

Determination

Application for Authorisation

lodged by

**Australian Newsagents' Federation Ltd and
Queensland Newsagents' Federation Ltd**

to engage in collective negotiations on behalf of newsagents
with the publishers and distributors of newspapers and
magazines

Date: 28 April 2004

Authorisation No:

A90804

Commissioners:

Sylvan

Martin

McNeill

Public Register No:

C2001/1439

Executive Summary

The application

On 12 October 2001, the Queensland Newsagents' Federation (the QNF) lodged application for authorisation No A90804 with the Australian Competition and Consumer Commission (the Commission). On 24 December 2001, the QNF advised the Commission that the Australian Newsagents' Federation (the ANF) would take over the Application.

On 29 April 2002, the ANF and the QNF jointly lodged an amended application. Further substantial amendments limiting the scope of the proposed arrangements were made by letter dated 29 August 2002. Finally, in October 2003 (following the Commission's release of a draft decision in June 2003), both the ANF and the QNF lodged submissions further narrowing the scope of the proposed arrangements and suggesting possible bargaining mechanisms to the Commission.

Broadly, authorisation is sought to engage in collective negotiations on behalf of member newsagents with major publishers and distributors of newspapers and magazines.

The authorisation process

A key objective of the *Trade Practices Act 1974* (the TPA) is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.

The TPA, however, allows the Commission to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the Commission for what is known as an 'authorisation'.

Broadly, the Commission may 'authorise' parties to engage in anti-competitive conduct where it is satisfied that the public benefit flowing from the conduct outweighs any public detriment from any lessening of competition. However, even if this is not the case, it may be still be possible for the Commission to grant authorisation where conditions can be imposed which, for example, reduce the public detriment so that it is less than the public benefit.

The Commission conducts a comprehensive public consultation process before making a draft decision and ultimately a final decision to grant or deny authorisation.

The Commission issued a draft decision in relation to this matter on 13 June 2003, proposing to deny authorisation to the application. Broadly, the Commission was concerned that the scope of the proposed arrangements (as they then stood) gave rise to potentially significant anti-competitive detriment that was not outweighed by any public benefits flowing from the proposed arrangements.

As noted above, since that time the applicants have significantly narrowed the scope of their proposed arrangements.

The Commission's assessment of the application

The Commission has considered the public benefits and anti-competitive detriment that are likely to flow from the arrangements for which authorisation is sought.

Public benefit

The Commission considers that the proposed arrangements, as they now stand, give rise to a small public benefit in that allowing newsagents to engage in collective negotiations with major publishers/distributors may redress an imbalance of bargaining power and provide newsagents with greater input into their contracts. This, in turn, may result in the negotiation of more commercially appropriate contract terms than is currently possible.

Public detriment

The Commission considers that the anti-competitive detriment flowing from the proposed arrangements is likely to be limited due to:

- the voluntary nature of the arrangements;
- the absence of any collective boycott activity;
- the limited number of publishers/distributors involved;
- the limited level of individual negotiation currently occurring;
- the ability of publishers/distributors to refuse to participate; and
- the constraints imposed on participating newsagents by the existence of other possible distribution chains for publishers/distributors.

The Commission notes that many of its concerns about the anti-competitive effect of the proposed arrangements, as expressed in the draft decision, have been addressed by the applicants.

Conclusion

The Commission considers that the proposed arrangements give rise to a small public benefit, and limited public detriment.

Where it is difficult to determine precisely the magnitudes of public benefit and detriment that appear to be of similar size – as is the case here – there may be some uncertainty about whether the public benefit outweighs the public detriment.

In these cases, the Commission will generally not be satisfied that the public benefit generated by the application outweighs the anti-competitive detriment. However, it may consider whether it is possible to grant authorisation subject to conditions aimed at reducing, as far as possible, any uncertainty about whether the public benefit is greater than the anti-competitive detriment. These conditions would either seek to increase the public benefit or, more typically, reduce the anti-competitive detriment sufficiently to remove any concern that authorisation was being granted inappropriately.

In this instance, the Commission has decided to grant authorisation to application A90804, subject to a number of conditions outlined at sections 6 and 7 of this final determination. Broadly, these conditions:

- limit collective negotiation to certain major publishers and distributors;
- provide that newsagents wishing to participate must explicitly ‘opt in’ to the proposed arrangements;
- limit negotiation groups to no broader than state-wide; and
- require that collective negotiation only occur in relation to certain core contract terms and conditions.

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1. Introduction

- 1.1. The Australian Competition and Consumer Commission (the Commission) is the Commonwealth agency responsible for administering the *Trade Practices Act 1974* (the TPA). A key objective of the TPA is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business. This results in greater choice for consumers in price, quality and service.
- 1.2. The TPA, however, allows the Commission to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the Commission for what is known as an ‘authorisation’.
- 1.3. Broadly, the Commission may ‘authorise’ parties to engage in anti-competitive conduct where it is satisfied that the public benefit flowing from the conduct outweighs any public detriment from any lessening of competition.
- 1.4. The Commission conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.
- 1.5. Upon receiving an application for authorisation, the Commission invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.6. The TPA requires that the Commission then issue a draft decision in writing proposing either to grant the application (in whole, in part, or subject to conditions) or deny the application. In preparing a draft decision, the Commission will take into account any submissions received from interested parties.
- 1.7. Once a draft decision is released, the applicant or any interested party may request that the Commission hold a conference. A conference provides interested parties with the opportunity to put oral submissions to the Commission in response to a draft decision. The Commission will also invite interested parties to lodge written submissions on the draft.
- 1.8. The Commission then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a written final decision.
- 1.9. This document is a final determination in relation to application for authorisation A90804 lodged with the Commission by the Australian Newsagents Federation (ANF) and Queensland Newsagents Federation.

The Application

- 1.10. On 12 October 2001, the QNF lodged application A90804 with the Commission.
- 1.11. On 24 December 2001, the QNF informed the Commission that the ANF would take over the application. On 29 April 2002, the ANF and QNF jointly lodged an amended application. Further substantial amendments limiting the scope of the proposed arrangements were made by letter dated 29 August 2002. At this stage authorisation was being sought for ANF and QNF members to collectively bargain with the publishers and distributors of newspapers and magazines, and the suppliers of soft gambling products, and for collective boycott activity with regard to publishers and distributors.
- 1.12. Finally, in October 2003, both the ANF and the QNF lodged submissions further narrowing the scope of the proposed arrangements and suggesting possible bargaining mechanisms to the Commission.
- 1.13. Throughout this decision, ‘the application’ refers to the application as it currently stands, and includes the amendments of 2002 and the further submissions lodged by the ANF and the QNF in October 2003.
- 1.14. The application was made under subsection 88 (1) of the TPA¹ and sought authorisation to make and/or give effect to a contract, arrangement or understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.
- 1.15. Broadly, under the application authorisation is sought to engage in collective negotiations on behalf of newsagents with certain publishers and distributors of newspapers and magazines. In their submissions, the ANF and the QNF proposed slightly different bargaining mechanisms which are discussed in further detail in Section 3 of this determination.
- 1.16. Authorisation is sought for a period of five years.

The Applicants²

- 1.17. The ANF is a national industry association representing specialist newsagents. In recent years, the ANF has undergone a restructure, and has implemented a new constitution that provides for newsagents to become direct members of the ANF regardless of whether they are members of the relevant State association. Previously, members of the State associations were automatically members of the ANF.

¹ The application has also been considered as an application under the *Competition Codes* of each of the participating Australian jurisdictions, namely, New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, the Northern Territory and the Australian Capital Territory.

² The following information about the Applicants is sourced from their submission, 29 April 2002.

- 1.18. Before this change was made, the ANF had approximately 2793 members. It is currently in the process of building its direct membership base, with a total of 921 members at 17 February 2004.
- 1.19. The QNF is the Queensland state association representing specialist newsagents.
- 1.20. The other state associations representing newsagents are as follows:
- Western Australian Accredited Newsagents Association (WAANA);
 - Newsagents Association of the Northern Territory (NANT);
 - Newsagents Association of NSW and ACT (NANA);
 - Newsagents Association of South Australia (NASA)
 - Tasmanian Newsagents Association Ltd (TNA); and
 - Victorian Authorised Newsagents Association Limited (VANA).
- 1.21. The application was also expressed as being on behalf of each of the above state associations. Each of the state associations made a submission in support of the application during the public consultation process.

The Commission's assessment of the application

Public consultation process

- 1.22. In assessing an application for authorisation, the Commission conducts a thorough and transparent public consultation process. In this case, the applicants significantly narrowed the scope of the conduct for which authorisation was sought during the public consultation process.
- 1.23. Initially, the QNF sought authorisation to engage in collective bargaining with the suppliers of goods and services to newsagents (including the publishers and distributors of newspapers and magazines, and the suppliers of soft gambling products, tobacco, stationery, greeting cards and consumables) and to engage in a collective boycott of the publishers and distributors of newspapers and magazines in the event that negotiations broke down.
- 1.24. The ANF joined the application in April 2002. Amendments made at this time and in August 2002 narrowed the conduct. At the time of the Commission's draft decision in June 2003, authorisation was being sought for newsagents to:
- engage in collective bargaining with the publishers/distributors of newspapers and magazines, and the suppliers of soft gambling products; and
 - engage in a collective boycott of the publishers and distributors of newspapers and magazines, should negotiations break down.

- 1.25. On 13 June 2003, the Commission issued a draft decision proposing to deny authorisation to the application.³ The Commission considered that some anti-competitive detriment was likely to result from the proposed arrangements as they then stood, particularly in light of the scope of those arrangements, and that significant anti-competitive detriment was likely to result from the proposed collective boycott activity.
- 1.26. In its draft decision, the Commission noted that its proposed decision was merely indicative of the Commission's assessment of the application as it stood on the evidence before it at the time.
- 1.27. The Commission also noted that it may reach a different final decision, and that the applicants may wish to consider their position with regard to the scope of the conduct for which authorisation was sought.⁴
- 1.28. Prior to releasing its draft decision, the Commission had provided interested parties with an opportunity to comment on the application as it then stood. The Commission considered these submissions, and the response from the applicants, in its draft decision.
- 1.29. Copies of the draft decision were then provided to interested parties, and they were invited to comment on the Commission's proposed decision.
- 1.30. The ANF indicated to the Commission that it intended to narrow the scope of the conduct for which authorisation was sought via e-mail on 25 July 2003. The applicants indicated that they intended to:
- limit the number of publishers/distributors with which negotiations were proposed to be conducted;
 - withdraw the request for authorisation in relation to negotiations with soft gambling suppliers; and
 - withdraw the request for authorisation of collective boycott activity.
- 1.31. The Commission circulated this e-mail to the parties that had indicated they would attend the pre-decision conference.
- 1.32. On 28 July 2003, the Commission convened a pre-decision conference in its Brisbane office. Discussion focussed on the Commission's draft decision in light of the applicants' intention to narrow the scope of the conduct. The applicants outlined their proposal and stated that they would provide more detailed submissions in the future.
- 1.33. Submissions were received from the applicants in October 2003 and were circulated to interested parties. These submissions are outlined in

³ A copy of the draft determination is available from the Commission's website:

www.accc.gov.au.

⁴ Paragraph 10.5, Draft Determination.

Section 3 of this decision. The Commission invited interested parties to comment on the draft decision in light of the submissions from the QNF and the ANF and has considered the submissions received when reaching its final decision.

Chronology of the Commission's assessment

1.34. A chronology of the Commission's assessment of the application is at Table 1.

Table 1 - Chronology of the Commission's assessment

Date	Action
12 October 2001	The QNF lodged the application.
5 November 2001	The QNF lodged a submission supporting its request for interim authorisation.
9 November 2001	The Commission sought the views of interested parties on the QNF's request for interim authorisation.
21 November 2001	The Commission denied the request for interim authorisation.
21 December 2001	The QNF informed the Commission that the ANF would take over the application.
15 March 2002	The Commission asked the ANF to lodge a submission supporting the application, in order to progress its consideration of the matter.
29 April 2002	The ANF and the QNF lodged an amended application and a submission in support of same.
29 May 2002	The Commission sought further information from the ANF.
31 May 2002	The Commission sought submissions on the application from interested parties.
16 July 2002	The Commission invited the applicants to comment on the issues raised in the submissions from interested parties.
29 August 2002	The ANF lodged further amendments to the application and provided a further submission in relation to soft gambling products, newspapers and magazines.
27 September 2002	The Commission sought comments on the ANF's further submission from interested parties.
20 December 2002	The Commission invited the applicants to comment on the submissions received from interested parties in relation to soft gambling products.
30 December 2002	The ANF provided comments on the submissions received from interested parties.
14 January 2003	The Commission invited the applicants to comment on further submissions received from interested parties in relation to soft gambling products.
19 February 2003	The ANF provided more comments on the submissions received from interested parties in relation to soft gambling products.

