



Determination

Applications for authorisation A91583 & A91584

lodged by

LPO Group Ltd & Ors

in respect of

collective negotiations with
Australia Post for terms and conditions
under their LPO Agreement

Date: 9 November 2017

Authorisation number: A91583 & A91584

Commissioners: Sims
Rickard
Schaper
Cifuentes
Court
Featherston
Keogh

Summary

The ACCC has decided to grant authorisation to allow LPO Group Ltd (LPOG), on behalf of itself and its current and future licensed post office members, to engage in voluntary collective bargaining with Australia Post.

The ACCC grants authorisation for five years, until 30 November 2022.

Authorisation provides statutory protection from legal action for conduct that may contravene cartel provisions of the *Competition and Consumer Act 2010*. LPOG proposes to collectively negotiate, make and give effect to agreements with Australia Post. LPOG proposes to negotiate a new agreement with Australia Post or vary the agreement that is currently in place (the LPO Agreement).

LPOG also proposes to give effect to provisions whereby LPOG members who opt-in to the collective bargaining group agree not to individually negotiate with Australia Post during specific periods of group negotiation.

LPOG is an industry organisation that represents licensed post offices. Of the 870 LPOG members, currently 525 licensed post offices (18 per cent of total licensed post offices) will be eligible to opt-in to collective negotiations with Australia Post. Australia Post currently has a network of 2881 licensed post offices.

The applications for authorisation

1. On 11 March 2017 LPO Group Ltd (**LPOG**) lodged applications for authorisation A91583 and A91584 with the ACCC under subsections 88(1A) and (1) of the *Competition and Consumer Act 2010* (**CCA**) seeking authorisation to engage in conduct that may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.¹
2. The applications are made by LPOG on behalf of itself and existing and future Licensed Post Office (**LPO**) members that opt-in to the collective bargaining group (together, **the Applicants**).

The proposed conduct

3. Authorisation was sought to enable the Applicants to collectively negotiate, make and give effect to a new LPO Agreement with Australian Postal Corporation (**Australia Post**) or to vary the LPO Agreement that is currently in place (**the proposed collective negotiations**). The LPO Agreement governs

¹ On 6 November 2017, a number of amendments to the CCA came into effect, including changes to the authorisation provisions in Division 1 of Part VII of the CCA. Pursuant to section 182(3), these changes apply to applications for authorisation under consideration by the ACCC on or after 6 November 2017. Accordingly, the CCA as amended will apply to this application, notwithstanding that it was lodged with the ACCC prior to the amendments coming into effect. Applications for authorisation under subsections 88(1A) and (1) are treated as applications for authorisation under subsection 88(1) of the CCA as amended.

the terms and conditions upon which LPOs provide products and services as part of Australia Post's retail network.

4. Additionally, the Applicants sought authorisation to give effect to limited exclusivity arrangements² whereby the Applicants (i.e. each post office owner) will agree not to negotiate with Australia Post on an individual basis while collective negotiations are occurring for a limited period of time. LPOG advises that the proposed exclusivity arrangements will only apply to members who have opted in to the bargaining group during annual reviews undertaken at or before the start of each financial year (lasting approximately 5 weeks each year from around June/July), and negotiation with respect to material changes³ to services by Australia Post. The Applicants envisage that negotiations should take less than 6-8 weeks. Individual LPOG members who wish to negotiate separately with Australia Post during the proposed exclusivity period would be free to do so by opting to leave the collective bargaining group. Whether an LPO decides to opt in or out of the collective bargaining will have no effect on the LPO's membership with LPOG.
5. By way of example, LPOG advises that the proposed terms and conditions that LPOG seeks to collectively negotiate with Australia Post include⁴:
 - assessment of payments for services – for example, outward mail processing, street carded articles,⁵ mail management services, representation services, business and passbook banking transactions
 - introduction of a new 'viability supplement' to subsidise low volume remote LPOs
 - changes to volume obligations of Australia Post's products and services for resale by LPOs
 - changes to the dispute resolution process to allow LPOG to represent LPOs in disputes with Australia Post
 - commitment by Australia Post to introduce new and sustainable business opportunities in the Australia Post retail network, and
 - greater flexibility in the LPO Agreement in relation to service offerings.
6. It is not a condition of LPOG membership that LPOs participate in the proposed collective negotiations. Further, participation in the proposed collective negotiations by LPOG members will be voluntary, and does not affect LPOs' services to Australia Post or the public.
7. Participation by Australia Post in collective negotiations would also be voluntary; authorisation will provide LPOG and its members with immunity from relevant provisions of the *Competition and Consumer Act 2010* to allow them to engage

² In its application, LPOG describes the conduct as 'a limited collective boycott'. However the conduct is better described and more properly referred to as the 'proposed exclusivity arrangements'.

³ Material changes have been defined by the Applicants as outlined at paragraph 37 and 38 below.

⁴ Applicant's submission dated 11 May 2017, page 22.

⁵ Items that would not be successfully delivered by the street delivery stream and would need to be carded back to a retail outlet for collection by the addressee: <http://www.ipogroup.com.au/content/street-carded-articles-calculator-and-box-parcels>

in collective bargaining, but it would not impose an obligation for any party to participate if it does not wish to do so.

