



Australian
Competition &
Consumer
Commission

Determination

Application for authorisation

lodged by

Australian Newsagents' Federation Ltd

*to engage in collective negotiations on behalf of member newsagents
with certain publishers and distributors of newspapers and magazines*

Date: 16 July 2009

Authorisation no.: A91134

Public Register no: C2009/781

Commissioners: Samuel
Kell
Schaper
Court
Dimasi
Willett

Summary

The ACCC grants conditional authorisation to the Australian Newsagents' Federation Ltd to engage in collective negotiations on behalf of member newsagents with certain publishers and distributors of newspapers and magazines. Authorisation is granted for a period of five years.

On 17 April 2009, the Australian Newsagents' Federation Ltd (ANF) applied for authorisation to engage in collective negotiations on behalf of member newsagents with certain publishers and distributors of newspapers and magazines.

The ACCC is satisfied that the proposed collective negotiations are likely to result in public benefits by enabling participating newsagents to have a greater opportunity to provide input into the terms and conditions of their contracts than would be the case if they were to each deal individually with publishers/distributors.

The ACCC considers that the proposed arrangements may also deliver public benefits in the form of transaction cost savings. The ACCC accepts that, in the context of magazines, the scale of these transaction cost savings may be increased by establishing a national collective bargaining group.

The ACCC considers that there are several features of the proposed collective bargaining arrangements which limit any other potential detriment. In particular, the proposed arrangements are voluntary and do not involve collective boycott activity.

To ensure that a net public benefit will be maintained over the period of authorisation the ACCC considers it appropriate to impose a number of conditions. Broadly, these conditions:

- limit collective negotiation to certain major publishers and distributors
- limit bargaining groups to no larger than state or regional groups (certain issues in relation to magazines may be negotiated by a national bargaining group)
- require that collective negotiations only occur in relation to certain core contract terms and conditions.

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List of abbreviations

ANF	Australian Newsagents' Federation Ltd
NANA	Newsagents Association of NSW & ACT
QNF	Queensland Newsagents Federation
WANH	West Australian Newspapers Holdings Limited
WAN	West Australian Newspapers Limited

1. Introduction

Authorisation

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2 The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.
- 1.3 The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.4 The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.5 After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.
- 1.6 Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.
- 1.7 The ACCC 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 final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

The application for authorisation

- 1.8 On 17 April 2009, the ANF lodged application for authorisation A91134 with the ACCC.
- 1.9 The ANF is seeking authorisation to engage in collective negotiations on behalf of its newsagent members with certain major publishers and distributors of newspapers and magazines. The ANF proposes that these publisher/distributors should be:

Newspapers

- News Ltd
- John Fairfax Holding Ltd/Rural Press Ltd
- APN News and Media Pty Ltd
- West Australian Newspapers Holdings Limited

Magazines

- ACP Publishing Pty Ltd
- Gordon and Gotch Australia Pty Ltd
- APN News and Media Ltd
- NDD Distribution Pty Ltd

1.10 The ANF proposes to negotiate on behalf of its newsagent members with publishers/distributors in relation to the following terms and conditions:

Newspapers

- newsagents' commissions and home delivery fees
- insert fees
- settlement discounts
- late paper fees
- split papers
- terms of supply
- rights of termination

Magazines

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

1.11 The ANF advises that the proposed negotiation process is voluntary. The ANF seeks authorisation for its members on an opt-in basis, or where the ANF can demonstrate previous written consent from members authorising collective negotiations on their behalf.

Interim authorisation

- 1.12 Collective bargaining arrangements were previously covered by authorisation A90804, which expired on 20 May 2009. At the time of lodging the application for authorisation, the ANF requested interim authorisation of the arrangements previously authorised under authorisation A90804.
- 1.13 On 15 May 2009, the ACCC granted interim authorisation to the arrangements previously authorised under authorisation A90804.

Draft determination

- 1.14 On 15 May 2009, the ACCC issued a draft determination proposing to grant authorisation to the collective bargaining arrangements for a period of five years, subject to a number of conditions.

Chronology

- 1.15 The ANF requested the ACCC consider this application under the streamlined authorisation process. Under this process, the ACCC undertakes to respond to interim authorisation requests and issue a draft determination on the substantive application within 28 days of receiving the application. The ACCC seeks to issue its final determination within three months of receiving the application.
- 1.16 Table 1.1 provides a chronology of significant dates in the consideration of this application.

Table 1.1: Chronology of application for authorisation A91134

DATE	ACTION
17 April 2009	Application for authorisation lodged with the ACCC.
1 May 2009	Closing date for submissions from interested parties in relation to the request for interim authorisation.
1 May 2009	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
6 May 2009	Submission received from the ANF in response to interested party submissions.
15 May 2009	The ACCC granted interim authorisation
15 May 2009	Draft determination issued.
5 June 2009	Closing date for submissions from interested parties in response to the draft determination.
16 June 2009	Pre-decision conference.
19 June 2009	Closing date for submissions from pre-decision conference attendees in response to issues raised at the pre-decision conference.

DATE	ACTION
24 June 2009	Submission received from the ANF in response to issues raised at the pre-decision conference.
16 July 2009	Final determination issued.