13 June 2003	The Commission issued a draft decision.
30 June 2003	The Newsagents Association of South Australia requested that the Commission hold a pre-decision conference in relation to its draft decision. This request was later withdrawn.
1 July 2003	The ANF requested that the Commission hold a pre-decision conference in relation to its draft decision.
25 July 2003	The ANF advised the Commission that it intended to narrow the scope of the conduct for which authorisation was sought.
28 July 2003	The Commission held a pre-decision conference in relation to its draft decision in light of the applicants' stated intention to narrow the scope of the conduct. The Commission also invited interested parties to make further written submissions on the draft decision.
1 August 2003	The Commission informed interested parties who had not attended the pre-decision conference of the applicants' stated intention to narrow the scope of the conduct for which authorisation was sought.
15 October 2003	The QNF provided a further submission narrowing the scope of the proposed conduct and suggesting a possible bargaining mechanism. The Commission circulated this submission to interested parties.
29 October 2003	The ANF provided a further submission narrowing the scope of the proposed conduct and suggesting an alternative possible bargaining mechanism. The Commission circulated this submission to interested parties.
18 November 2003	The Commission provided the applicants with copies of the submissions received from interested parties.
17 February 2004	The ANF responded to the submissions from interested parties.
28 April 2004	The Commission issued a final decision.

2. Background⁵

- 2.1. Newsagents are (predominantly small) businesses engaged in the retailing (and, in the case of newspapers, delivery) of newspapers, magazines, stationery supplies, greeting cards, confectionery and soft gambling products such as lottery tickets.
- 2.2. According to the ANF, there are approximately 4500 newsagents in Australia. These businesses turn over approximately \$6.5 billion per annum, and employ approximately 20 000 people.
- 2.3. A major function of newsagents is the retail and distribution of newspapers and magazines. In the eastern states, newsagents traditionally perform both retail and delivery functions. In South Australia and Western Australia, there are separate ‘delivery only’ agents who deliver newspapers and magazines to homes, shops, sub-agents and other sellers, but who do not operate a shopfront.
- 2.4. In Tasmania, deliveries are currently undertaken by newsagents who also operate retail outlets, with the exception of four delivery runs undertaken directly by publishers. In the Australian Capital Territory, some Canberra Times deliveries are facilitated by contractors other than newsagents.
- 2.5. Some newsagents offer additional services beyond those that have been available traditionally, such as facilities for dry-cleaning, banking and photograph processing.
- 2.6. In addition, newspapers, magazines and other items sold by newsagents are also carried by other retail outlets such as supermarkets and convenience stores.

Newspapers and magazines

- 2.7. Background information about major newspaper and magazine publishers and distributors is provided below.

*News Ltd*⁶

- 2.8. News Ltd and its subsidiaries publish many of the major metropolitan daily newspapers, including the *Daily Telegraph* (with a daily circulation figure of 400 885 copies and a readership of more than one million) and the *Herald Sun* (with a daily circulation figure of 553 000 copies and a readership of more than 1.5 million). News Ltd also publishes the major daily national newspaper, *The Australian*, and a

⁵ Information in this section is sourced from the ANF’s supporting submissions (29 April 2002 and 2 September 2002); the ANF’s website at www.australiannewsagents.com.au; previous Commission determinations in relation to the industry; and Australian Competition Tribunal decisions in relation to the industry.

⁶ The information below is drawn from the News Ltd website at www.newsmedianet.com.au and from News Ltd’s submissions to the Commission.

number of weekend papers including the Sunday Telegraph and the Weekend Australian.

*Fairfax*⁷

- 2.9. Fairfax publishes two major metropolitan daily newspapers, the *Sydney Morning Herald* (with a daily circulation figure of approximately 221 000 in NSW) and the *Melbourne Age* (with a daily circulation figure of approximately 196 000 in Victoria), and the national financial daily newspaper the *Financial Review*. Fairfax also publishes significant regional newspapers such as the *Illawarra Mercury* and the *Newcastle Herald* and a number of magazines including *Business Review Weekly*.

*ACP*⁸

- 2.10. ACP describes itself as having a “leading magazine in all major categories”, including Australia’s most widely-read magazine, the *Australian Women’s Weekly* (with 2.69 million readers each month). Other high-selling titles include *Cleo*, *Cosmopolitan* and the *Woman’s Day*.

*Gordon and Gotch*⁹

- 2.11. Gordon and Gotch has a share of approximately 40% of the magazine distribution market and distributes publications on behalf of 380 publishers, including Pacific, the publisher of high-selling titles such as *New Idea* and *Girlfriend*.

*APN*¹⁰

- 2.12. APN publishes 14 regional daily newspapers in Australia, including the *Sunshine Coast Daily*, the *Mackay Daily Mercury* and the *Toowoomba Chronicle*.

*West Australian Newspapers*¹¹

- 2.13. WAN operates only in Western Australia, where it publishes the only West Australian daily newspaper, the *West Australian* (with a daily circulation figure of 220 000). WAN also publishes 18 regional newspapers in towns such as Kalgoorlie, Broome and Albany.

*Rural Press*¹²

- 2.14. Rural Press publishes over 150 newspapers and magazines including a number of significant rural newspapers such as those in Canberra, Launceston and Bathurst. It also produces significant agricultural publications.

⁷ The information below is drawn from the Fairfax website at www.f2.com.au.

⁸ The information below is drawn from the ACP website at www.acp.com.au.

⁹ The information below is drawn from the Gordon and Gotch website at www.gordongotch.com.au and from Gordon and Gotch’s submissions to the Commission.

¹⁰ The information below is drawn from the APN website at www.apn.com.au.

¹¹ The information below is drawn from WAN’s submissions to the Commission and from the website www.thewest.com.au.

¹² The information below is drawn from the Rural Press website at www.ruralpress.com.au.

*Retail Delivery Service*¹³

- 2.15. NDD Distribution Pty Ltd trades as Retail Delivery Service. NDD distributes more than 700 magazine titles, largely those catering to special interests such as crafts or hobbies.

Distribution arrangements – newspapers and magazines

- 2.16. Broadly, the publishers of major newspapers usually distribute them to newsagents, whilst the publishers of magazines generally use the services of a specialist distributor to place their products in newsagencies.
- 2.17. Newsagents are paid a proportion of the cover price for each newspaper they sell. Other fees are payable to newsagents in relation to additional services such as the provision of home delivery.
- 2.18. Magazines are usually distributed to newsagents on the basis that those that are not sold will be returned to the publisher. Newsagents are paid a commission on their sales of magazines.
- 2.19. A former newsagent noted in his submission that publishers have different market shares in different states, and that magazine publishers have tended to ‘piggyback’ newspaper publishers’ distribution networks.

Past authorisations

- 2.20. Traditionally, the distribution of newspapers and magazines in each state (except Tasmania) was controlled by a local newsagency council comprised of all significant newspaper and magazine publishers and the state newsagents’ association. The newsagency councils’ responsibilities included determining territories in which authorised newsagents had exclusive rights to distribute publishers’ newspapers and magazines.
- 2.21. Because the system involved an agreement between competitors, concerns arose that the system breached the TPA. Newsagency councils therefore sought and obtained authorisations from the Commission’s predecessor, the Trade Practices Commission (the TPC).
- 2.22. Over the following years, the question of whether the authorised arrangements continued to be in the public interest was examined by both the TPC and the Australian Competition Tribunal (the Tribunal).
- 2.23. On 12 December 1997, the Commission revoked several newsagency council authorisations, but granted substitute authorisations until 1 February 2001 to allow the parties time to formulate new arrangements consistent with the TPA.

¹³ The information below is drawn from NDD’s submissions to the Commission.

- 2.24. The decision was appealed to the Tribunal. On the 18 November 1998, the Tribunal made its decision in similar terms to the Commission's decision.¹⁴ However, it decided to grant a shorter transition period. The Tribunal concluded that the system should continue until:
- | | |
|-----------------|---|
| 1 July 1999 | for the distribution of magazines generally and for the supply of newspapers to 'look-alike' newsagencies (non-authorised specialist newsagencies largely located in Victoria); |
| 1 February 2000 | for the supply of newspapers to sub-agents; and |
| 1 February 2001 | for home delivery of newspapers. |
- 2.25. The newsagency council system therefore no longer operates to determine territories in which authorised newsagents have exclusive rights to distribute publishers' newspapers and magazines. Publishers now negotiate directly with newsagents for the distribution of newspapers and magazines.
- 2.26. Following the Tribunal's decision, the Federal Government asked the Commission to consult with industry stakeholders and report to the Government as to the best way forward for the industry in regard to distribution arrangements.
- 2.27. The concerns raised by stakeholders during this consultation process gave rise to an application for authorisation from the ANF that was lodged on 13 April 1999. The ANF sought authorisation in relation to proposed negotiations with twelve nominated publishers as to the terms and conditions of contracts between newsagents and the publishers, for a period of six months.
- 2.28. The Commission considered the application in the context of an industry in transition, in particular with respect to the issue of negotiation on terms and conditions between small businesses and larger entities. The Commission also drew upon earlier decisions involving other industries.
- 2.29. The Commission's assessment of the potential anti-competitive effects of the arrangements took into account that authorisation would not cover negotiations on commissions paid to newsagents or common territories for newsagents and would not provide any protection in relation to any primary boycott. It also noted that any agreements between the ANF and publishers would not bind individual newsagents and that other groups or individuals would not be prevented from negotiating with publishers. The short period for which authorisation was sought was also significant to the Commission's assessment.
- 2.30. The Commission accepted that public benefits would arise from the conduct, namely that ANF representatives would bring a depth of

¹⁴ *Re: 7-Eleven Stores Pty Ltd & ors* [1998] ACompT 3 (18 November 1998).

experience to the process of adapting to new contracts and that collective negotiations were likely to speed the industry's progress to stability.

- 2.31. Authorisation was granted, and subsequently expired on 30 May 2000.
- 2.32. In South Australia, an interim authorisation for the distribution arrangements was granted by the Commission until 1 February 2001. With regard to WA, the Commission revoked the authorisation in relation to the system for distributing newspapers and magazines in Western Australia from 15 September 2002. Accordingly, distribution arrangements are not currently the subject of any authorisation in any state or territory.

3. The application

The application

- 3.1 As outlined at paragraphs 1.10 - 1.16, the QNF first lodged an application for authorisation on 12 October 2001.
- 3.2 The application was made under subsection 88(1) of the TPA and sought authorisation to make and/or give effect to a contract, arrangement or understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA. The application was made on a Form B as provided for in Schedule 1 of the Trade Practices Regulations.
- 3.3 Initially, authorisation was sought to engage in collective negotiations on behalf of newsagents with suppliers of goods and services to newsagents (including the publishers and distributors of newspapers and magazines, and the suppliers of soft gambling products, tobacco, stationery, greeting cards and consumables), and to engage in a collective boycott of the publishers and distributors of newspapers and magazines should negotiations breakdown.
- 3.4 At the time of lodging the application, the QNF sought interim authorisation to negotiate on behalf of its members for:
 - the home delivery fees of Queensland Newspapers (a subsidiary of News Ltd); and
 - the distribution and retailing of the Cairns Post and Townsville Bulletin (a subsidiary of News Ltd) and Australian Provincial Newspapers (APN) publications.
- 3.5 The Commission was not satisfied that the circumstances were sufficiently exceptional to warrant granting interim authorisation. In particular, the Commission noted that if new contracts were negotiated by QNF during the period of interim authorisation, they could not be undone if the Commission later denied authorisation proper. Accordingly, the Commission denied interim authorisation.

Amendments to the application

- 3.6 On 24 December 2001, the QNF informed the Commission that the ANF would take over the application. On 29 April 2002, the ANF and QNF jointly lodged an amended application. Further substantial amendments limiting the scope of the proposed arrangements were made by letter dated 29 August 2002.

The draft decision

- 3.7 The Commission issued a draft decision proposing to deny authorisation to the application on 13 June 2003. Broadly, as the application stood at that time, authorisation was being sought to:

- engage in collective negotiations on behalf of newsagents with the suppliers of soft gambling products and newspaper and magazine publishers and distributors; and
- engage in a collective boycott of publishers and distributors of newspapers and magazines should negotiations break down.

Further submissions from the applicants

- 3.8 In October 2003, the ANF and the QNF lodged separate submissions proposing to narrow the scope of the proposed conduct.
- 3.9 Broadly, the applicants are now seeking authorisation to engage in collective negotiations on behalf of newsagent members with certain major publishers and distributors of newspapers and magazines. The QNF proposed that these major publishers/distributors should be Queensland Newspapers Pty Ltd (a subsidiary of News Ltd) and ACP Publishing Pty Ltd (ACP). The ANF proposed that these major publishers/distributors should be:
- News Ltd;
 - John Fairfax Holdings (Fairfax);
 - ACP;
 - Gordon and Gotch Australia Pty Ltd (Gordon and Gotch);
 - Retail Delivery Service (RDS);
 - APN News & Media Ltd (APN);
 - West Australian Newspapers Holdings Ltd (WAN); and
 - Rural Press Ltd (Rural Press).
- 3.10 The applicants no longer wish to negotiate with the suppliers of soft gambling products, and are not seeking authorisation to engage in collective boycott activity.
- 3.11 The submissions provided the Commission with alternative suggestions as to bargaining mechanisms that could be adopted were the Commission minded to grant authorisation. These suggestions are outlined below.

The QNF's proposed bargaining mechanism

- 3.12 The QNF proposed to negotiate on behalf of its newsagent members with Queensland Newspapers Pty Ltd (a subsidiary of News Ltd) in relation to the following terms and conditions for the distribution of the Courier Mail:
- newsagents' commission and home delivery fees;
 - insert fees
 - settlement discounts;
 - late paper fees;
 - split papers; and
 - terms of supply and rights of termination.

