), and clause 15 (Dispute Resolution).

³ Specifically, clause 1.1(b) (Membership Extension Principle) and clause 1.10 (Objections to Membership).

⁴ The association also includes two internal member groups; the first comprising nursing agencies, the Association of Nursing Recruitment Agencies; and another comprising medical recruiters, the Association of Medical Recruiters Australia and New Zealand.

Previous authorisations

- 2.3. The ACCC has previously granted authorisation to RCSA on 4 occasions, each time for 5 years.
- 2.4. The current authorisation (AA1000435) was granted on 8 August 2019 until 8 August 2024. On 17 December 2021, the ACCC granted a minor variation to AA1000435 following amendments to RCSA's Constitution and Professional Conduct Guidelines.⁵

Changes to the Code since Authorisation AA1000435

- 2.5. RCSA submits that it has made 2 changes to the Code, one being an extended definition of 'exploitation' which raises the standard of behaviour, and the second which brings non-member volunteers into being bound by the Code.
- 2.6. RCSA submits that the Code has been amended in response to feedback from RCSA members since the ACCC's previous authorisation. RCSA further submits that these changes are intended to extend the boundaries of the Code in an effort to disseminate the highest industry standards possible.

Changes to the Professional Conduct Guidelines since Authorisation AA1000435

- 2.7. RCSA submits that its revised Professional Conduct Guidelines will improve the management of professional conduct issues within the organisation, enhance efficiency, clarity, and fairness in addressing professional conduct matters.
- 2.8. RCSA submits that the changes to the Professional Conduct Guidelines include:⁶
 - remodelling 'Structured Listening' as conciliation within the RCSA Registry function with the ability for the Professional Conduct Registrar⁷ to make a recommendation, and enhancing counselling services for members
 - establishing a pathway to allow members to make informal commitments with the Professional Conduct Registrar
 - empowering the Professional Conduct Review Committee⁸ to engage in conciliation before formal investigation
 - restricting legal representation in favour of collaborative approaches. This will be furthered in simplifying guidelines
 - highlighting the authority to require members to contribute to costs, as well as the flexibility in setting time limits
 - clarifying who can trigger the Summary Show Cause
 - streamlining complex Arbitration procedures to refer to either the Constitution model or Commercial Arbitration Rules.

⁵ Previous authorisations are available on the [ACCC's public register](#).

⁶ A more detailed summary of these changes is provided in Attachment C (Summary of key updates to PCGIG) to the [Application](#).

⁷ The Professional Conduct Registrar's role is to receive grievances, facilitate their handling, coordinate a panel of members, provide information about the Code, and may make recommendations or accept written commitments.

⁸ The Professional Conduct Review Committee's role is to make professional conduct recommendations, direct investigations, make findings about member conduct, recommend sanctions to the Board.

3. Consultation

- 3.1. The ACCC invited submissions from a range of potentially interested parties including the Fair Work Commission, the Fair Work Ombudsman, State authorities, RCSA members and other recruitment/staffing associations.
- 3.2. The ACCC received no submissions from interested parties in relation to the application.
- 3.3. The ACCC now invites submissions in response to this draft determination by 10 May 2024.

4. ACCC assessment

- 4.1. RCSA has sought authorisation for Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act or constitute exclusive dealing within the meaning of section 47 of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsections 90(7) and 90(8) of the Act,⁹ the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result.
- 4.2. To assist with the assessment of the Conduct, the ACCC considers that:
 - the relevant area of competition likely to be affected is the provision of recruitment and workforce services in Australia; and
 - that the likely future without the Conduct is that RCSA's Professional Conduct Regime would remain in place. However, there would be less of an incentive for RCSA members to adhere to the Code, as RCSA would not have statutory protection to enforce the Professional Conduct Guidelines, which include imposing sanctions for Code breaches.

Public benefits

- 4.3. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that in considering public benefits:

... we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.¹⁰

- 4.4. RCSA submits that the Conduct has delivered and will continue to deliver public benefits, including:
 - promoting equitable dealings in the workforce services market

⁹ See subsection 91C(7).