2. Background to the application

The applicant

- 2.1 The ANF is the national peak industry body representing newsagents in Australia. The ANF's membership comprises approximately 2,350 newsagents Australia wide.¹

The newsagency industry

- 2.2 Newsagents are predominantly engaged in the retailing (and in the case of newspapers, delivery) of newspapers, magazines, stationery supplies, greeting cards, confectionary and soft gambling products such as lottery tickets.
- 2.3 The newsagent industry in Australia comprises of a network of 5,000 small businesses employing over 20,000 staff, generating an estimated annual industry turnover in excess of \$7 billion per annum.²
- 2.4 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.

Distribution arrangements – newspapers and magazines

- 2.5 Broadly, the publishers of major newspapers usually distribute them to newsagents. The publishers of magazines generally use the services of a specialist distributor to place their products in newsagencies.
- 2.6 Newsagents are paid a portion 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.
- 2.7 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.

Past authorisations

- 2.8 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.
- 2.9 As this system involved an agreement between competitors, concerns arose that the system breached the Act. Newsagency councils therefore sought and obtained

¹ ANF application for authorisation A91134, supporting submission, 17 April 2009.

² *ibid.*

authorisations from the ACCC's predecessor, the Trade Practices Commission (the TPC).

- 2.10 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).
- 2.11 On 12 December 1997, the ACCC 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 Act. These decisions were appealed to the Tribunal.
- 2.12 On 18 November 1998, the Tribunal made its decision in similar terms to the ACCC's decision.³ However, it decided to grant a shorter transition period.
- 2.13 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.
- 2.14 The concerns raised by stakeholders during this consultation process gave rise to further applications for authorisation. These applications differed from those previously considered by the ACCC and the Tribunal in that they related to proposals for newsagents to collectively negotiate directly with individual publishers and distributors of newspapers and magazines.

Authorisation A90804

- 2.15 On 28 April 2004, the ACCC granted authorisation for the ANF, the QNF, and other state newsagent associations to collectively negotiate on behalf of their members with certain major publishers and distributors of newspapers and magazines.
- 2.16 The ACCC considered that the arrangements gave rise to a 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. The ACCC considered that this in turn may result in the negotiation of more commercially appropriate contract terms than were otherwise possible at the time.
- 2.17 The ACCC considered that the anti-competitive detriment generated by the proposed arrangements was limited by:
- the voluntary nature of the arrangements
 - the absence of any collective boycott activity
 - the limited number of distributors/publishers involved
 - the ability of distributors/publishers to refuse to participate

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

- the constraints imposed on participating newsagents by the existence of other possible distribution chains for publishers/distributors.

2.18 The application was granted subject to a number of conditions. 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
- require that collective negotiation only occur in relation to certain core contract terms and conditions.

2.19 Authorisation was granted for a period of five years and expired on 20 May 2009.

Differences between authorisation A90804 and the current application

2.20 Authorisation A90804 was granted subject to five conditions. Condition C3 stated that ‘newsagent members are to form groups no larger than state level. Where appropriate, regional groups can be formed.’

2.21 The current application seeks to establish collective bargaining groups of a size no larger than state level, and where appropriate a regional level, in respect of collective bargaining with newspaper publishers. However, where magazine publishers and distributors are concerned, the current application seeks authorisation to establish a national collective bargaining group. This is discussed further in Chapter 5.

2.22 Condition C4 of authorisation A90804 outlines the terms and conditions which the ANF could negotiate with the publishers/distributors of magazines and newspapers. In respect of magazines these terms and conditions included, among others, ‘variable commissions for shelf life’. In its current application, the ANF is seeking to extend this to ‘variable commissions and/or supply terms for shelf life’. This is discussed further in Chapter 5.

3. ACCC consultation

3.1 The ACCC sought submissions from more than 20 interested parties potentially affected by the application, including newspaper and magazine publishers and distributors, industry bodies and small business organisations. The ACCC received submissions from:

- News Limited
- ACP Magazines Ltd (ACP)
- John Fairfax Holdings Limited/Rural Press Limited
- Queensland Newsagents Federation and Newsagents Association of NSW & ACT (QNF and NANA)
- West Australian Newspapers Holdings Limited (WAN)
- Gordon and Gotch Australia Pty Ltd (Gordon and Gotch)

3.2 The views of the ANF and interested parties are outlined below. Copies of public submissions are available from the ACCC website (www.accc.gov.au) by following the 'Public Registers' and 'Authorisations Public Registers' links.

ANF's supporting submission

3.3 The ANF's views on the public benefits and detriments of the proposed arrangements are discussed in Chapter 5.

Interested party submissions

No objection to the application

3.4 John Fairfax Holdings Limited/Rural Press Limited and News Limited do not object to the application for authorisation.

3.5 ACP does not object to the proposed authorisation. However, ACP does raise two issues in relation to the proposed authorisation.

3.6 First, ACP submits concern that the granting of collective bargaining authorisations to multiple groups in relation to similar subject matter creates the potential for significant confusion. ACP identifies the possibility that a situation will arise in which a single newsagent is simultaneously being represented in two collective bargaining processes and those processes are taking inconsistent approaches to a particular issue. ACP submits that it is unclear how this inconsistency would be managed.