- 3.13 The QNF also proposed to negotiate on behalf of its newsagent members with ACP in relation to the following terms and conditions for the distribution of ACP magazines:
- variable commissions for shelf life;
 - supply allocations;
 - carrying of non-core product;
 - subscription delivery;
 - returns policy; and
 - terms of supply and rights of termination.
- 3.14 Finally, the QNF proposed that the relevant QNF branches in Townsville, Cairns and on the Gold Coast will negotiate on behalf of newsagent members in relation to the terms and conditions for the distribution of the following News Ltd-owned publications:
- the Gold Coast Bulletin;
 - the Townsville Bulletin; and
 - the Cairns Post.
- 3.15 The QNF proposed that any collective bargaining arrangements would be voluntary.

The ANF's proposed bargaining mechanism

- 3.16 The ANF proposed to negotiate on a national basis with:
- News Ltd;
 - John Fairfax Holdings Ltd;
 - ACP Publishing Pty Ltd;
 - Gordon and Gotch Australia Pty Ltd; and
 - Retail Delivery Service.
- 3.17 The ANF proposed to negotiate on a regional basis with:
- APN News & Media Ltd;
 - West Australian Newspapers Holdings Ltd; and
 - Rural Press Ltd.
- The ANF proposed that regional negotiations be conducted by smaller groups of newsagents, at most in State groups but ideally in regional groups.
- 3.18 The ANF proposed to negotiate collectively on behalf of newsagents in relation to home delivery terms and conditions and non-sensitive matters (such as general conditions of contract, returns policy and procedures and 'boiler plate' provisions).
- 3.19 The ANF proposed to negotiate individually on behalf of newsagents with respect to sensitive matters other than home delivery terms and conditions (such as commissions, product range and display requirements). The ANF's bargaining agent would be prohibited from disclosing the content or outcome of negotiations on behalf of one party

to other parties. The ANF referred to this bargaining mechanism as the 'messenger' model.

- 3.20 The ANF proposed that newsagent members would be able to opt out of negotiations.

4. Submissions

Submissions received prior to the draft decision

- 4.1. Prior to the Commission's draft decision, the ANF and interested parties provided submissions on the application as it then stood.¹⁵ These submissions are outlined below, to the extent that they are still relevant in light of the narrower scope of the conduct for which authorisation is sought. The submissions are also discussed in further detail at section 6 of this determination.
- 4.2. The submissions received in relation to soft gambling products are not discussed, as they are no longer relevant to the proposed conduct.

Submission from the ANF

- 4.3. The ANF provided a submission in support of the application on 29 April 2002.

Public Benefits

- 4.4. The ANF submitted that the proposed arrangements would give rise to significant public benefits which would outweigh any anti-competitive detriment. The ANF submitted that the proposed arrangements would:
- ensure the continued viability of small business operations, particularly in rural and regional areas, thus ensuring competition in those areas;
 - foster business efficiency generally;
 - assist the efficiency and competitiveness of small business by:
 - facilitating the availability of information on operational and pricing issues;
 - limiting transaction costs in the negotiation of supply agreements;
 - freeing up small business operators to focus on increasing the competitiveness of their businesses;
 - fostering industrial harmony; and
 - promoting equitable dealings in the market.
 - provide countervailing/bargaining power to small business in dealing with large and powerful suppliers;
 - promote industry cost savings, potentially resulting in contained or lower prices at all levels in the supply chain;
 - result in the supply of better information (eg in regard to appropriate pricing for home delivery) to suppliers to permit more informed choices in their dealings with small businesses;

¹⁵ Described more fully in the Commission's draft decision, available from www.accc.gov.au.

- provide publishers with the opportunity to take a national approach to negotiation with newsagents, and save publishers the costs associated with individual negotiation (particularly in regional areas).

Effect on competition

- 4.5. The ANF contended that there are no likely anti-competitive effects flowing from the proposed arrangements as the ANF is concerned about the ability of individual newsagents, acting independently, to conduct meaningful negotiations with publishers and distributors.
- 4.6. The ANF contended that there are increased business efficiencies arising from a consistent (national) approach to issues and that publishers are not disposed to negotiate individually with a number of State Associations and a large number of small businesses.
- 4.7. The ANF further submitted that the ability to negotiate collectively with publishers will not have the anti-competitive effect of putting newsagents in an advantageous position, but will simply ‘level the playing field’ so that newsagents are in a position to compete effectively.
- 4.8. The ANF acknowledged that collective negotiation may result in an increase in commission rates to newsagents. The ANF submitted, however, that this did not necessarily mean that the price to the consumer would increase. The ANF submitted that the competitive influence of the large supermarket chains and franchised conglomerates (with regard to both supply and demand) was likely to minimise retail price rises.

Submissions from interested parties

Submissions supporting the application

- 4.9. Submissions supporting the application were received from:
- the NANT;
 - NANA;
 - NASA;
 - Kenmore Tavern Plaza News;
 - Garbutt News;
 - Kirwan News; and
 - VANA.
- 4.10. The Commission also received approximately 60 copies of a form letter in support of the application, signed by individual newsagents who requested that their anonymity be preserved.
- 4.11. The submissions supporting the application raised the following issues:
- the complexity of existing supply contracts is a problem for individual newsagents, who may be unable to afford legal advice;

- suppliers have refused to negotiate with regard to the supply contracts; and
- collective negotiation will assist in the formation of equitable contracts.

Submissions opposing the application

4.12. Submissions opposing the application were received from:

- a former newsagent who wished to remain anonymous;
- NDD Distribution Pty Ltd (NDD);
- Gordon and Gotch Australia Pty Ltd (Gordon and Gotch);
- West Australian Newspapers Ltd (WAN);
- Pacific Publications Pty Ltd (Pacific);
- ACP Publishing Pty Ltd (ACP);
- APN Newspaper Pty Ltd (APN);
- EMAP Australia (EMAP);
- Australasian Association of Convenience Stores (AACS); and
- Trading Post Group Pty Ltd (Trading Post).

4.13. Broadly, the submissions opposing the application raised the following issues:

- the ANF is not the most appropriate bargaining agent;
- if the industry balance is tipped too far, it could adversely affect small individual publishers that distribute special interest magazines;
- the transition to deregulation has already occurred, and collective bargaining is not needed to facilitate this process;
- efficient home delivery does not rely on newsagents, nor on the ability of newsagents to negotiate prices for home delivery;
- there is no evidence that newsagents do not have bargaining power in relation to individual publishers;
- there is little or no evidence to support the public benefit claims made by the ANF, nor to support the conclusion that any benefits would be passed on to consumers;
- it is questionable whether publishers (particularly magazine publishers) would benefit from the arrangements;
- individual newsagents will have little incentive to offer publishers more competitive distribution services (such as in-store displays or promotions);
- the proposed conduct will allow the exchange of price and operation information between ANF members and to suppliers, which may support other anticompetitive conduct;
- existing legislation already protects ANF members (eg sections 46 and 51AC of the TPA);

- deregulation has progressed beyond the point at which collective negotiation could be said to be necessary or desirable;
- a national approach to newspaper distribution is neither necessary nor desirable;
- collective negotiation of a fixed delivery fee would destroy competition between newsagents in the market for home delivery services;
- newsagents already have significant countervailing power in relation to magazine publishers and distributors; and
- the likely outcomes of collective bargaining are higher delivery fees and commissions (resulting in higher prices to consumers and/or advertisers), less regional flexibility and reduced territorial competition between newsagents, and an increase in newsagents' bargaining power to the detriment of other competitors such as supermarkets and convenience stores.

The ANF's response to the submissions from interested parties

4.14. The ANF responded to the submissions from interested parties on 3 January 2003. The ANF's response is outlined below.

4.15. The ANF submitted that any anti-competitive detriment is limited by a range of factors, including the possibility that individual newsagents may opt out of any negotiations; the market structure restraining newsagents and publishers from engaging in conduct which is likely to increase prices; and the existence of competition at the retail level.

4.16. The ANF further submitted that:

- authorisation will not reverse the process of deregulation;
- a national approach to negotiation is preferred by publishers and distributors, and where necessary or appropriate the ANF may obtain information from or delegate negotiation to State Associations;
- the existence of other competitors supplying newspapers and magazines will balance any increased market power obtained through collective negotiation;
- any authorisation will not disrupt existing contractual arrangements;
- the ANF is not aware of any instance in which an individual newsagent has been successful in negotiating amendments to the standard form contracts presented by major publishers and distributors; and
- the ANF is seeking to negotiate and not to determine fees for home delivery.

Submissions received following the draft decision

Submissions made at the pre-decision conference

- 4.17. Following the release of the draft decision, the ANF requested that the Commission convene a pre-decision conference. This conference was held in the Commission's Brisbane office on 28 July 2003.
- 4.18. On 25 July 2003, the ANF advised that it intended to narrow the scope of the conduct for which authorisation was sought. The ANF advised that it proposed to:
- withdraw the collective boycott element;
 - restrict the number of publishers/distributors with whom negotiations were proposed to be conducted to certain major publishers/distributors (as listed in paragraph 3.9); and
 - remove the request for authorisation in relation to negotiations with the suppliers of soft gambling products.
- 4.19. Discussion at the pre-decision conference focussed on the draft decision in light of the applicants' stated intention to narrow the scope of the conduct.¹⁶

Submissions from the applicants at the pre-decision conference

- 4.20. The applicants submitted that:
- the anti-competitive detriment likely to flow from the proposed arrangements is limited, particularly now that there is no proposal to engage in collective boycott activity;
 - there is less competition in the market than was identified by the Commission in its draft decision, as the Commission wrongly assumed that the current situation involves individually negotiated contracts;
 - a national approach to negotiation is currently favoured by publishers/distributors;
 - any possible increase in commission rates arising from collective negotiation would lead to more efficient pricing and may also lower the price of other goods sold by newsagents;
 - newsagents may be more inclined to increase their efficiency (eg by sharing wrapping facilities) if they were able to secure better prices from publishers; and
 - the profitability of home delivery is marginal and the viability of that service is threatened as a result, with some newsagents cross-subsidising home delivery from their other business operations in order to maintain their customer base.

¹⁶ A copy of the record of the pre-decision conference is held on the Commission's Public Register.

Submissions from interested parties at the pre-decision conference

- 4.21. VANA submitted that newsagents faced the problem of oversupply of some publications, and that the supply terms offered to newsagents were less advantageous than the supply terms offered to supermarkets (for example, newsagents are required to return unsold magazines to the publisher at the newsagent's cost, whereas supermarkets are required only to return the covers of magazines if anything).
- 4.22. News Ltd submitted that:
- there is a role for the applicants in the discussion of some issues, but this role can be played without authorisation and News Ltd does not consider it necessary for the applicants to have input into all issues;
 - News Ltd can make recommendations to its individual publishers but does not make the final decision about the terms offered to newsagents with regard to a particular publication;
 - negotiations between News Ltd and individual newsagents currently occur, but commission rates and home delivery fees are not normally subject to these individual negotiations, as News Ltd wishes to offer uniform commission rates;
 - commission rates can also be docked if newsagents do not meet certain performance criteria, so there is some potential for variation of concession rates from business to business;
 - standard form contracts are likely to continue to be offered if authorisation is granted, but the terms of those contracts may differ;
 - the fact that newsagents could opt-out of the arrangements, coupled with the level of membership of the ANF, could mean that it would be inefficient for publishers to negotiate collectively with a group of newsagents and then conduct individual negotiations with other newsagents; and
 - some newsagents are already implementing efficiencies and benefiting from lower costs, and increased commission rates are not necessary to support this.
- 4.23. APN submitted that the application essentially proposed to re-regulate the industry.
- 4.24. ACP submitted that it develops its contracts on a national basis and wishes to continue with this arrangement and that it co-operates with the ANF and other associations in this regard.

Other submissions received following the draft decision

Submissions from the QNF/ANF

- 4.25. Following the release of the draft decision, the Commission received further written submissions from the QNF and the ANF, giving effect

to the applicants' stated intention to narrow the scope of the conduct for which authorisation was sought. As noted in section 3 of this determination, the applicants each suggested a different bargaining mechanism to the Commission.

4.26. In addition, the ANF submitted the following.

- In the absence of collective boycott activity, where collective negotiations fail they are likely to revert to individual negotiations between newsagents and publishers/distributors.
- Where collective negotiations take place it can be assumed that they do so with the consent of publishers/distributors and so the benefits (with regard to efficiency) will be maximised.
- Limiting the number of publishers/distributors with whom negotiations will be conducted addresses the Commission's concern (stated in the draft decision) about the industry wide coverage of the arrangements originally proposed by the applicants.
- National negotiations will be limited to national publishers/distributors, reducing the breadth of the proposed conduct and focusing negotiations.
- The level of representation will match the issues raised. So, for example, a national publisher that delegates negotiations to a regional office will negotiate with newsagents at a similar organisational level (eg state or regional). However, if national issues are then raised, newsagent representatives will be able to obtain assistance from the ANF at the national level.
- Products published or distributed on a national basis must compete with products not caught by the proposed national negotiations, which means it is unlikely that significant increases in costs for consumers will occur.
- Where state or regional negotiations are appropriate, a bargaining agent will represent the relevant members with assistance (where necessary) from the ANF, the State Association, or the relevant ANF Branch. This addresses the Commission's concerns about the scope of the negotiations.
- Newsagents will be able to opt-out of collective negotiations, which allows for individual negotiations and enables newsagents to indicate (by their presence or absence) whether or not the negotiations are satisfactory to them.
- Limiting collective bargaining to home delivery terms and conditions focuses on the areas in which newsagents are at their greatest bargaining disadvantage.