¹⁰ Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

- providing improved means of continuing effective regulation through assisting members to act ethically and professionally within the workforce services industry and providing effective grievance intervention mechanisms
 - fostering business efficiency to the extent to which the arrangements provide for efficient business models (supplier transition) and facilitate faster resolution of grievances
 - enabling market participants to make decisions that are more informed
 - providing consistency in behavioural standards where state and territory legislation is misaligned.
- 4.5. RCSA further submits that the proposed arrangements will assist members to act professionally and ethically and reduce the risk that parties who deal with members (work seekers; business consumers; other service suppliers) will be exposed to unprofessional conduct.
- 4.6. RCSA has provided case study information¹¹ on how the Professional Conduct Regime is conducted and the outcomes achieved. RCSA submits that the case study information provides evidence of how the Professional Conduct Regime has assisted members to act professionally and ethically. RCSA submits that 94% of grievance requests received are accepted for intervention, demonstrating a high level of intervention and integrity in the consideration of all matters received.
- 4.7. The ACCC has assessed RCSA's public benefit claims and considers RCSA's Professional Conduct Regime is likely to raise professional standards in the industry and in turn result in a reduction of information asymmetry by providing market participants (including job seekers and employers) with an indication that RCSA members' professional conduct adheres to a particular standard.

Improved professional standards and reduction of information asymmetry

- 4.8. Information asymmetry can arise between: a) service providers and their clients; b) service providers and work seekers; or c) service providers and other service providers. In these circumstances, those seeking to acquire and supply labour market services may have insufficient information to make informed and efficient decisions.
- 4.9. The ACCC considers that information asymmetries may lead to work seekers and clients choosing not to engage with workforce services providers at all in circumstances where it would be beneficial for them to do so. For example, due to search costs of distinguishing between service providers, and uncertainty about which service providers may be more likely to perform to a high standard versus those that would not.
- 4.10. The ACCC considers RCSA's Professional Conduct Regime is likely to reduce this imbalance and to result in a public benefit by: firstly, raising standards in the industry so that unprofessional or inappropriate conduct becomes less likely; and secondly by providing job seekers and clients with an assurance that by choosing to deal with an RCSA member, they can expect a high standard of ethical conduct and professional behaviour. In turn, job seekers can make more efficient and informed decisions about which recruitment services provider is likely to best suit their needs.

¹¹ See Attachment F of the [Application](#).

4.11. In particular, the ACCC considers that:

- There is some evidence that RCSA's Professional Conduct Regime has been effective in raising professional standards to date. Specifically, the level of non-compliance with the Code appears to be low. We consider that RCSA prefers less stringent forms of intervention backed by the threat of sanctions and note that, should this reflect a reluctance to impose sanctions where they are warranted, this could in turn make the threat of sanctions less credible and less effective in deterring misconduct in the first instance. While RCSA has only imposed sanctions on a few occasions in the past, and sanctions were not imposed at all under AA1000435, the ACCC does not have evidence to indicate that sanctions have not been imposed where appropriate.¹² In addition, the ACCC notes that RCSA has used the protection provided by authorisation to refuse membership to applicants that it does not consider suitable for membership.¹³
- As a voluntary association, those who choose to become RCSA members¹⁴ may be more likely to comply, or intend to comply, with the standards specified in the Code. Further, the threat of sanctions, including expulsion, creates an additional incentive for members to engage with RCSA's compliance pathways that are more conciliatory and less stringent, and reduces the risk of non-compliance or refusal to engage with compliance measures. The ACCC considers that RCSA's educative and cooperative approach, supported in part by the threat of sanctions, has encouraged engagement with its intervention methods, and is likely to result in public benefits.
- This said, in considering any future application for authorisation, the ACCC will look for evidence that RCSA is undertaking effective enforcement and compliance activities leading to appropriate deterrence. Evidence that RCSA has not imposed sanctions, where they would have been appropriate for delivering specific and general deterrence, would raise concerns as to whether the benefits arise to the extent claimed.
- The operation and enforcement of RCSA's Professional Conduct Regime is likely to incentivise higher levels of equitable dealings and facilitate effective self-regulation of professional operational standards in the employment services market. RCSA's Professional Conduct Regime sets standards that are above those required by the law and its guidance material specifies and guides how members should approach specific situations. RCSA submits its guidance materials work alongside the Code in raising professional standards across the industry on a broader range of issues.