3.7 Second, ACP disagrees with the statement in the ANF's application that ACP is the largest magazine publisher. ACP accepts that in the context of magazine distributor, this statement has some accuracy. However, ACP submits that it is not the largest magazine publisher – News Limited is a significantly larger publisher and Fairfax is approximately the same size publisher.

3.8 ACP believes the following statement in the ANF's application is misleading: 'ACP has a share of approximately 50% of all consumer magazines published in Australia.'

ACP's share of total audited magazine sales is 50.3%, however only a small proportion of magazine titles offered for sale in Australia are audited. In ACP's most recent analysis, the broader ACP group publishes less than 20% of all magazines by volume sold in Australia.

- 3.9 ACP submits that newsagents enjoy significant countervailing power to magazine publishers and distributors.

Conditional support for the application

- 3.10 The QNF and NANA do not object to the ANF being authorised to collectively bargain on behalf of its members based on authorisation A90804.
- 3.11 The QNF and NANA submit that it would be anomalous if the ACCC allowed the ANF to negotiate nationally. The QNF and NANA note that the ACCC has insisted on state or regional groupings in relation to other collective bargaining authorisations, and has always been cautious about national groups. The QNF and NANA submit that the ANF application does not give any cogent reasons for diverting from that ACCC policy.
- 3.12 The QNF and NANA consider that the ANF appears to ignore the condition in the authorisation A90804 that restricts the size of collective bargaining groups to state level. They submit that the ANF appears to be negotiating on behalf of a nationwide group of its members in relation to a newspaper publisher contract.
- 3.13 WAN recognises the overall public benefit, on balance, in the ACCC granting immunity in relation to collective bargaining between it and its distributors (ANF, West Australian Distributors Association and Independent Distributors). However, WAN submits that there is no reason to believe that any progress is likely to be achieved through the implementation of the ANF authorisation, which would only apply to ANF members.
- 3.14 WAN submits that the ANF authorisation will positively discourage and facilitate a deterioration of the resolution of the Western Australian Supreme Court proceedings between WAN and its distributors. WAN states the ACCC should refuse authorisation of the ANF authorisation insofar as it relates to WAN and its distributors.
- 3.15 Gordon and Gotch notes that there are two differences between authorisation A90804 and the ANF's current application, namely:
- The change of the terms and conditions of collective negotiations in respect of magazines (outlined in condition C4) from 'variable commissions for shelf life' to 'variable commissions and/or supply terms for shelf life'. On the assumption that the inclusion of 'supply terms' goes no further than other matters already included in authorisation A90804, Gordon and Gotch neither consents nor opposes this point
 - The seeking of authorisation to establish a national collective bargaining group for magazine negotiation. However Gordon and Gotch submits that it has not been given enough time to consider the ramifications of this

ANF's response to interested party submissions

3.16 The ANF submits that:

- The preference of national publisher/distributors to centralise decision making processes and issue national contracts which are substantially uniform, means the relative bargaining power of newsagents will remain weak in the context of state sized bargaining groups
- The proposed arrangements do not limit the ability to tailor collectively negotiated contracts to state, regional or individual circumstances where appropriate
- With respect to the representatives of the WAN, the ANF feels that their position in response to the application has come about as a result of a misunderstanding
- The ANF acknowledges that any future representations made on behalf of its members to the WAN under the renewed authorisation A91134, would still require the consenting participation of the WAN and a cooperative approach from both parties
- The responses from the national magazine stakeholders do not as yet indicate significant issues with the proposed magazine arrangements outlined in the substantive application.

Submissions received in response to the draft determination

3.17 WAN remains concerned about the very substantial public and private detriment that would eventuate if the conduct subject to the authorisation were to take place in respect of WAN. If the conduct were to take place, WAN submits that the Supreme Court proceedings would not be able to be resolved as contemplated by the Agreed Terms of Mediation.

3.18 News Limited states that it has no comments or objections in relation to the draft determination.

The pre-decision conference and further written submissions

3.19 On 26 May 2009, the QNF and NANA requested that the ACCC hold a pre-decision conference in relation to the draft determination. The pre-decision conference was held on 16 June 2009 at the ACCC's Sydney office, chaired by ACCC Acting Chairman, Peter Kell. The conference was attended by representatives of the ANF, the QNF, NANA, ACP, Gordon and Gotch and NDD Distribution Pty Ltd (NDD).

3.20 Following the pre-decision conference, written submissions were made by the QNF and NANA and the ANF.

3.21 The views expressed at the pre-decision conference and contained in these further submissions are discussed in Chapter 5 of this decision. These submissions and a record of the pre-decision conference are available at the ACCC's website (www.accc.gov.au) by following the 'Public Registers' and 'Authorisations and Notifications Registers' links.

4. The net public benefit test

- 4.1 The ACCC may only grant authorisation where the relevant test in section 90 of the Act is satisfied.

Application A91134

- 4.2 The ANF lodged application for authorisation A91134 under section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act. The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.
- 4.3 In respect of the making of and giving effect to the arrangements, sections 90(6) and 90(7) of the Act state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
- the provision of the proposed contract, arrangement or understanding would result, or 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 result, or be likely to result, if the proposed contract or arrangement was made and the provision concerned was given effect to.