4.27. The QNF submitted the following.

- Allowing newsagents to engage in collective negotiation will produce outcomes closer to those one could expect were the participants more evenly matched.
- The QNF's proposal addresses the Commission's concerns as to the effect on competition of the proposed arrangements (for example, the negotiation process is proposed to be voluntary, and no collective boycott activity is proposed).
- National negotiations may not be appropriate due to regional differences between newsagents.
- The current market structure means that major publishers/distributors have substantial buying power and are able to dictate unfavourable terms and conditions to newsagents. Newsagents have little choice in terms of the newspapers that they sell, as major metropolitan daily newspapers must be stocked.
- Increased commissions and home delivery rates would not distort the market; rather, they would reflect more accurately the outcome one would expect in a more competitive market.
- Most of the competition to supply distribution services to publishers/distributors occurs not between newsagents but between newsagents and supermarkets, who have greater bargaining power than newsagents and are able to obtain more favourable terms and conditions.
- As there is currently no individual negotiation of contracts, collective negotiation could not adversely affect the current level of competition between newsagents.
- There is a public benefit in a broader range of magazines being available to the public. This is possible through the newsagency system which provides for specialty titles to be stocked that are not available in other outlets.

Submissions from interested parties

4.28. The Commission provided interested parties with an opportunity to comment on the draft decision in light of the additional submissions from the QNF and the ANF. The submissions received from interested parties are outlined below and discussed in more detail, where relevant, in section 6 of this determination.

4.29. The following interested parties made submissions in support of the application:

- the NANT;
- the WAANA;
- Chip-n-Dales Bathurst City Newsagency; and
- an individual newsagent who wished to remain anonymous.

- 4.30. In addition, NDD (which trades as Retail Delivery Service), although expressing concern about elements of the proposal as it currently stands, submitted that “further refinement could result in an acceptable package” and sought “the Commission’s forbearance in permitting the applicants more leeway before final determination.”¹⁷
- 4.31. Broadly, the issues raised by those interested parties that supported the application were as follows.
- Newsagents are ordinarily ‘mum and dad’ operations without an extensive background in business. Accordingly, permitting an industry association to negotiate on behalf of newsagents may serve to balance the power enjoyed by publishers and distributors.
 - Newsagents have found it impossible to negotiate, as individuals, the terms of the standard form contracts with which they have been issued by major publishers and distributors, and consider that this problem could be alleviated by collective negotiation.
 - Publishers and distributors are unresponsive to concerns raised by newsagents, including concerns as to the oversupply of some products or the cost of upgrading equipment in line with the requirements of publishers and distributors (who contribute to but do not meet the full cost of upgrading such equipment).
- 4.32. The following interested parties made submissions opposing the application:
- News Ltd;
 - Fairfax;
 - WAN;
 - ACP;
 - Gordon and Gotch;
 - APN;
 - EMAP; and
 - A former newsagent who wished to remain anonymous.
- 4.33. Broadly, the issues raised by those interested parties that opposed the application are outlined below.
- Collective negotiations between larger publishers and newsagents could, in practice, result in smaller publishers being forced to accept the outcomes of such negotiations.
 - Collective negotiations could adversely affect other distribution channels (such as subagents).
 - The applicants have not demonstrated that newsagents have suffered any detriment in the current negotiating environment, that publishers/distributors have taken advantage of any stronger bargaining position that they may have, or that fees are currently

¹⁷ Submission from NDD Distribution Pty Ltd, 24 November 2003, p 2.

insufficient. The applicants have also not demonstrated that any benefit to the public arises from the proposal.

- The terms and conditions in relation to which collective negotiations are proposed to occur are too broad in scope.
- Some newsagents have improved their profitability and viability through more efficient behaviour without any collective negotiation.
- The use of an 'opt-out' mechanism risks including newsagents in collective negotiation by default rather than by choice. It also means that newsagents will know something of the proposed collective negotiation strategy and will bring this knowledge to their individual negotiations if they choose not to participate in collective negotiations.
- Existing contracts may be in force for some time (for example, in the case of APN, for the next five years).
- The proposed 'messenger' mechanism is impractical and inefficient, and the confidentiality of negotiations under this proposed system cannot be guaranteed. Further, a newsagent could receive the same benefit in terms of the bargaining skill of a bargaining agent without requiring authorisation if he or she appointed a bargaining agent individually to act solely on his or her behalf.
- There is a risk of collective boycott conduct occurring where collective negotiation is permitted.
- Newsagents may direct their businesses in other ways (eg towards the supply of gaming or stationery products) and do not rely on newspaper or magazine distribution.
- As agents of publishers/distributors, it is necessary and appropriate for newsagents to be given direction by publishers/distributors from time to time.
- Commercial issues in relation to newspaper/magazine distribution are similar to those faced by newsagents in their negotiations with other suppliers and should not receive special treatment.
- Granting authorisation would be a backwards step in the de-regulation process, and would re-introduce some of the anti-competitive aspects of the industry identified in the 1998 Tribunal decision.
- Collective negotiations would diminish the flexibility of contractual arrangements between newsagents and publishers, and would reduce the level of competition between newsagents and between newsagents and their non-newsagent competitors (such as supermarkets or convenience stores). It may also provide newsagents with the opportunity to obtain effectively standardised terms and conditions across publishers/distributors.

- An increase in newsagency fees would compel publishers to increase the price of their publications.
- Collective negotiations would be problematic as the financial/commercial position of individual newsagents varies.
- Collective negotiation would not allow newsagents to contribute more effectively to their contracts with publishers; rather, it may undermine the ability of newsagents to negotiate contracts which suit their individual needs.
- The applicants are already consulted by some publishers/distributors, and do not need to engage in conduct that may contravene the TPA in order to play a role in the industry.
- Negotiating with those who have opted not to participate in collective negotiations will lead to duplication in the negotiating process.
- Limiting collective negotiations only to the major publishers/distributors may impose costs upon them that their competitors do not have to meet. This will decrease the ability of major publishers/distributors to compete with publishers/distributors that are not included in collective negotiations.
- A national approach would not be useful for those publishers/distributors whose bargaining position varies across different States/Territories, or for those publishers/distributors that defer to regional subsidiaries when negotiating with newsagents.
- Allowing newsagents to engage in collective negotiation could give rise to similar applications from other distribution channels (such as convenience stores). This could result in additional fee increases being passed on to advertisers and consumers.
- An increase in home delivery fees could make home delivery unviable in certain areas.

The ANF's response

- 4.34. Both the ANF and the QNF were provided with copies of the submissions received from interested parties. The QNF did not respond. The ANF responded on 17 February 2004.
- 4.35. Broadly, the points made by the ANF in response to the submissions from interested parties were as outlined below.
- The ANF noted that several publishers had welcomed the involvement of the ANF in existing discussions and state that it considered its proposal as a means of extending that involvement into a limited field of negotiation.
 - Under the proposed arrangements, newsagents who prefer to negotiate independently will be able to do so, but will also have a choice to participate in collective negotiations if they wish.

- With regard to publishers' subsidiaries, the ANF stated that it proposed to devolve responsibility for collective negotiations to the organisational level that most closely approximates that of the other party.
- It will be simple to identify those newsagents who are participating in collective negotiations, as the other party will be provided with a list of participating newsagents.
- The arrangements proposed by the ANF will allow newsagents across Australia to choose the bargaining agent that they wish to represent them, if any, in negotiations with publishers.
- The messenger model will involve a publisher/distributor making an offer that will be put to newsagents who will then determine individually whether they will accept that offer or negotiate variations through the messenger. If they choose to negotiate variations in this way, they are able to utilise the messenger's market knowledge, skill and experience. This does not require the messenger to disclose details of other agreements.

5. Statutory Background

The Statutory Test

- 5.1. Under section 90(6) of the TPA, the Commission may grant authorisation in respect of a proposed contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
- the contract, arrangement or understanding would be likely to result in a benefit to the public; and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.
- 5.2. Under section 90(7) of the TPA, the Commission may grant authorisation in respect of a contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
- the contract, arrangement or understanding would be likely to result in a benefit to the public; and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.

Other Relevant Provisions

- 5.3. Section 88(10) of the TPA provides that an authorisation may be expressed so as to apply to or in relation to another person who becomes a party to the proposed arrangements in the future. The Commission notes that the application was expressed as applying to current and future members of the relevant associations.

6. Evaluation

The Commission's past consideration of collective bargaining

- 6.1. In recent years, the Commission has considered a number of applications for authorisation in respect of collective bargaining arrangements and has granted authorisation to a number of those applications, including those lodged in relation to chicken growers, concrete carters, lottery agents and dairy farmers, where it has been demonstrated that a net public benefit will result.
- 6.2. The Commission also made public submissions to the *Dawson Review*¹⁸ recommending a notification process in relation to collective bargaining arrangements by small business in their dealings with businesses with a substantial degree of market power, in certain circumstances.
- 6.3. On 16 April 2003 the Dawson committee handed down its report, making recommendations similar to those of the Commission.
- 6.4. Having regard to the Commission's previous consideration of collective bargaining, it is apparent that the Commission accepts that in certain circumstances, collective bargaining arrangements are in the public interest. The Commission must, however, consider each application for authorisation on its merits and it is incumbent on applicants (under the authorisation process) to satisfy the Commission that the likely public benefits will outweigh any anti-competitive detriment.
- 6.5. In this instance, the scope of the authorisation originally sought was extremely broad. For example, the proposed arrangements were not subject to any restrictions either geographically or in terms of the suppliers with whom negotiations were proposed to be entered into. Past authorisations granted by the Commission in respect of collective bargaining have largely involved arrangements that are confined in some way, either because they relate only to negotiations with one supplier (such as CSR Ltd,¹⁹ Golden Casket²⁰ or Inghams²¹), involve small bargaining groups, or will occur only in one particular area of Australia.
- 6.6. The Commission's draft decision proposed to deny authorisation in light of concerns about the scope of the proposed arrangements as they stood at the time. Since the draft decision was released, the applicants have narrowed the proposed conduct significantly, addressing many of the concerns expressed by the Commission in its draft decision.

¹⁸ The Federal Government's *Review of the Competition Provisions of the Trade Practices Act 1974*.

¹⁹ Authorisation A90769, CSR Ltd (WA), final determination 3 February 2003.

²⁰ Authorisation A90853, Golden Casket Agents' Association Ltd, final determination 4 September 2003.

²¹ Authorisation A90826, Inghams Enterprises Pty Ltd, final determination 22 January 2003.

Future with and without test

- 6.7. The Commission's evaluation is in accordance with the statutory test outlined in section 5 of this determination. As required by the test, it is necessary for the Commission to assess and weigh the likely public benefits and detriment flowing from the proposed arrangements.
- 6.8. In order to identify and assess the public benefits and anti-competitive detriment generated by the proposed arrangements, the Commission applies the 'future with-and-without test' that was first established by the Tribunal.²² This requires a comparison of the public benefit and anti-competitive detriment that the proposed arrangements would generate in the future if the authorisation is granted with the position if the authorisation is not granted. The scenario in which authorisation is assumed not to have been granted is often referred to as the counterfactual.

The future without authorisation

- 6.9. The Commission is of the view that, in the absence of authorisation of the proposed collective negotiations, those negotiations will not proceed.
- 6.10. The ANF appeared to submit that without authorisation it or its state representative bodies would be prevented (under the competition provisions of the TPA) from contributing to or having input into the relationships between newsagents and publishers/distributors.
- 6.11. The ANF also appeared to submit that this would be a departure from past practices where the ANF and the relevant state representative provided input into contractual terms and conditions between members and publishers/distributor.
- 6.12. The extent to which persons are exposed to the competition provisions of the TPA is ultimately a matter for individual parties to assess. For its part, however, the Commission is of the view that, up to a point, the ANF or relevant state representatives providing input into the relationships between its members and publishers/distributors does not necessarily give rise to concerns about possible contraventions of the TPA. Certainly, providing input into pricing issues (to the extent that conduct falls close to that which is prohibited under section 45A of the TPA) is more likely to be of concern, but raising issues such as possibly harsh or unfair terms is clearly less likely to be problematic.
- 6.13. Industry associations such as the applicants are, of course, able to represent and assist their members to the extent concordant with the law. This may include providing assistance to members to ensure that they are able to gain access to appropriate legal or financial services, or making representations to major suppliers in relation to issues of concern to members.

²² See, for example, *Re Australasian Performing Rights Association* (1999) ATPR ¶41-701.

- 6.14. In fact, the Commission notes that News Ltd submitted that its subsidiaries regularly hold meetings with state newsagents associations to discuss industry issues and the improvement of the relationship between individual newsagents and publishers. In addition, Gordon and Gotch submitted that it also discussed relevant issues as to the formulation of its new contracts with ANF representatives.
- 6.15. Following industry reform, the current situation with respect to arrangements between newsagents and publishers appears to be individually negotiated contracts. The extent to which contracts are negotiated is discussed further below. The Commission believes the future situation absent authorisation will be a continuation of individually negotiated contracts between newsagents and publishers with legitimate input, along the lines discussed directly above, by the ANF and state representative bodies.