The ACCC considers that higher standards and guidance materials are likely to promote equitable dealing and foster efficiency by providing consistent and appropriate approaches that members can adopt in their dealings.

¹² RCSA submits that faced with the threat of sanctions, some members have chosen to adopt Professional Conduct Recommendations, resolved grievances, entered into undertakings with RCSA or surrendered or lapsed their membership: See RCSA's response to ACCC's Information Request on the public register.

¹³ RCSA submits that it has refused membership on 2 occasions under AA1000435: See RCSA's response to ACCC's Information Request on the public register.

¹⁴ RCSA submits that it has a membership pool that roughly equates to 60% of the turnover of these markets: see page 4 of the [Application](#).

- Any confusion that could arise about whether individual service providers who form part of the same franchise or corporate group are all RCSA members and are all bound by the Professional Conduct Regime is likely to be prevented by the potential third line forcing conduct arising from the Membership Extension Principle.¹⁵ For example, if a franchisor represented itself as an RCSA member it could be unclear as to whether all franchisees are also bound by the Professional Conduct Regime. In any event, the ACCC considers the potential third line forcing conduct is only likely to affect a small number of RCSA members.
- To the extent that regulation of the recruitment industry is not uniform across Australia, and to the extent statutory regulations do not capture all professional conduct matters, RCSA's Professional Conduct Regime is likely to result in the promotion of consistency across the industry for higher standards of services, ethics, and professional conduct.

Public detriments

4.12. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...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.*¹⁶

4.13. RCSA submits that any detriments to the public resulting from the Conduct are minimal, and its Professional Conduct Regime is unlikely to result in anticompetitive behaviour in the supply of recruitment and workforce services.

Access to RCSA services

4.14. Membership of RCSA may provide an advantage to recruitment service providers over those that choose not to become members as members hold themselves to a higher professional conduct regime than is required by law. This may make RCSA members more attractive to job seekers and potential employers. If members are inappropriately expelled or not accepted as members, this may impact on their ability to compete to provide recruitment services.

4.15. However, the ACCC considers that this anticompetitive detriment is unlikely, as:

- RCSA membership is voluntary, open to all eligible service providers, and is not a necessary requirement for recruitment, consulting, and on-hire service providers. Alternative industry associations are available (for example, APSCo Australia). These associations may constrain RCSA where work seekers and clients give weight to membership of an association (but not specifically RCSA) in their dealings.
- The ACCC has not received any evidence that RCSA has refused membership in an inappropriate or anticompetitive manner.

¹⁵ The 'Membership Extension Principle' allows RCSA to require a franchisor or corporate group to include its franchisees or related entities involved in providing the same or similar services in any application for RCSA membership or to assume responsibility for the franchisee/related entity's conduct that may be inconsistent with the Code: see clause 1.1(b) of RCSA's By-Laws.

¹⁶ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- RCSA's Professional Conduct Regime contains a dispute resolution and appeals process. The ACCC has not received any evidence to suggest it is not administered in a fair and transparent way.
- While some franchises and corporate groups may be precluded from becoming members under the Code unless they also require their franchisees and related entities to also become members, it is not a requirement to join RCSA to provide recruitment services. Businesses will elect to sign up if they see benefit to the group. In any event, the incidence of such arrangements is not so great as to suggest that any substantial lessening of competition in the provision of recruitment services would result from this Membership Extension Principle.