Application of the tests

- 4.4 The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition.⁴
- 4.5 However, the Tribunal has previously stated that regarding the test under section 90(6):
- [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.⁵
- 4.6 Consequently, given the similarity of wording between section 90(6) and 90(7), when applying these tests the ACCC can take most, if not all, detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

⁴ *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

⁵ *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

Definition of public benefit and public detriment

4.7 Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.⁶

4.8 Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁷

Future with-and-without test

4.9 The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.⁸

4.10 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

Length of authorisation

4.11 The ACCC can grant authorisation for a limited period of time.⁹

Conditions

4.12 The Act also allows the ACCC to grant authorisation subject to conditions.¹⁰

Future and other parties

4.13 Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

- persons who become party to the contract, arrangement or understanding at some time in the future¹¹

⁶ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677. See also Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242.

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

⁸ Australian Performing Rights Association (1999) ATPR 41-701 at 42,936. See also for example: Australian Association of Pathology Practices Incorporated (2004) ATPR 41-985 at 48,556; Re Media Council of Australia (No.2) (1987) ATPR 40-774 at 48,419.

⁹ Section 91(1).

¹⁰ Section 91(3).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.¹²

¹¹ Section 88(10).

¹² Section 88(6).

5. ACCC evaluation

- 5.1 The ACCC's evaluation of the ANF's proposed collective arrangements is in accordance with the net public benefit test outlined in Chapter 4 of this draft determination. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments flowing from the proposed arrangements.

The market

- 5.2 The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.
- 5.3 In the past, the ACCC has identified two markets that are affected by the proposed collective bargaining arrangements:
- supply by newsagents of distribution services to publishers of newspapers and magazines, where newsagents compete with each other and with other suppliers of distribution services such as supermarkets, petrol retailers and convenience stores
 - the retail supply of goods and services including newspapers and magazines to consumers, in which newsagents compete with each other and other suppliers.
- 5.4 The ACCC considers that these markets remain relevant to its assessment of the current proposed collective bargaining arrangements.

The counterfactual

- 5.5 As noted in Chapter 4 of this draft determination, in order to identify and measure the public benefit and public detriment generated by conduct, the ACCC applies the 'future with-and-without test'. This involves a counterfactual of identifying the conduct likely to occur if authorisation is not granted.
- 5.6 The ANF submits that the relevant counterfactual for newspaper distribution would involve a continuation of the current situation with no negotiation activity. In respect of magazines, the ANF considers that without any authorisation the status quo will persist with no bargaining legitimately occurring.
- 5.7 The ACCC understands that, to date, there has been a 'lack of any collective negotiation' under the terms of authorisation A90804.¹³
- 5.8 The ACCC considers that without authorisation, the proposed collective negotiations would not proceed. This would mean a continuation of the current situation, where there are standard form contracts between newsagents and publishers with some scope for input from individual newsagents and/or state representative bodies.

¹³ ANF application for authorisation A91134, supporting submission, 17 April 2009

Public benefit

- 5.9 The ANF submits that the following public benefits will result from the proposed arrangements:
- increased input into contracts and redressing imbalances in bargaining power
 - transaction cost savings
 - industrial harmony

Increased input into contracts

- 5.10 The ANF submits that in its 2004 final determination, the ACCC stated that allowing newsagents to participate in collective bargaining is likely to enable those newsagents to have greater input into the terms and conditions of their contracts with participating publisher/distributors and may produce outcomes consistent with parties whose bargaining power was more evenly matched.¹⁴
- 5.11 The ANF submits that the validity of increased contractual input as a public benefit argument is increasingly pertinent five years after the 2004 determination, in part due to the lack of any collective negotiation and partly due to a ‘deterioration of the industry’.
- 5.12 ACP does not agree with the ANF’s view of ‘current low levels of bargaining power between newsagents and the proposed counterparties.’ ACP considers that:
- ...newsagents enjoy significant countervailing power to magazine publishers and distributors due to the importance of the newsagent channel for many high volume as well as speciality magazine titles that are not readily able to be sold through other volume, range and display space restricted distribution channels such as the supermarket and convenience channels.
- 5.13 The ACCC accepts that most newsagents are small businesses that are negotiating with large suppliers such as News Limited or Fairfax – companies that are well resourced and have significant experience negotiating in a commercial environment. These large companies could be expected to have significant bargaining power in negotiations with individual newsagents.
- 5.14 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. However, publishers who are dissatisfied with their dealings with newsagents have alternative distribution channels such as supermarkets, petrol retailers and convenience stores. It is not clear what alternative sources of supply exist for the newspapers and magazines that underpin a newsagent’s business.
- 5.15 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; for example, a consumer in Brisbane is unlikely to accept substitution of News Limited’s *Courier Mail* with Fairfax’s *The Age*. Newsagents unable to source the major metropolitan daily papers

¹⁴ ACCC final determination A90804, 28 April 2004

from News Ltd or Fairfax would therefore be likely to lose a significant number of customers.