The situation with authorisation

- 6.16. Identifying the likely situation under the proposed arrangements is more problematic. Were the Commission to authorise collective negotiations, the likely outcome is somewhat uncertain, as the Commission would not (and could not) compel publishers/distributors to participate in the negotiations.
- 6.17. The extent to which collective negotiation would be able to alter the status quo would depend on the willingness of those parties to take part in negotiations or to take notice of collective representation.
- 6.18. The Commission is of the view that even where suppliers might have a large degree of bargaining power, they may choose to either:
- take part in collective negotiations; or
 - take into account (to some extent) collective representations of acquirers even where they choose not to engage in active negotiation.
- 6.19. In this respect, the Commission notes the submission by News Ltd that although it expected that standard form contracts would remain were collective negotiation authorised, the terms of these contracts may differ. The ANF also submitted that standard form contracts were likely to continue, but that newsagents would be in a better position to have input into those contracts.
- 6.20. On balance, the Commission considers that if authorisation is granted, newsagents are more likely to influence effectively the terms and conditions (including price) of their contracts with publishers/distributors than they would be able to in the absence of authorisation.

The relevant market

- 6.21. Defining the markets affected by the arrangements proposed for authorisation assists in assessing the public benefit and public detriment from any lessening of competition from the arrangements. The Commission will generally only define a market to the extent necessary to undertake the required analysis.
- 6.22. With regard to the application, the applicants did not provide any submission on the issue of market definition.
- 6.23. The Commission's view as to market definition is informed by the 1994 and 1998 Tribunal decisions. In its 1994 decision, the Tribunal identified two markets in relation to newspaper and magazine distribution²³:
- the market for the publication and distribution of metropolitan daily newspapers (which offer two products: news, information and entertainment; and advertising); and
 - the market for magazine publication and distribution (which also offers two products, namely content and advertising).
- 6.24. In 1998, the Tribunal affirmed this view and further stated that it still considered that the relevant markets were State-wide in geographic terms (with regard to distribution). In 1994 the Tribunal had also stated that with regard to retailing, the markets were geographically characterised by a series of local markets.
- 6.25. The Commission considers that the relevant areas of competition in relation to newspapers and magazines are likely to be those identified by the Tribunal and has conducted its analysis accordingly.
- 6.26. For the purpose of this analysis, it is probably more instructive to consider the areas in which the applicants – newsagents – compete and indeed with whom else they compete.
- 6.27. It is clear that newsagents supply distribution services to publishers of newspapers and magazines in return for commissions on the sale of those publications. In this regard, newsagents compete with each other and with other suppliers of distribution services such as supermarkets, petrol retailers, convenience stores and independent contractors.
- 6.28. It is also clear that newsagents compete in the retail of goods and services (including publications on commission) to consumers. Again, newsagents compete with each other and with other retailers such as supermarkets, petrol retailers and convenience stores.

²³ *Re 7 Eleven Stores Pty Ltd* (1994) ATPR ¶41-357 at 42,672.

Effect on competition

- 6.29. As discussed in Section 5, the Commission must assess the extent to which the proposed arrangements give rise to detriment to the public constituted by any lessening of competition that flows from the proposed arrangements.
- 6.30. Importantly, in respect of the proposed arrangements, the Commission notes that they do not in any way restrict the capacity for newsagents to compete, both with each other, and with other retailers such as supermarkets, petrol retailers and convenience stores, in the retail sale of goods and services (including newspapers and magazines) to the public.

Current level of competition

- 6.31. In assessing the anti-competitive effects of proposed arrangements, it is important to compare the level of competition that would be likely to exist both with and without the proposed arrangements.
- 6.32. As discussed previously in this document, the Commission believes that the likely situation without authorisation is the status quo. That is, a continuation of individually negotiated contracts between newsagents and publishers with legitimate input, along the lines discussed in paragraphs 6.12 to 6.14, by the ANF and state representative bodies.
- 6.33. The ANF submitted that, currently, there exists little competition between newsagents in the supply to publishers of a distribution channel for newspapers and magazines. It was submitted that newsagents, individually, are in weak bargaining positions with regard to publishers and as such publishers are not disposed to negotiate terms and conditions with individual newsagents.
- 6.34. In assessing the ANF's position, it should first be noted that the Commission believes that even businesses with a higher degree of bargaining power are influenced by demand and supply forces in the manner in which they set their prices. In setting their prices (in this case commissions), publishers are likely to have regard to how much each newsagent is willing to accept. In this respect, newsagents do compete (at least to some extent) with each other.
- 6.35. This is not to say that the competition manifests itself in more overt forms such as bargaining or undercutting. At times it is hard to describe how this less overt form of competition exists. A simple way is to ask the question why publishers do not set a lower rate of commission. Surely, publishers would choose to save distribution costs where they could without reducing the number of newsagents willing to distribute at a lower price. The answer is that publishers believe that by setting lower rates, more newsagents will choose not to (or will not be able to) continue to distribute publications. This is reflective of competition (albeit not necessarily high) between newsagents.

- 6.36. In this case, in addition to the less overt manifestations of competition described above, the Commission notes features in the market that suggest more overt forms of competition exist.
- 6.37. First, there does exist a degree of choice available to newsagents in terms of the publishers to whom they can provide their distribution services. While certain regions are dominated by one publisher (in relation to newspapers) there do exist choices in terms of national and niche publications. However, the Commission notes that these choices do have limits having regard to consumer loyalty. For example, in order for a Victorian newsagency to remain viable it is more or less compelled to distribute the *Melbourne Age* and the *Herald Sun*. Similarly in other states, newsagents are compelled to distribute the major metropolitan dailies. Nevertheless, a degree of choice for newsagents with respect to the publishers to whom they provide distribution services does exist at some level.
- 6.38. In relation to magazines, while there may exist a level of brand loyalty and while there exists some concentration in terms of publishers, there does exist a greater level of choice to newsagents. When faced with choice (even if limited), businesses (in this case newsagents) do carry a greater degree of bargaining power than they would without any choice.
- 6.39. Second, since deregulation there appears to have developed a degree of negotiation between certain newsagents and publishers.
- 6.40. For example, News Ltd submitted that it has entered into new standard form contracts with newsagents, or in some cases has engaged in arrangements designed to facilitate the transition to new form contracts.
- 6.41. APN Newspapers Pty Limited (“APN”) submitted that it had negotiated extensively with individual newsagents. APN submitted that the QNF had acknowledged APN’s willingness to negotiate, stating in the QNF’s Special Bulletin No. 198:
- “APN have a policy wherein their individual regional newspapers would endeavour to preserve existing arrangements of supply to newsagents, which varied by region, within their new contract offers...”
- ”Some Regional Publishers have detailed preparedness to negotiate these terms to ensure that the Distributor is not disadvantaged on present supply terms?”
- 6.42. ACP Publishing Pty Ltd (“ACP”) submitted that it had entered into agreements with newsagents that took account of the individual circumstances of each newsagent (such as the floor plan of the particular newsagency). Further, ACP submitted that it had witnessed “high levels” of competition between individual newsagents.

- 6.43. However, more generally, News Ltd submitted that its commission rates and home delivery fees are not normally subject to individual negotiations, as it wishes to offer uniform commission rates. Similarly, ACP submitted that it develops its contracts on a national basis.
- 6.44. Further, the Commission received some confidential standard form submissions from individual newsagents who indicated that they had experienced some difficulty in negotiating terms with major suppliers, whom they considered to be indifferent to individual considerations. These submissions also suggested that some individual newsagents feared that they may face retribution with regard to supply arrangements if they attempted to negotiate with more powerful suppliers. Submissions received from individual newsagents following the Commission's draft decision also supported these claims.
- 6.45. On balance, the Commission is satisfied on the evidence before it that standard form contracts are generally prevalent in the industry. Although some newsagents may be able to have some input into certain terms of those contracts in some situations, it appears to the Commission that individual negotiation is limited.
- 6.46. Accordingly, it appears to the Commission that whilst there is some competition between newsagents in the provision of distribution services to major publishers/distributors, this is limited.

Effect on competition in relevant newspaper and magazine markets

- 6.47. There are two areas in which collective negotiations may have an anti-competitive effect in the relevant markets:
- lost efficiencies resulting from collusion; and
 - increased potential for collective activity in other areas.

These are discussed below.

Lost efficiencies resulting from collusion

- 6.48. Competition between buyers or sellers ordinarily directs resources to their most efficient or productive use. Where buyers or sellers collude on the terms or conditions of acquisition or supply, competition can be distorted and resources directed to less efficient uses.
- 6.49. This distortion in competition can often result in increased prices to consumers, less choice, lower quality of product or services and increased costs to producers than would otherwise exist.
- 6.50. Pricing is a key component of negotiations between suppliers and buyers. Price competition, that is, the interaction of the price suppliers are willing to accept with that which buyers are willing to pay will ordinarily direct resources to their most efficient use.

- 6.51. As noted above, agreements between competitors which interfere with the price at which they are willing to supply or acquire goods or services will ordinarily divert resources away from those more efficient uses and towards less efficient uses.
- 6.52. This is the foundation of the principles of competition and, as such, Parliament has deemed agreements between competitors as to price to substantially lessen competition in breach of the TPA.
- 6.53. Generally, collective negotiations that set the terms (and, in particular, the price) on which goods or services are supplied or acquired are likely to lessen competition relative to a situation where the acquirers individually negotiate their own terms.
- 6.54. The ANF submitted that there currently exists little or no competition between newsagents in the supply of distribution services to publishers. The ANF therefore submitted that the agreements as to terms (including price) would not affect (or affect to any great extent) the competitive process.
- 6.55. As discussed above, the Commission believes that there currently exists some, albeit quite limited, level of competition between newsagents in the supply of distribution services to publishers.
- 6.56. While submitting that there would be no likely anti-competitive effects, the ANF did acknowledge that collective bargaining may result in an increase in commission rates to newsagents. In fact, the ANF submitted that the likely change in commissions would be sufficient to alter the viability of a number of newsagents. In acknowledging such, the ANF does appear to accept that collective negotiations are likely to have some effect on competition between newsagents in the provision of distribution services to publishers (in that it could be said that such an outcome reflects reduced competition on price).
- 6.57. Against this however, major publishers such as News Ltd and ACP submitted that they do not generally negotiate with newsagents individually on price. In addition, the Commission notes the substantial lack of bargaining power by individual newsagents which limits their ability to negotiate individually with major publishers on terms of supply, including price.
- 6.58. The extent to which newsagents currently negotiate individually with publishers on price, and therefore the extent to which the proposed arrangements might constrain such competition, appears to the Commission to be limited. The extent to which the proposed arrangements will limit competition on price is therefore also limited.
- 6.59. The Commission has accepted in the past that where collective negotiation results in an increase in the price being paid to the bargaining group, where there is a capacity for any such increase to be

passed on in terms of higher prices to consumers, this could constitute an anti-competitive detriment.

- 6.60. However, the Commission notes that in this instance the scope for newsagents bargaining collectively to negotiate higher commission rates than they would otherwise receive through individual negotiation is constrained by the competition newsagents face from other suppliers of distribution services to publishers, such as supermarkets, petrol retailers, convenience stores and independent contractors.
- 6.61. With respect to home delivery services, the Commission notes the submission of ACP regarding magazine deliveries that “Australian Post and couriers remain as competitive substitutes to the home delivery services of newsagents for the purposes of magazines and other products.”²⁴ Further, the Commission notes that some publishers, such as those operating in Canberra and Darwin, distribute their newspapers through parties other than newsagents (i.e. independent contractors).
- 6.62. The Commission considers that these alternative avenues for the distribution of newspapers and magazines are likely to constrain the extent to which newsagents could obtain significantly higher prices, which will in turn constrain the extent to which prices to consumers may increase.
- 6.63. In addition, the Commission notes that participation by newsagents in the collective bargaining arrangements would be voluntary. To the extent that newsagents currently consider that they are able to compete on price, the proposed arrangements do not limit individual agents’ ability to continue to do so if they wish. Those newsagents who consider that they stand to benefit from individual negotiations with publishers are free to negotiate individually and, indeed, are likely to choose to do so.
- 6.64. In respect of increased prices to consumers, the Commission notes the submission of ACP to the effect that an increase in commission rates or a change to the conditions upon which such commission rates were payable would impose an additional cost on magazine publishers and distributors that may be passed through to consumers.
- 6.65. To the extent that newsagents are able to negotiate higher commissions through bargaining collectively, the ANF submitted that, any increase in commissions will not be passed on by publishers to consumers due to competitive pressures from other suppliers such as supermarkets.
- 6.66. In this respect, the Commission notes that any increase in commissions is equivalent to an increase in distribution costs to publishers/distributors. Competition between publishers is likely to ensure at least some of these increased costs, at least in some instances, would be absorbed by publishers. Further, the competitive constraints

²⁴ Submission from ACP, 20 November 2003, p 8.

imposed by other, cheaper (or free) forms of media such as free-to-air television and the Internet are also likely to limit the extent to which publishers are able to pass on increased costs to consumers.