Reduced competition between recruitment service providers

- 4.16. The ACCC does not consider the Conduct will reduce competition between recruitment service providers. This is because the regime is not likely to facilitate the sharing of information and coordination between competitors in relation to fees and/or broader conduct, resulting in a reduction of choice for consumers and/or leading to higher prices (and/or lower wages).
- 4.17. The ACCC considers that the risks of detriment in the form of reduced choices and/or higher prices are low, as RCSA's Professional Conduct Regime relates to professional standards and dispute resolution procedures and not fees, wages and/or broader conduct.
- 4.18. The Conduct may result in public detriment if RCSA does not hold members to higher professional standards than those required by legislation and does not impose appropriate sanctions for non-compliance. Work seekers or businesses might engage RCSA members over other market participants due to an impression of a higher level of disciplinary (as opposed to compliance) intervention than is accurate.
- 4.19. However, the ACCC considers that RCSA's Professional Conduct Regime clearly sets out its preference for early guidance, conciliation, and compliance measures over the imposition of sanctions. RCSA has published guidance materials to assist in interpreting the Code, including periodic public statements of strategic intent, Code guidelines, and consensus statements. The ACCC further considers that detriment of this form is unlikely so long as there is a high level of member compliance with RCSA's Professional Conduct Regime regardless of the type of disciplinary activity undertaken by RCSA.

Balance of public benefit and detriment

- 4.20. For the reasons outlined in this draft determination, the ACCC is satisfied that the Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Conduct.

Length of authorisation

- 4.21. The Act allows the ACCC to grant authorisation for a limited period of time.¹⁷ This enables 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.

¹⁷ Subsection 91(1) of the Act.

- 4.22. In this instance, RCSA seeks authorisation for 10 years.
- 4.23. RCSA submits that a 10-year authorisation period is appropriate given the length of time the Code has been in operation.
- 4.24. In 2019, the ACCC granted authorisation to RCSA for 5 years because RCSA had submitted a substantially amended regime in response to significant changes in its regulatory environment. However, we consider that the circumstances of the current application differ from 2019.
- 4.25. Accordingly, the ACCC considers that the time period sought in the current application is appropriate.

5. Draft determination

The application

- 5.1. On 18 March 2024, RCSA lodged an application to revoke authorisation AA1000435 and substitute authorisation AA1000663 for the one revoked. This application for authorisation AA1000663 was made under subsection 91C(1) of the Act.
- 5.2. The documents RCSA is seeking authorisation to give effect to are as follows:
- RCSA's Code of Professional Conduct (the **Code**), which specifies and guides standards for ethics, probity, and professional conduct
 - RCSA's Professional Conduct and Grievance Intervention Guidelines (**Professional Conduct Guidelines**)
 - Specific clauses of RCSA's Constitution, identical to those previously authorised¹⁸
 - Specific clauses of RCSA's By-Laws, identical to those previously authorised¹⁹
- (the **Conduct**).
- 5.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.4. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Conduct.
- 5.5. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Conduct, including any lessening of competition.
- 5.6. Accordingly, the ACCC proposes to grant authorisation.

¹⁸ Specifically, clause 2.1 (Classes of Membership), clause 2.2 (Criteria for Membership), clause 2.8 (Exclusion or Suspension or other sanctions), clause 8.3 (By Laws), and clause 15 (Dispute Resolution).

¹⁹ Specifically, clause 1.1(b) (Membership Extension Principle) and clause 1.10 (Objections to Membership).

Conduct which the ACCC proposes to authorise

- 5.7. The ACCC proposes to revoke authorisation AA1000435 and grant authorisation AA1000663 in substitution. Authorisation AA1000663 is for the Conduct, as defined in paragraph 5.2.
- 5.8. The ACCC proposes to grant authorisation in relation to Division 1 of Part IV of the Act and sections 45 and 47 of the Act for 10 years.
- 5.9. This draft determination is made on 24 April 2024.

6. Next steps

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