- 5.16 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.
- 5.17 This improved input can provide a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their businesses, for example, addressing common contractual problems in a more streamlined and effective manner. The ACCC accepts that providing small businesses with the ability to provide greater input into the terms and conditions of their contracts with larger businesses may also reduce the likelihood of unfair contractual terms being imposed.
- 5.18 In this case, the ACCC considers that public benefits arise by allowing newsagents to collectively bargain, assisting them to achieve more appropriate commercial outcomes.
- 5.19 It would still be open to publishers/distributors to negotiate with newsagents on an individual basis if that is their preference. However, the proposed arrangements, by providing newsagents with a greater voice in negotiations, provide an opportunity for issues, such as oversupply, to be given greater consideration. If both sides consider it appropriate, contract terms and conditions can be negotiated that take greater account of these issues.
- 5.20 The proposed arrangements do not limit the ability of publishers to tailor collectively negotiated contracts to individual circumstances where appropriate or to deal directly with individual newsagents.

Transaction cost savings

- 5.21 Generally, there are transaction costs associated with contracting. These transaction costs can be lower where a single negotiating process is utilised, such as in a collective bargaining arrangement, relative to a situation where multiple negotiation processes are necessary. The ACCC considers that to the extent that these transaction cost savings do arise they are likely to constitute a public benefit.
- 5.22 The ANF submits that if an agreed contractual amendment is identified as a result of negotiation with publisher/distributors, the collective adoption of such an amendment can consolidate and share the associated costs in varying such agreements.
- 5.23 The information available to the ACCC suggests that newsagents are generally offered standard form contracts with little scope to vary terms and conditions. However, there may still be costs associated with entering into such contracts in the form of professional advice or obtaining the information necessary to make an informed choice. A collective may be able to consolidate and share such costs.
- 5.24 The ANF submits that ‘the benefits of cost savings would be further magnified in respect of magazine related negotiations should the ACCC grant authorisation to form national level collective bargaining groups, rather than the previously authorised state level bargaining groups.’

- 5.25 The ANF submits that:
- the majority of magazine titles have national breadth and scope
 - major decisions in respect of magazine distribution occur centrally at a national level
 - the participation of the major magazine publisher/distributor stakeholders in the development of a national voluntary non-prescribed code of conduct demonstrates a willingness of representatives from all sides to address national issues.
- 5.26 The ACCC notes these points and accepts that a national collective bargaining group may deliver greater transaction cost savings in respect of magazines. This issue is discussed further below.

Industrial harmony

- 5.27 The ANF submits that should the proposed collective bargaining arrangements be authorised, they will have the potential to create a good faith basis that would afford newsagents greater trust in the sales-based supply allocation of magazine products. The ANF believes that an extensive history of newsagents' problems with magazine oversupply and related issues indicates that newsagents will respond positively to an opportunity to address these problems.
- 5.28 Although publishers and distributors generally do not object to the application, the ACCC understands that, in the past, publishers and distributors have been unwilling to participate in any collective negotiations. In this context, the ACCC does not accept that improved industrial harmony is a public benefit likely to arise from the proposed collective arrangements.

ACCC conclusion on public benefits

- 5.29 The ACCC considers that the proposed arrangements are likely to deliver public benefits by addressing the current bargaining imbalance between newsagents and major publisher/distributors. Collective bargaining arrangements may provide newsagents with greater bargaining power, allowing them more effective input into contractual terms and conditions. These arrangements may also lead to transaction cost savings, particularly in respect of magazines where a national collective bargaining group is formed.

Public detriment

- 5.30 Under collective bargaining arrangements, competitors come together to negotiate terms and conditions, which can include, price, with a supplier or customer.
- 5.31 Generally speaking, competition between individual businesses generates price signals which direct resources to their most efficient use. Collective agreements to negotiate terms and conditions can interfere with these price signals and lead to inefficiencies. The capacity of new entrants to compete for the rights to undertake the business of existing market participants subject to the collective bargaining agreement also has implications for how competition is affected. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.

- 5.32 The ACCC has previously identified that the anti-competitive effect of collective bargaining arrangements constituted by lost efficiencies is likely to be more limited where:
- the current level of negotiations between individual members of the group and the proposed counterparties is low
 - participation in the collective bargaining arrangement is voluntary
 - there are restrictions on the coverage or composition of the group
 - there is no boycott activity.

Current level of negotiations

- 5.33 Where the current level of individual bargaining between members of a proposed bargaining group and the target is low, the difference between the level of competition with or without the collective arrangements may also be low.
- 5.34 The ANF submits that the low level of individual bargaining and resultant low level of competition among newsagents would suggest that the current level of competition among newsagents with or without the collective bargaining arrangements in place may also be low.
- 5.35 The use of standard form contracts by major publisher/distributors is the norm in their commercial dealings with newsagents. The ANF submits that these arrangements allow newsagents little opportunity to bargain or have effective input into the terms of these major commercial relationships.
- 5.36 There appears to be some opportunity for individual newsagents to vary the terms and conditions of supply where the publisher/distributor deems it appropriate. However, in general, the ACCC considers that the level of bargaining between individual newsagents and publisher/distributors is low.
- 5.37 The ACCC considers that the difference in the level of competition amongst newsagents with or without the collective bargaining arrangements is likely to be small.