- 6.67. Alternatively, the additional cost could be passed on to advertisers in the form of increased advertising fees; the remarks above are equally applicable here.
- 6.68. The Commission also notes the concerns of the Trading Post which submitted that any increase in the amount of commission paid to participating newsagents would flow on to newsagencies that did not participate in the arrangements.
- 6.69. Similarly, APN submitted that the arrangements would damage the large number of small businesses that compete directly with newsagents in the distribution market and as such would erode the benefits of deregulation to date. The Commission does not share this view, as it considers that should other distribution channels (such as other retailers) prove to be cheaper or otherwise more efficient, publishers/distributors are likely to make greater use of those channels. Again, this will constrain the extent to which any increase in price negotiated by newsagents will be passed on to consumers.
- 6.70. For the reasons outlined above, the Commission considers that where newsagents are able to negotiate higher commission rates from publishers as a consequence of the proposed arrangements, such increase would, at least in part, be passed on to consumers in the form of higher prices. However, for the reasons outlined, the Commission considers that the capacity for newsagents to negotiate higher commission rates from publishers as a consequence of the proposed arrangements is limited, and therefore any consumer detriment would also be quite limited.
- 6.71. Aside from price, businesses compete on issues such as quality, service and other terms of trade. Just as price agreements stifle competition on price, non-price agreements can stifle competition in areas such as quality and service.
- 6.72. For example, it was submitted by ACP that it had entered into agreements with newsagents that took account of the individual circumstances of each newsagent (such as the floor plan of the particular newsagency).
- 6.73. Where businesses collectively negotiate, the incentive for businesses (in this case newsagents) to innovate or improve their quality of service is reduced. In effect, resources are directed away from innovative businesses to less innovative businesses.
- 6.74. However, two elements of the proposed arrangements as they now stand appear likely to mitigate this concern. First, it would be voluntary for newsagents to participate in any collective negotiation.

As noted above with respect to competition on price, those newsagents who consider that they stand to benefit from individual negotiations with publishers are free to negotiate individually and, indeed, are likely to choose to do so.

- 6.75. Second, in the absence of any collective boycott activity (for which authorisation is no longer sought) publishers cannot be compelled to engage in negotiations. If publishers consider that collective negotiations are likely to lead to inefficient or less innovative outcomes, they will simply choose not to participate.
- 6.76. The Commission notes the concern of some interested parties to the effect that authorising the proposed arrangements would be a backwards step in terms of the competitive advances that have been made in the industry since the Tribunal's 1998 decision. For example, News Ltd submitted that an "essential feature [and] clearly intended consequence"²⁵ of the deregulation of the industry was to establish individual agreements between newsagents and publishers.
- 6.77. The Commission notes the submission from Pacific which suggested that if collective negotiations are authorised, individual newsagents will have little incentive to offer publishers more competitive distribution services (such as in-store displays or promotions). Pacific further submitted that collective negotiation would reduce the likelihood that newsagents would engage in competitive conduct, both amongst themselves and in respect of other retail outlets.
- 6.78. With respect to this point, as noted above, the proposed arrangements do not in any way restrict the capacity for newsagents to compete, both with each other, and with other retailers such as supermarkets, petrol retailers and convenience stores, in the retail sale of goods and services (including newspapers and magazines) to the public.
- 6.79. Newsagents' revenue is a function of both the commission rates they receive and the volume of sales made. In this respect, collective bargaining by newsagents in no way reduces incentives for those newsagents party to the collective bargaining arrangements to compete amongst themselves, with other newsagents and with other distribution channels to supply newspapers and magazines to the public.
- 6.80. More generally, the Commission believes that any anti-competitive effect of collective bargaining arrangements constituted by lost efficiencies are likely to be more limited where the features referred to below are present:
- participation in the arrangements is voluntary;
 - there are restrictions on the coverage, composition and representation of bargaining groups; and

²⁵ News Ltd submission, 8 July 2002, p 3.

- boycott activity is not permitted.
- 6.81. The Commission may also consider the anti-competitive effects of collective negotiations to be more limited where the current levels of competition are low (due, for instance, to the structural features of the market) such that the difference between the level of competition with and without collective bargaining would be small.
- 6.82. The Commission notes, however, that markets that exhibit low levels of competition may be more affected by collective agreements where the reduction in competition caused by the collective agreements is large in the context of already limited competition. It can also be the case that where markets are characterised by low levels of competition, some public benefits such as transaction cost savings or other efficiencies may be dissipated in the short, medium or longer term due to the absence of competitive pressures. In this regard, each case will be considered on its merits.
- 6.83. Turning to the case at hand, as discussed above, the Commission is of the view that there appears to be some, albeit small, level of competition between newsagents in the provision of distribution services to publishers.

Voluntary participation

- 6.84. Collective negotiations are voluntary where members of collective negotiation groups are free to choose not to participate in the collective negotiations if they prefer to negotiate individually. This provides an element of ongoing competition and as such lessens the anti-competitive impact of the arrangements.
- 6.85. The arrangements proposed by the applicants will allow newsagents to decide whether or not they wish to participate in collective negotiations. This element of the proposed arrangements reduces their anti-competitive effect. The Commission notes the concern expressed by APN that “the use of an opt-out system runs the risk of including agents in collective negotiations by default rather than active choice”.
- 6.86. Generally, the Commission agrees that collective negotiations are less likely to be anti-competitive where they are voluntary, and that the voluntary nature of such negotiations is best preserved by the use of opt-in rather than opt-out provisions, ensuring that no party is involved in negotiations without their express and deliberate consent. This concern is dealt with further in the section outlining the conditions of authorisation to be imposed by the Commission.

Restrictions on coverage

- 6.87. Further, collective negotiation agreements that limit the coverage, composition and representation of bargaining groups limit the anti-competitive nature of the arrangements in a number of ways.

- 6.88. First, where the size of bargaining groups are restricted, the 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 suppliers or acquirers outside the group.
- 6.89. Second, where bargaining groups are limited in scope (either by geography, product range or size etc) negotiations are able to take into account the specific demand or supply characteristics of those particular businesses. This significantly reduces the anti-competitive effects associated with “one size fits all” negotiations and allows competition between groups to provide the competitive discipline that leads to efficient resource use.
- 6.90. Third, where different bargaining groups do not have common representation, which could act as a conduit between the groups, the capacity to reduce the competition that might otherwise exist between those groups is more limited.
- 6.91. The Commission believes that some elements of the coverage, composition and representation of the arrangements as proposed by the ANF, may maintain or enhance the anti-competitive effects of collective negotiations. However, the Commission is of the view that the alternative proposal put forward by the QNF, which limits negotiations to, at their largest, a state-wide group, is likely to curtail the anti-competitive effect of the collective negotiations. This is addressed in greater detail in the section outlining the conditions of authorisation to be imposed by the Commission.

Boycotts

- 6.92. The Commission also notes that the applicants are no longer seeking authorisation for collective boycott activity. Absent boycotts, the other party (in this case the publisher) has greater discretion over the extent to which they participate in negotiations and, therefore, the extent to which terms and conditions (including price) deviate from those that might be expected to prevail absent the collective arrangements.
- 6.93. Accordingly, the withdrawal of collective boycott activity from the proposed arrangements for which authorisation is sought significantly reduces the likely anti-competitive effect of those arrangements. As noted above, publishers that consider that collective negotiations would be likely to result in less efficient outcomes can be expected to refrain from participating in such negotiations.

Opportunity for collective activity

- 6.94. The Commission notes the concern raised by interested parties that information sharing (between newsagents and between newsagents and

suppliers) may in fact underpin anti-competitive conduct (such as price-fixing).

- 6.95. In considering collective bargaining arrangements in the past, the Commission has noted concerns that the arrangements may increase the potential for collusive anti-competitive conduct beyond that authorised.
- 6.96. Such increased potential arises where competitors are encouraged to meet, share information and discuss pricing. The Commission has been concerned that in this environment, there may be an increased likelihood of anti-competitive conduct (beyond that which is authorised) occurring.
- 6.97. The Commission is of the view that the likelihood of this occurrence and any subsequent effect is lessened where the arrangements are not industry wide. Further, the Commission is of the view that the likelihood is also reduced where participants are made aware of their obligations under the TPA.
- 6.98. The Commission notes that the ANF has proposed that some negotiations still take place on a national basis. The Commission is concerned that such a proposal may increase the potential for anti-competitive conduct beyond that ultimately authorised. However, the Commission notes the QNF's alternative proposal, which would restrict bargaining groups at least to state-level.
- 6.99. The Commission is of the view that restricting the scope of bargaining groups to state-level or smaller reduces the likelihood that anti-competitive conduct (beyond that which is authorised) will occur as a result of any collective negotiations. This is addressed in the section outlining the conditions of authorisation to be imposed by the Commission.

Conclusion on public detriment

- 6.100. The Commission is of the view that the anti-competitive effect of the proposed collective negotiation arrangements is likely to be limited, due to:
- the voluntary nature of the arrangements;
 - the absence of any collective boycott activity;
 - the limited number of publishers/distributors involved;
 - the limited level of individual negotiation currently occurring;
 - the ability of publishers/distributors to refuse to participate; and
 - the constraints imposed on participating newsagents by the existence of other possible distribution chains for publishers/distributors.

- 6.101. The Commission remains concerned by some elements of the ANF's proposed bargaining mechanism, specifically;
- the possibility of national negotiations; and
 - the 'messenger' mechanism, which the Commission considers has the potential to underpin anti-competitive activity.
- 6.102. The Commission is of the view that if these elements were to be part of any authorisation, they would increase the likely anti-competitive effects of the proposed arrangements.
- 6.103. However, the Commission notes that the bargaining mechanism proposed by the QNF does not allow for national negotiation, nor for the 'messenger' model.

Public Benefits

- 6.104. In order to grant authorisation, the Commission must be satisfied that the proposed arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition arising from the arrangements. The applicants submitted that the proposed arrangements will give rise to a number of public benefits, which are discussed below.
- 6.105. In making their submissions, the applicants did not use a consistent description of the claimed benefits. Various descriptions were used at different parts of the submissions and claimed benefits were grouped in different ways. For this reason, the Commission, in assessing the application, has grouped the claimed benefits as it considers appropriate. All public benefits claimed by the applicants have been considered.

A national system

- 6.106. The ANF submitted that publishers generally adopt standard contracts across the industry although commission rates may vary from state to state. The ANF noted submissions from certain publishers that they were attempting to establish a consistent national approach to their dealings with newsagents and distributors.
- 6.107. The ANF submitted that the adoption of a national approach demonstrates increased business efficiencies from such and that publishers were not willing to negotiate individually with a number of State Associations and a large number of small businesses.
- 6.108. The ANF acknowledged that for regional publications a regional rather than national approach is relevant.
- 6.109. The ANF submitted that it is inequitable for small businesses in the position of newsagents to be faced with circumstances where only one party to the transaction can negotiate on that wider basis. It submitted that if a national approach is adopted, then it is appropriate and

efficient for a national representative of newsagents to be in a position to negotiate on an equal footing with publishers.

- 6.110. Although the ANF was of the view that a national approach to bargaining was desirable, APN Newspapers Pty Ltd (APN) submitted that the unique features of regional markets have been recognised in the past and will continue to shape the development of the deregulated distribution market. APN further noted the innovation that has resulted in Canberra and Darwin, where alternative distribution channels have been developed that, according to APN, have produced lower home delivery fees and better services for consumers.
- 6.111. The Commission is not satisfied that a national approach gives rise to a public benefit as submitted by the applicants. In fact, given its potential to stifle innovation and to ignore the legitimate differences between regional areas, a national approach may even constitute a detriment, as discussed earlier. In this respect, the Commission considers the QNF's preference for negotiations to be limited to state-wide groups (and regional groups where appropriate) is more desirable in terms of reducing the anti-competitive impact of the proposed arrangements.

Continued viability of small businesses

- 6.112. The ANF submitted that the viability of the home delivery system for newsagents was decreasing. It submitted that the ability of publishers to make "take it or leave it" offers for increases to delivery fees will contribute to the situation where newsagents will consider whether to continue undertaking home delivery.
- 6.113. The Commission notes that, with regard to newspapers, several newsagents submitted that home delivery rates are currently insufficient and in some instances are so inadequate (for example, in rural areas) that home delivery is effectively cross-subsidised by other sales.
- 6.114. The Commission accepts that an increase in bargaining power to newsagents as a result of the authorisation of collective negotiation may assist in the negotiation of a higher home delivery fee, and in turn provide a small increase in the viability of some newsagents in the provision of these services. The Commission would be likely to take the view that this is a public benefit to the extent that it would increase the viability of efficient small businesses, if this can be satisfactorily demonstrated to the Commission. However, there is not likely to be a public benefit in the maintenance of inefficient small businesses.
- 6.115. The Commission accepts that to this extent, there may exist some public benefit flowing from the collective negotiations in relation to home delivery terms and conditions, and more broadly in relation to the terms of supply agreements in general.

- 6.116. However, with respect to the claimed benefit of the maintenance of the home delivery system, the Commission notes the view expressed by the Tribunal in its 1994 decision.