Voluntary participation in the collective bargaining arrangements

- 5.38 The ANF advises that the application seeks to conduct collective negotiations on behalf of members of the ANF on an opt-in basis, or where the ANF can demonstrate previous written consent from members authorising collective negotiation on their behalf.
- 5.39 The ANF submits that the requirement to opt-in provides a reliable means of ensuring that no party is involved in the negotiation without having first given express and deliberate consent, thus assuring the voluntary nature of the proposed arrangements.
- 5.40 The ANF notes that should the proposed collective negotiation appear anti-competitive, detrimental or unfavourable to publishers or distributors, there is no obligation to participate. Therefore, the ANF submits that the proposed negotiations must provide some benefits to publishers/distributors and participating newsagents in order for any agreed amendments to occur.

- 5.41 The ACCC notes that individual newsagents remain free to negotiate directly with the targets or other suppliers of newspapers and magazines at any time.

Coverage or composition of the group

Newspapers

- 5.42 The ANF seeks to establish collective bargaining groups of a size no larger than state-based in respect of newspaper publishers, and where appropriate establish regional level groups.
- 5.43 In authorisation A90804, that ACCC considered that limiting bargaining groups (either by geography or size) would allow negotiations to better take into account the specific demand or supply characteristics of 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.¹⁵
- 5.44 The ACCC notes that there is regional variation in newspaper circulation. That is, the newspaper with the highest circulation within a region is often a publication specific to that particular region. While these publications are often owned by large publishers, the ACCC considers that there are likely to be regional considerations giving rise to commercial differences which appropriately support collective bargaining on a state or regional basis.

Magazines

- 5.45 The ANF seeks authorisation to establish a national collective bargaining group in respect of magazine publishers and distributors. The ANF states that, where appropriate, national collective bargaining deliberations can be varied to encompass significant state or regional disparities.
- 5.46 In support of this, the ANF submits that:
- the majority of magazine titles have national breadth and scope
 - major decisions in respect of magazine distribution occur at a national level, and in the absence of a national bargaining group authorisation for magazines it will be more difficult to address genuinely national issues affecting newsagents (such as questions concerning the sales-based allocation of magazine supply)
 - the absence of a national bargaining approach may have been a contributory factor in the lack of collective bargaining during the term of the authorisation A90804
 - the participation of major magazine publisher and distributors in the development of a national code of conduct demonstrates a willingness to address national issues and further supports the notion that key decision making in respect of magazine production and distribution generally does occur on a national level
 - national collective bargaining groups are the preferred approach of both publishers and distributors

¹⁵ ACCC final determination A90804, 28 April 2004

- common national issues, such as magazine supply allocation, have the potential to yield additional public benefits of improved allocative and dynamic efficiencies through the proposed authorisation.

5.47 The QNF and NANA submit that:

- it would be anomalous if the ACCC allowed the ANF to negotiate nationally. The QNF and NANA note that the ACCC has insisted on state or regional groupings in relation to other collective bargaining authorisations, and has always been cautious about national groups. The QNF and NANA submit that the ANF application does not give any cogent reasons for diverting from that ACCC policy
- allowing a national collective bargaining group would add to the anti-competitive detriment of the proposed arrangements and result in a situation where major suppliers would ignore state based collective bargaining groups
- if national collective bargaining groups are allowed in some circumstances, as set out in the proposed Condition C3 in the draft determination, then these circumstances should be spelt out.

5.48 At the pre decision conference, three major magazine distributors (NDD, ACP and Gordon and Gotch) indicated that most issues in respect of magazines are national in nature. NDD submitted that it makes many policy decisions on a national basis. ACP indicated that addressing issues on a national basis is more beneficial to the industry. Gordon and Gotch submitted that there are many issues that need to be addressed that affect all newsagents nationally.

5.49 The ACCC has carefully considered the submissions by the ANF and interested parties on the appropriateness of collective negotiations on a national basis in respect of magazines.

5.50 The ACCC accepts that most magazine titles are distributed on a nation-wide basis and that there is a commonality of significant issues affecting newsagents nationally in their dealings with magazine publishers and distributors.

5.51 The ACCC notes that three of the major magazine distributor targets are generally supportive of a national collective bargaining process. Generally Speaking, the ACCC considers that collective negotiations will be more likely to take place if they have the support of the targets.

5.52 In light of these factors, the ACCC has decided to grant the ANF conditional authorisation to negotiate on behalf of a national collective bargaining group with magazine publishers and distributors in relation to those issues which can not be effectively addressed at a state or regional level. This is set out in condition C3 in Chapter 6.

5.53 The ACCC has considered the proposal by the QNF that if national collective bargaining groups are allowed in some circumstances, then these circumstances should be spelt out. The ANF submits that it is up to the newsagents to identify which issues will be addressed at a local level and the ANF cannot compel distributors to deal with certain issues at certain levels.

5.54 The ACCC notes that condition C4 limits the terms and conditions of collective negotiations. The ACCC anticipates that newsagents, publishers and distributors

participating in negotiations in respect of magazines will determine which of these terms and conditions will be better addressed by a national collective bargaining group, and which will be more effectively addressed at a state level.