We are content to say that, on all the evidence, it is inconceivable that either publisher, acting independently, would fail to promote home delivery. For it is the loyal delivery customers who give stability to circulation, reassure the advertisers and have no 'returns'.²⁶

- 6.117. The Commission is of the view that it is in the publishers' best interests to ensure the maintenance of an efficient home delivery system, and it is the Commission's expectation that publishers will act in accordance with this interest.
- 6.118. The Commission notes the submission from APN that suggested that publishers in Canberra and in Darwin have demonstrated a degree of innovation and flexibility with regard to the home delivery of newspapers that would be less likely to occur if authorisation is granted.²⁷ The Commission does not consider that the authorisation of voluntary collective negotiations, coupled with the availability of alternative avenues for newspaper distribution, is likely to reduce innovation in this regard.
- 6.119. As discussed above, any increase in commissions may be passed on to consumers in the form of increased prices of publications; advertisers in the form of increased advertising fees; or other suppliers of distribution services in the form of lower commissions. Further, the Commission notes APN's submission, which contended that the collective negotiation of a home delivery fee may "[rob] the market of the economies of scope, scale and improved service quality which free competition in the market for home delivery would offer."²⁸
- 6.120. However, the Commission considers that the restricted scope of the arrangements, at least as proposed by the QNF, the voluntary nature of negotiations and the existence of other possible distributors will, in fact, reduce the likelihood that significant price rises will occur.
- 6.121. In addition, as noted above, those newsagents who consider that they are able to obtain a better deal through individual negotiations will continue to do so, with the likely result that there will continue to be some incentive for newsagents to introduce greater efficiencies and innovation into their businesses.
- 6.122. Finally, the Commission considers it unlikely that publishers will participate in negotiations that are not advantageous to them. The absence of any collective boycott activity ensures that publishers will not be compelled to do so.

²⁶ Re 7-Eleven Stores Pty Ltd (1994) ATPR ¶41-357 at 42,679.

²⁷ Submission from APN dated 23 July 2002, p 12.

²⁸ Submission from APN dated 23 July 2002, p 16.

- 6.123. In conclusion, the Commission does not consider that the applicants have demonstrated that collective negotiations will increase the viability of currently efficient businesses.

Increased bargaining power

- 6.124. Arguments based on increasing bargaining power essentially relate to a change in the relative power of the parties to the proposed agreement. An increase in bargaining power in this context typically involves one part attempting to improve its bargaining position relative to another (through collective arrangements, for example).
- 6.125. The alleged ‘need’ for collective negotiation can be assessed in light of the deregulation of the newsagency industry. Publishers and distributors appear to have adjusted to the phasing out of the previously authorised systems. New contractual arrangements between publishers/distributors and individual newsagents are now in place. It appears then that many newsagents are becoming increasingly accustomed to negotiating with publishers and distributors.
- 6.126. Despite this, most newsagents are small businesses negotiating with suppliers including large suppliers such as News Ltd or ACP. These large companies could be expected to have significant bargaining power in negotiations with individual newsagents, as they are well-resourced and have significant experience at negotiating in a highly commercial environment.
- 6.127. In its draft decision, the Commission noted that the authorisation then being sought was in relation to all publishers and distributors, regardless of their relative size or apparent level of bargaining power, and considered that any claim as to increased bargaining power could not be sustained across such a broad field.
- 6.128. However, the Commission notes that since that time, the list of publishers/distributors with whom negotiations are proposed to be conducted has been reduced to a small number of significant publishers/distributors.
- 6.129. Further, in its draft decision, the Commission noted that the applicants had not provided compelling evidence to the effect that the current negotiating environment was not producing competitive outcomes, nor that this could be resolved, at least to some extent, through collective negotiation.
- 6.130. However, since that time, individual newsagents and the applicants have provided more detailed examples of the negotiating environment in which they are currently operating. This information suggested that some newsagents were having difficulty in negotiating appropriate supply arrangements with some publishers.
- 6.131. For example, some newsagents complained that the number of copies of a particular title that they were required to pay for and stock was

often not open to negotiation, with the result being that small businesses found themselves under increasing strain at times of restricted cashflow (or where storage/display space was limited) without any ability to tailor their supply agreements in a manner more appropriate to their business.

- 6.132. In light of the information provided, the Commission considers that there is some evidence that at least some newsagents are not currently able to negotiate efficient supply terms with at least some publishers/distributors. This appears to be a particular problem in terms of oversupply, and in the price offered by some publishers for home delivery of newspapers in some areas. No evidence was provided to suggest that these newsagents were inefficient businesses.
- 6.133. As a result, it may be that a newsagent that is operating in an efficient manner would, nonetheless, be unable to negotiate supply terms that reflected the particular needs of his or her business.
- 6.134. The Commission notes the submission from a former newsagent who argued that newsagents are obliged to accept contracts from major publishers/distributors if they are to be able to maintain supplies of major publications necessary to their business. The Commission considers that this need to secure certain major publications is reflective of an imbalance in bargaining power.
- 6.135. The Commission accepts that, in light of the evidence provided by the applicants and by individual newsagents, the relevant publishers/distributors have a significant level of bargaining power that is not currently matched by individual newsagents.
- 6.136. In addition, whilst the level of bargaining power enjoyed by the larger publishers is slightly mitigated by the fact that newsagents provide the major distribution channel for newspapers, it is clear from the experience of publishers in Canberra and Darwin that alternative distribution channels can be established. Additionally, greater use can be made of existing alternative distribution channels such as supermarkets, petrol retailers and other convenience stores. Alternative sources of supply for the newspapers and magazines that underpin a newsagent's business are less clear.
- 6.137. The bargaining power of major newspaper publishers is further entrenched by the fact that most of the highest selling newspapers are metropolitan newspapers that are specific to a particular region. This suggests that many newspapers carry significant reader loyalty and therefore may be less directly substitutable (that is, a consumer in Brisbane is unlikely to accept substitution of News Ltd's *Courier Mail* with Fairfax's *The Age*). Newsagents unable to source the major metropolitan daily papers from News Ltd or Fairfax would therefore be likely to lose a significant number of customers.

- 6.138. Further, the Commission notes the concerns raised by individual newsagents with regard to the offer of standard contracts by major publishers, which, according to those newsagents, appear to have little room for negotiation.
- 6.139. Some publishers disputed that standard form contracts were being offered on a ‘take it or leave it’ basis. However, on balance, it appears that largely common contracts are being offered to newsagents who, generally, have little scope to negotiate more favourable terms and conditions.
- 6.140. Pacific submitted that although there may be a case for collective negotiation with regard to newspapers, this does not extend to an argument in favour of collective negotiation with regard to other suppliers (such as magazine distributors).
- 6.141. With regard to magazines, ACP submitted that newsagents already enjoy significant countervailing power in relation to magazine publishers and distributors, as newsagents are a major distribution channel for magazine publishers, and newsagents have discretion with regard to the placement and presentation of magazines. Again, however, the Commission notes that alternative distribution channels (such as other retailers or independent contractors) are also available to magazine distributors dissatisfied with their dealings with newsagents.
- 6.142. The Commission acknowledges that newsagents are not completely without power in their negotiations with the publishers and distributors of both newspapers and magazines. However, the Commission accepts the contentions of individual newsagents and the applicants that this power is likely to be significantly lower than the power enjoyed by the larger publishers and distributors.
- 6.143. Further, the Commission notes that the consequences of a decision by a major publisher or distributor not to supply its products to a particular newsagent could be damaging to that individual newsagent without significantly affecting the publisher/distributor, given that it appears that newspapers and magazines are the most significant drawcard for consumers to enter newsagencies.
- 6.144. In short, the Commission accepts that the power balance between the major publishers/distributors and newsagents is currently unequal. This appears to have flow-on effects: standard form contracts have some degree of prevalence in the industry, and a number of newsagents are finding it difficult to negotiate commercially appropriate supply terms with major publishers/distributors.
- 6.145. Generally, one way in which small businesses can seek to redress an imbalance in bargaining power is to bargain collectively. This may allow small businesses to achieve competitive parity with larger businesses, enabling them to achieve more appropriate commercial

outcomes through, for example, greater input into contract terms and conditions.

- 6.146. In this instance, the Commission considers that in light of the evidence provided, allowing newsagents to engage in collective bargaining may assist them to achieve more appropriate commercial outcomes. For example, the Commission considers that, collectively, newsagents may be better able to influence supply terms.
- 6.147. In this regard, the Commission notes that there has been much debate recently as to whether redressing a bargaining imbalance between large and small businesses constitutes a public benefit. For example, the Dawson Committee was instructed by the Commonwealth Government to review the operation of the competition and authorisation provisions of the TPA, including with reference to scenarios in which businesses are competing or dealing with businesses that have larger market concentration or power.
- 6.148. The report of the Dawson Committee noted that:
- Collective bargaining at one level may lessen competition but, at another level, provided that the countervailing power is not excessive, it may be in the public interest to enable small business to negotiate more effectively with big business.²⁹
- 6.149. The Dawson Committee's propositions and recommendations with respect to collective bargaining were supported by both the Federal Government and the Opposition.
- 6.150. Similarly, the Senate Economic References Committee report into the TPA's efficacy in protecting small businesses endorsed the Dawson Committee's view that, in some circumstances, it may be in the public interest to enable small businesses to negotiate more effectively with big businesses.³⁰ The Senate Committee's view on this issue received unanimous bipartisan support from participating Senators.
- 6.151. It appears, then, that elected representatives from around Australia and from different ends of the political spectrum, to the extent that one can draw this inference from responses to the Dawson review and from the Senate Committee's report, are of the view that provided the degree of bargaining power is not excessive, in certain circumstances, enabling small business to negotiate more effectively with larger businesses through collective negotiation may, in itself, constitute a public benefit.
- 6.152. As noted earlier, when considering issues of bargaining power, the Commission looks at the outcomes of any proposed change in

²⁹ Dawson Committee, *Review of the Competition Provisions of the Trade Practices Act*, January 2003, p 115.

³⁰ Senate Economics References Committee, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Businesses*, March 2004 p 58.

bargaining power. It is these likely outcomes that are essential to the net public benefit test.

6.153. The Commission considers that allowing newsagents to engage in collective bargaining is likely to enable participating newsagents to have greater input into the terms and conditions of their contracts with major publishers/distributors who elect to participate in negotiations.

6.154. The Commission notes the comments of the Tribunal that:

[I]t is clear that it could be possible to argue in some cases that a benefit to the members or employees of the corporations involved served some acknowledged end of public policy even though no immediate or direct benefit to others was demonstrable.³¹

6.155. Given that the Commission is of the view that the anti-competitive detriment generated by these proposed arrangements is limited, and that the bargaining position of newsagents in relation to major publishers/distributors is an unequal one, the Commission considers that this is one such instance foreshadowed by the Tribunal.

6.156. Accordingly, the Commission considers that allowing newsagents to engage in collective negotiations with major publishers/distributors may produce outcomes that are closer to those which one would expect to see were the bargaining power of the participating parties more evenly matched, and that this gives rise to a public benefit.

Industrial harmony

6.157. The ANF further claimed that the proposed arrangements are likely to foster industrial harmony. When considering such a claim, the Commission notes the following comment of the Tribunal:

...in order...to accept that a public benefit exists, the evidence must clearly establish that the granting of authorisation will lead to significantly greater industrial harmony in the future than a likely alternative.³²

6.158. In this instance, the Commission considers that is not in receipt of evidence to the effect that industrial harmony will be improved by collective negotiation with publishers.

6.159. Further, the Commission notes that, generally, publishers and distributors do not support the application, and it is therefore difficult for the Commission to conclude that the arrangements for which authorisation is sought will lead to improved industrial harmony.

³¹ *Queensland Co-operative Milling Association Ltd (QCMA) and Defiance Holdings Ltd (1976)* ATPR ¶40-012 at 17,743.

³² *Re Lamont (1990)* ATPR ¶41-035 at 51525.

- 6.160. Accordingly, the Commission does not accept that improved industrial harmony is a public benefit likely to arise from the proposed arrangements.

Equitable Dealings

- 6.161. In previous decisions, the Commission has accepted that providing smaller businesses with the ability to provide greater input into the terms and conditions of their contracts with larger businesses might reduce the likelihood of any harsh or unfair contractual terms being imposed.
- 6.162. The ANF has claimed that collective negotiations will promote equitable dealings in the industry.
- 6.163. While the failure to negotiate on the part of a business with significant market power may well be a relevant factor in considering claims of unconscionable conduct, the circumstances of any one matter need to be considered.
- 6.164. In this instance, the Commission is of the view that although some newsagents have submitted that harsh or unfair dealings have occurred, the evidence presented (particularly in light of contradictory evidence provided by publishers/distributors) is not sufficient to satisfy the Commission that this is the case.
- 6.165. In assessing this public benefit claim, the Commission notes that while publishers/distributors do not appear to negotiate individually with most newsagents, many do seek the views of the relevant association in relation to certain terms and conditions. As discussed earlier in this document, there is no reason why legitimate input (ie input falling short of contravening the TPA) would not continue to be made by the applicants absent of authorisation.
- 6.166. Further, the Commission notes that the ANF has proposed a ‘messenger model’ which would provide for individual negotiations to be conducted on behalf of newsagents by a bargaining agent. Newsagents are free to appoint bargaining agents, without authorisation, where they consider that their negotiation skills are not adequate to the task before them.
- 6.167. However, trade practices concerns arise where more than one newsagent employs the same bargaining agent, as it appears may occur through the proposed ‘messenger model’. Given that any benefit that could be said to be obtained from the greater bargaining skill/experience that a bargaining agent may exercise on behalf of a newsagent can be achieved without contravening the TPA, the Commission is not satisfied that there is any benefit to be gained from authorising individual newsagents to be represented by a common bargaining agent in individual negotiations with publishers.

- 6.168. On balance, the Commission is not satisfied that the applicants have demonstrated any public benefit in relation to this particular claim.