- 5.55 The ACCC recognises that the decision to allow national collective bargaining groups in respect of magazines is an expansion of the situation permitted under authorisation A90804. However, the ACCC considers that the anti-competitive effect of allowing the expansion is likely to be mitigated. In particular, participation in the proposed negotiations by magazine publishers and distributors is voluntary. It is also open for members of the ANF and other newsagents to bargain individually with publishers and distributors of magazines if they consider such negotiations will deliver better commercial outcomes. The ACCC considers that these factors are likely to constrain the potential anti-competitive effect of the expanded bargaining group.

Boycott activity

- 5.56 Collective boycotts can remove the discretion of the target to participate in collective bargaining and to accept the terms and conditions (including price) offered by the collective bargaining group. This is because the target, faced with the threat of withdrawal of supply, will be under increased pressure to accept the terms and conditions offered by the collective bargaining group.
- 5.57 Collective boycotts can also significantly disrupt downstream and upstream businesses. The Tribunal has found that collective boycotts have the potential to inflict significant damage upon the target of the boycott, its employees, consumers, and also, the boycotters themselves.¹⁶ The Tribunal considered that the threat of a boycott – even without it ultimately being engaged in – is likely to come at a high cost to society.
- 5.58 The ACCC considers that collective boycotts can significantly increase the potential anti-competitive effects of collective bargaining arrangements and it is unlikely to allow protection from legal action to such conduct in most cases.
- 5.59 The ANF has not applied for authorisation to engage in collective boycott activity. Accordingly, any such conduct, should it occur, would not be protected from legal action under the Act. If such conduct did occur, the ACCC would investigate.

Scope of negotiations

- 5.60 The ACCC also considers it important to set clear limits on the scope of any collective negotiations. This is reflected in the condition on authorisation A90804 limiting negotiations to certain terms and conditions.
- 5.61 In its current application, the ANF has sought authorisation for ‘variable commissions and/or supply terms for shelf life’ which appears to extend the ‘variable commissions for shelf life’ authorised in 2004.
- 5.62 Gordon and Gotch submits that if the inclusion of ‘supply terms’ goes no further than other matters already included in authorisation A90804, it neither consents nor opposes this point.

¹⁶ *VFF Chicken Meat Growers’ Boycott Authorisation* [2006] AcompT9 at paragraph 442.

5.63 The ACCC understands that the inclusion of the words ‘and/or supply terms’ is intended to clarify rather than expand this point. However, the ACCC considers that this issue is adequately addressed by condition C4, which provides for negotiation in relation to ‘terms of supply and rights of termination’.

Potential for collusive anti-competitive conduct beyond that authorised

5.64 The QNF and NANA submit that recent conduct of the ANF may be outside the scope of its current authorisation, and may potentially breach the Act. In light of this, they propose that any collective negotiations by the ANF be subject to the following conditions:

- When collectively bargaining in any state or region, the ANF must establish state or regional based groups chaired by different people, and collective bargaining by these groups cannot be done on a joint or collaborative basis
- ANF national staff are not to be involved in more than one such group. The QNF and NANA note that the ACCC has in the past refused to accept the ANF’s proposed ‘messenger system’
- The ANF must advise each of its state or regional bargaining groups of the progress of any national collective bargaining and seek their input both before and during the bargaining process.

5.65 The ACCC understands that any state or regional based collective bargaining by the ANF would be led by a representative of the relevant ANF state branch. ANF national staff provide secretariat functions to state branches and as a result, may be involved in any state or regional based collective bargaining. However, the ACCC understands that any such involvement would not extend to the type of role envisaged under the previously proposed ‘messenger system’ (where a single bargaining agent represented multiple different parties).

5.66 The ACCC would be concerned if the ANF facilitated coordination between state based bargaining groups in such a way as to achieve de facto national negotiations. This type of conduct would be contrary to condition C3.

5.67 More generally, the ACCC would be concerned if, under the guise of the authorised arrangement, other issues were collectively determined between the authorised parties. For example, the ACCC would be concerned if newsagents raised issues of market sharing during any discussion with the targets, contrary to condition C4. Similarly, the ACCC would be concerned if collective negotiations were to be conducted with multiple targets at once, contrary to condition C2, or involved an understanding between the targets.

ACCC conclusion on public detriments

- 5.68 The ACCC considers that there are several features of the proposed arrangements which limit the potential detriment. In particular, the proposed arrangements are voluntary and do not involve collective boycott activity.

Balance of public benefit and detriment

- 5.69 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangement is likely to result in a public benefit that will outweigh any public detriment.

- 5.70 In the context of applying the net public benefit test at section 90(8)¹⁷ of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.¹⁸

- 5.71 The ACCC is satisfied that that the proposed arrangements are likely to generate public benefits by giving newsagents more effective input into contractual terms and conditions.

- 5.72 The ACCC considers that the proposed arrangements may also deliver public benefits in the form of transaction cost savings. In the context of magazines, the scale of these transaction cost savings may be increased by establishing a national collective bargaining group.

- 5.73 The ACCC notes that participation by publishers and distributors in the collective negotiations is voluntary.

- 5.74 On balance, the ACCC considers the public benefit is likely to outweigh the public detriment.