Efficiency

Transaction Cost Savings

- 6.169. While collective negotiation may result in transaction cost savings when compared to individual negotiations, this will not always be the case.
- 6.170. In this instance, the standard form contracts currently employed by publishers are likely to be of limited cost, particularly as it appears that such contracts are unlikely to be the subject of any further negotiation or lack significant variation.
- 6.171. However, the Commission notes the submissions from News Ltd and ACP, which suggested that standard form contracts were negotiable to some extent.
- 6.172. In light of the evidence received, the Commission is of the view that it appears that standard form contracts are generally prevalent across the industry, but that there is some room for negotiation on some terms by some newsagents with some publishers/distributors. This scope for negotiation appears to be limited and so it is unlikely that allowing collective negotiations would generate measurable transaction cost savings.
- 6.173. As a final note on this point, ACP submitted that the introduction of collective negotiations would divert resources away from the negotiation of individual agreements. It is difficult to see how this could be the case. If it is correct that standard form contracts are negotiable, to some extent, then it is not clear how reducing the number of individual negotiations (by conducting at least some negotiations collectively) would impose any additional burden on publishers/distributors.

Information sharing

- 6.174. Although the ANF claimed that collective negotiation would lead to better information sharing between participants in the negotiations, it did not provide information as to how this would occur. The Commission is not satisfied that authorisation will improve the quality or effective dissemination of information. Further, to the extent that this claim is made in relation to the supply of information to publishers and distributors, the Commission notes that no publisher or distributor supported the application.
- 6.175. With regard to the ability of newsagents to obtain appropriate legal or financial advice, the Commission understands that such advice (or other forms of assistance) may well be provided by industry associations such as the applicants regardless of whether or not

collective negotiation is authorised. Accordingly, the Commission does not accept that the proposed arrangements give rise to a public benefit in this regard.

Benefits to publishers

- 6.176. The ANF submitted that collective negotiations would also benefit publishers in the provision of information and input into contractual terms and conditions.
- 6.177. In particular, the ANF submitted that it would be inequitable to restrict the ANF from making submissions in response to requests for input by publishers into terms and conditions of standard form contracts.
- 6.178. The Commission notes that the publishers/distributors did not accept that collective negotiations and collective boycott activity would provide any benefits to them. Publishers noted that the desirability of a national approach to negotiation was limited by regional considerations that would exist regardless of any collective negotiations.
- 6.179. Further, News Ltd submitted that the costs of implementing new contractual arrangements to take into account the 1998 Tribunal decision have already been incurred, and that there are, as a result, no savings to be gained by publishers in entering into collective negotiations with the ANF.
- 6.180. However, the Commission understands that some major publisher/distributors will seek to renew their contracts with newsagents shortly. It may be, then, that some publishers would see some benefit to themselves in negotiating those contracts collectively were that option available to them.
- 6.181. It is important at this point to distinguish between the applicants' wish to represent their members in collective negotiations with publishers and distributors, with their provision of legitimate input into standard form contracts.
- 6.182. The distinction may be grey at the margins but is nevertheless important. Collective negotiations envisage direct participation by the applicants representing a party (or parties) to the proposed contract and direct involvement in the mechanics of striking a deal between newsagents and their suppliers. This is distinct from the current conduct of the applicants in providing input into the terms and conditions of standard form contracts. The Commission understands that such input primarily takes the form of the applicants providing information and suggestions based on the experiences of their members.
- 6.183. With regard to the supply of better information to suppliers (including publishers), the applicants did not provide evidence as to how the supply of information would be improved by collective negotiation.

The Commission is not satisfied that such an improvement would occur.

- 6.184. In light of the above discussion, the Commission is unable to conclude that collective negotiations such as those proposed would give rise to any measurable benefit to publishers/distributors.

Conclusion on public benefit

- 6.185. The Commission concludes that, on the information currently before it, collective negotiations with newspaper and magazine publishers and distributors gives rise to a small level of public benefit in addressing the current bargaining imbalance between newsagents and major publishers/distributors. The Commission considers that collective bargaining arrangements may provide newsagents with greater bargaining power, allowing them more effective input into contractual terms and conditions.

Conclusion

- 6.186. The Commission notes that the concerns expressed by it in the draft decision were largely related to the scope of the proposed arrangements, and that the applicants have addressed this issue by restricting the proposed arrangements significantly since that time.
- 6.187. Accordingly, with regard to the application as it now stands, on the evidence before it and for the reasons given above, the Commission considers that the proposed arrangements give rise to a small public benefit and limited public detriment.
- 6.188. Where it is difficult to determine precisely the magnitudes of public benefit and detriment that appear to be of similar size – as is the case here – there may be some uncertainty about whether the public benefit outweighs the public detriment.
- 6.189. In these cases, the Commission will generally not be satisfied that the public benefit generated by the application outweighs the anti-competitive detriment. However, it may consider whether it is possible to grant authorisation subject to conditions aimed at reducing, as far as possible, any uncertainty about whether the public benefit is greater than the anti-competitive detriment. These conditions would either seek to increase the public benefit or, more typically, reduce the anti-competitive detriment sufficiently to remove any concern that authorisation was being granted inappropriately.
- 6.190. In this instance, the Commission has decided to grant authorisation subject to the conditions outlined below. These conditions are designed to minimise any anti-competitive detriment to ensure that the proposed negotiations result in a net public benefit.

Conditions

6.191. The Commission grants authorisation to the Australian Newsagents Federation, the Queensland Newsagents Federation and the following state associations:

- Western Australian Accredited Newsagents Association (WAANA);
- Newsagents Association of the Northern Territory (NANT);
- Newsagents Association of NSW and ACT (NANA);
- Newsagents Association of South Australia (NASA);
- Tasmanian Newsagents Association Ltd (TNA); and
- Victorian Authorised Newsagents Association Limited (VANA),

to engage in collective negotiations on behalf of newsagent members subject to the conditions outlined below.

Condition C1

Collective negotiations on behalf of newsagents are to be conducted only with the following publishers/distributors and their subsidiaries (if any):

- **News Ltd;**
- **John Fairfax Holdings Ltd;**
- **ACP Publishing Pty Ltd;**
- **Gordon and Gotch Australia Pty Ltd;**
- **APN News & Media Ltd;**
- **West Australian Newspapers Holdings Ltd;**
- **Rural Press Ltd; and**
- **Retail Delivery Service.**

Condition C2

Collective negotiations are to be conducted on behalf of members of the associations named above. Those members are to elect to participate in collective negotiations before such negotiations commence. Publishers/distributors who decide to participate in any collective negotiations are to be provided with a list of participating newsagents before negotiations commence.

Condition C3

Newsagent members are to form groups at no larger than state level. Where appropriate, regional groups can be formed.

Condition C4

Collective negotiations with the publishers and distributors of magazines are to be in respect of the following terms and conditions only:

- **variable commissions for shelf life;**
- **supply allocations;**
- **carrying of non-core product;**
- **subscription delivery;**
- **returns policy; and**
- **terms of supply and rights of termination.**

Collective negotiations with the publishers of newspapers are to be in respect of the following terms and conditions only:

- **newsagents' commission and home delivery fees;**
- **insert fees;**
- **settlement discounts;**
- **late paper fees;**
- **split papers; and**
- **terms of supply and rights of termination.**

Condition C5

Authorisation does not extend to the 'messenger' system proposed by the ANF, which would allow the same bargaining agent to represent a number of individual newsagents in individual (rather than collective) negotiations with publishers/distributors.

- 6.192. Under the terms of this authorisation, no party may be compelled to engage in collective negotiations. Publishers/distributors and newsagents who do not wish to participate may continue with individual negotiations.
- 6.193. Further, this authorisation does not extend to any collective boycott activity. Accordingly, any such activity, should it occur, is not protected from legal action under the TPA.
- 6.194. Authorisation is granted for a period of **five years**. Authorising arrangements for a limited period allows the Commission an opportunity to assess whether the public benefits upon which its decision was based actually eventuate in practice and the appropriateness of the authorisation in the market environment as it exist at the time authorisation expires.

6.195. In addition, the Commission may review the authorisation, prior to the expiry of the authorisation, if there has been a material change of circumstances since the authorisation was granted.

Other issues

6.196. The Commission notes that several submissions from interested parties have referred to ‘territories’. Territorial exclusivity was a feature of the old authorised newsagent system. However, it may raise concerns under the TPA and it is no longer protected from legal action in most circumstances.

6.197. Territorial exclusivity may raise trade practices concerns in a number of ways. Depending on the structure of these arrangements, they may:

- raise concerns under section 45 of the TPA (including through the operation of section 4D), if the agreements preserving territorial exclusivity are between newsagents; or
- raise concerns under section 47 of the TPA, if the agreements preserving territorial exclusivity are between newsagents and publishers.

6.198. Where these arrangements are not protected, either through authorisation or the notification process that provides immunity in respect of section 47 of the TPA in some circumstances, newsagents and publishers should be aware that they may be in breach of the TPA to the extent that they are engaging in such arrangements and should take steps to ensure their ongoing compliance in this area.

7. Determination

The Application

- 7.1. On 12 October 2001, the Queensland Newsagents' Federation (QNF) lodged application A90804 with the Australian Competition and Consumer Commission (the Commission). On 29 April 2002, the Australian Newsagents' Federation (the ANF) and the QNF lodged an amended application with the Commission. Further substantial amendments limiting the scope of the proposed arrangements were made by letter dated 29 August 2002.
- 7.2. Finally, in October 2003, both the ANF and the QNF lodged submissions further narrowing the scope of the proposed arrangements and suggesting possible bargaining mechanisms to the Commission.
- 7.3. The application was made under sub-section 88 (1) of the *Trade Practices Act 1974* (the TPA) to make or give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA (Form B, Schedule 1 of the Trade Practices Regulation 1974).³³
- 7.4. Broadly, authorisation was sought to engage in collective negotiations on behalf of newsagents with certain major publishers and distributors of newspapers and magazines.
- 7.5. Authorisation was sought by the ANF and the QNF on behalf of themselves and the following newsagents associations:
 - Newsagents Association of New South Wales;
 - Victorian Accredited Newsagents Association Ltd;
 - Newsagents Association of South Australia Ltd;
 - Western Australian Accredited Newsagents Association;
 - Newsagents Association of Northern Territory; and
 - Tasmanian Newsagents Association Ltd.
- 7.6. Authorisation was sought for a period of five years.

Statutory Test

- 7.7. For the reasons outlined in section 6 of this determination, and subject to the conditions set out below, the Commission is satisfied that in all the circumstances the making of and giving effect to agreements in relation to collective negotiation with the publishers and distributors of newspapers and magazines for which authorisation is sought under subsection 88 (1) of the TPA
 - would be likely to result in a benefit to the public; and

³³ The application has also been considered as an application under the *Competition Codes* of each of the participating Australian jurisdictions, namely, New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, the Northern Territory and the Australian Capital Territory.

- that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the arrangements.

Conditions

7.8. The Commission grants authorisation to the Australian Newsagents Federation, the Queensland Newsagents Federation and the following state associations:

- Western Australian Accredited Newsagents Association (WAANA);
- Newsagents Association of the Northern Territory (NANT);
- Newsagents Association of NSW and ACT (NANA);
- Newsagents Association of South Australia (NASA)
- Tasmanian Newsagents Association Ltd (TNA); and
- Victorian Authorised Newsagents Association Limited (VANA),

to engage in collective negotiations on behalf of newsagent members subject to the conditions outlined below.

7.9. Pursuant to section 88(1) of the TPA, this authorisation extends to current and future members of the above associations.

7.10. This authorisation is subject to the following conditions:

Condition C1

Collective negotiations on behalf of newsagents are to be conducted only with the following publishers/distributors and their subsidiaries (if any):

- **News Ltd;**
- **John Fairfax Holdings Ltd;**
- **ACP Publishing Pty Ltd;**
- **Gordon and Gotch Australia Pty Ltd;**
- **APN News & Media Ltd;**
- **West Australian Newspapers Holdings Ltd;**
- **Rural Press Ltd; and**
- **Retail Delivery Service.**

Condition C2

Collective negotiations are to be conducted on behalf of members of the associations named above. Those members are to elect to participate in collective negotiations before such negotiations commence. Publishers/distributors who decide to participate in any

collective negotiations are to be provided with a list of participating newsagents before negotiations commence.

Condition C3

Newsagent members are to form groups at no larger than state level. Where appropriate, regional groups can be formed.

Condition C4

Collective negotiations with the publishers and distributors of magazines are to be in respect of the following terms and conditions only:

- **variable commissions for shelf life;**
- **supply allocations;**
- **carrying of non-core product;**
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- **returns policy; and**
- **terms of supply and rights of termination.**

Collective negotiations with the publishers of newspapers are to be in respect of the following terms and conditions only:

- **newsagents' commission and home delivery fees;**
- **insert fees;**
- **settlement discounts;**
- **late paper fees;**
- **split papers; and**
- **terms of supply and rights of termination.**

Condition C5

Authorisation does not extend to the 'messenger' system proposed by the ANF, which would allow the same bargaining agent to represent a number of individual newsagents in individual (rather than collective) negotiations with publishers/distributors.

Conclusion

- 7.11. The Commission grants authorisation for a period of five years.
- 7.12. This determination is made on 28 April 2004. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 20 May 2004.

- 7.13. If an application is made to the tribunal, the determination will come into force:
- where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review; or
 - where the application is withdrawn – on the day on which the application is withdrawn.