- 5.75 To ensure that a net public benefit will be maintained over the period of authorisation the ACCC considers it appropriate to impose a number of conditions. These conditions are set out in Chapter 6.

Likelihood of collective bargaining occurring

- 5.76 The ACCC understands that the experience of the applicants under authorisation A90804 suggests that collective bargaining may not occur with all or any of the targets.

- 5.77 The ACCC's role in applying the statutory test is to assess what benefits and detriments flow from the conduct if it were to take place. The ACCC does not discount the public benefits that accrue from collective negotiations because there is uncertainty about whether the conduct will actually be engaged in.

¹⁷ The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

¹⁸ Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.

5.78 In the event that collective negotiations do occur between the participants and the targets, the ACCC is satisfied that the public benefits flowing from this conduct are likely to outweigh the public detriment.

Length of authorisation

5.79 The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

5.80 In this instance, the ANF seeks authorisation for five years.

5.81 The ACCC grants authorisation in respect of the proposed arrangements for a period of five years.

6. Determination

The application

- 6.1 On 17 April 2009, the ANF lodged application for authorisation A91134 with the Australian Competition and Consumer Commission (the ACCC).
- 6.2 Application A91134 was made using Form B of the Trade Practices Regulations 1974. The application was made under subsection 88(1) of the Act to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 6.3 In respect of the making of and giving effect to the arrangements, sections 90(6) and 90(7) of the Act state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding would result, or 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 result, or be likely to result, if the proposed contract or arrangement was made and the provision concerned was given effect to
- 6.4 In particular, the ANF seeks authorisation to represent its newsagent members in collective negotiations with certain publishers and distributors of newspapers and magazines.

The net public benefit test

- 6.5 For the reasons outlined in Chapter 5 of this draft determination, the ACCC considers that in all the circumstances the arrangements for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.
- 6.6 The ACCC is satisfied that the arrangements for which authorisation is sought are likely to result in such a benefit to the public that the arrangements should be allowed to take place.
- The ACCC therefore **grants** authorisation to application A91134.
- 6.7 To ensure that a net public benefit will be maintained over the period of authorisation the ACCC has imposed a number of conditions. Broadly, these conditions:
- limit collective negotiation to certain major publishers and distributors
 - limit bargaining groups to no larger than state or regional groups (certain issues in relation to magazines may be negotiated by a national bargaining group)
 - require that collective negotiations only occur in relation to certain core contract terms and conditions.

Conduct for which the ACCC proposes to grant authorisation

- 6.8 The ACCC grants conditional authorisation to the Australian Newsagents' Federation to engage in collective negotiations on behalf of its member newsagents with major publishers and distributors of newspapers and magazines.
- 6.9 The ACCC grants authorisation to the arrangements for a period of five years.
- 6.10 This authorisation is subject to the conditions outlined below.
- 6.11 Further, the authorisation is in respect of the arrangement as it stands at the time authorisation is granted. Any changes to the arrangement during the term of the authorisation would not be covered.
- 6.12 This determination is made on 16 July 2009.

Conduct not authorised

- 6.13 The ACCC understands that the ANF and national magazine distribution stakeholders have been in discussions regarding a national code of conduct.
- 6.14 The ANF submits that the parties involved in developing this code will seek advice to consider if the issues raised in relation to a code warrant separate authorisation. In light of this, the ANF submits that part of condition C4 in the draft determination is not necessary because matters relating to a code of conduct do not strictly relate to the proposed collective bargaining authorisation.
- 6.15 The ACCC has decided to remove the part of condition C4 of the draft determination that referred to a code of conduct, but emphasises that this authorisation does not extend to discussion or implementation of any code of conduct.

Conditions

Condition C1

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

- **News Ltd**
- **John Fairfax Holdings Ltd/Rural Press Ltd**
- **APN News and Media Pty Ltd Publishing Pty Ltd**
- **West Australian Newspapers Holdings Ltd**
- **Gordon and Gotch Australia Pty Ltd**
- **NDD Distribution Pty Ltd**
- **ACP Publishing Pty Ltd**

Condition C2

Collective negotiations are to be conducted on behalf of members of the Australian Newsagents Federation.

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 collective bargaining groups at no larger than state level. Where appropriate, regional groups can be formed.

Where magazine publishers and distributors are concerned, newsagent members may establish a national collective bargaining group to negotiate in relation to issues which can not be effectively addressed at a state or regional level.

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**
- **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**
- **terms of supply and rights of termination.**

Interim authorisation

- 6.16 At the time of lodging the application, the ANF requested interim authorisation in relation to the conduct previously authorised under authorisation A90804.
- 6.17 On 15 May 2009, the ACCC granted interim authorisation to allow the ANF to collectively negotiate on behalf of member newsagents with major publishers and

distributors of newspapers and magazines, subject to the conditions as they were stated in authorisation A90804.

- 6.18 Interim authorisation will remain in place until the date the ACCC's final determination comes into effect, or until the ACCC decides to revoke interim authorisation.

Date authorisation comes into effect

- 6.19 This determination is made on 16 July 2009. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal) it will come into force on 7 August 2009. If an application for review is made to the Tribunal, the determination will come into effect:

- 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.