8. The Applicants sought authorisation for five years.

Draft determination

9. On 16 August 2017, the ACCC issued a draft determination⁶ proposing to grant authorisation for five years to LPOG and its current and future LPO members to collectively negotiate, make and give effect to a new agreement with Australia Post or vary the agreements that are currently in place for the provision of postal and distribution services by LPOs.
10. The ACCC also proposed to grant authorisation to a limited exclusivity provision whereby members of LPOG who form part of the collective bargaining group will voluntarily agree, for a limited period of time, not to negotiate with Australia Post on an individual basis while the proposed collective negotiations are occurring.
11. Two submissions were received following the ACCC's draft determination; one from Australia Post and one from the Applicants. These submissions are available on the ACCC's public register and have been taken into account in the ACCC's assessment below. No conference was requested.

Interim authorisation

12. The Applicants were granted interim authorisation by the ACCC on 30 June 2017 to enable them to negotiate, make and give effect to relevant agreements while the ACCC considered the substantive applications for authorisation.⁷
13. Interim authorisation remains in place until it is revoked or the date that this final determination comes into effect.

Background

Australia Post (the counterparty)

14. Australia Post is a Government Business Enterprise incorporated under the Australian *Postal Corporation Act 1989* (Cth) (**APC Act**).
15. The principal function of Australia Post is to supply postal services within Australia, and between Australia and places outside Australia. Australia Post is also able to carry on, within Australia or outside Australia, any business or activity that is incidental to this.
16. Under the APC Act, Australia Post has the exclusive right to carry mail items weighing less than 250 grams (with some exceptions) and issue stamps within Australia with a uniform service standard and price across the country (Reserved Service).
17. In addition to the Reserved Service, Australia Post also has the non-exclusive right to supply a number of other services including parcel delivery, post office boxes and the retail supply of other postal products. Australia Post also offers additional products and services, such as some financial services.

⁶ Subsection 90A(1) of the Act requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

⁷ <http://registers.accc.gov.au/content/index.php/html/itemId/1202204/fromItemId/278039/display/acccDecision>

18. As at 30 June 2016, the Australia Post retail network consisted of over 4,300 retail outlets. Under the *Australian Postal Corporation (Performance Standards) Regulations* (Cth), Australia Post is required to maintain an overall minimum presence of 4000 retail outlets across Australia and a minimum number of 2500 retail outlets in rural and remote areas.⁸

19. There are three main types of outlet as follows:

- Corporate Post Offices (CPOs) are owned and operated by Australia Post and offer Australia Post's full suite of products and services
- LPOs, owned and operated by a licensee.
- Community Postal Agencies (CPAs) are established in a host business or other local premises and offer basic postal services only. The majority of CPAs are located in rural or remote communities.

Licensed Post Offices (LPOs)

20. Australia Post currently has a network of 2881 LPOs. LPOs are private businesses which are granted an indefinite licence by Australia Post to operate a post office using Australia Post products, branding and systems. LPOs are obliged to provide a number of products and mandatory services as part of Australia Post's retail network, including postage assessment, mail acceptance and delivery, agency banking and BillPay.

21. LPOs vary, from stand-alone post office businesses to outlets located in or operated in conjunction with other businesses such as newsagencies, general stores, pharmacies, supermarkets etc.

LPO Group Ltd (the applicant)

22. LPO Group Limited (**LPOG**) is an industry organisation formed in August 2013 to represent the interests of its members, who qualify for membership through their ownership of a Licensed Post Office (LPO) business.

23. LPOG's membership, consists of registered members who do not pay any fees and financial members who pay an annual membership fee. LPOG currently has 870 registered members in total (including 525 financial members)⁹ located in metropolitan, regional and rural areas. LPOG's financial members make up 18 per cent of the total number of 2,886 LPOs in Australia. Only LPOG's financial members will be eligible to join the proposed collective negotiations.

24. LPOG describes its role as:

- providing a forum for its members to deal with common interests and issues, and
- representing the interests of members to Australia Post, government agencies and other stakeholders in the postal industry.

⁸ Australia Post submission dated 26 May 2017, page 5.

⁹ Applicants' submission dated 27 July 2017, page 3.

Post Office Agents Association Limited

25. The Post Office Agents Association Limited (**POAAL**) is the other national organisation for small business owners in the postal sector. POAAL has represented Licensees and their predecessors since 1939 and has advised that it represents 90 per cent of LPOs.
26. LPOG is not associated with POAAL, although some LPOs are members of both LPOG and POAAL.

LPO Agreement

27. The terms of the existing relationship between LPOs and Australia Post are governed by the LPO Agreement. The LPO Agreement was originally drafted in 1993. It is a standard form contract which Australia Post enters into with each LPO. LPOs are considered franchisees as they operate under a franchise agreement with Australia Post (the LPO Agreement) for the purposes of the Franchising Code of Conduct.
28. The LPO Agreement grants the right to LPOs as independent contractors to use the Australia Post brand and intellectual property in relation to postal services, and in relation to the sale of postal and other products. Australia Post provides each LPO with specified fees, commissions or discounts in relation to the supply of these products and services by LPOs.
29. There are two dispute resolution processes available to licensees. The LPO Agreement contains a specific dispute resolution process that operates in accordance with a Code for Resolving Disputes contained in the LPO Manual. The Code for Resolving Disputes is a dispute resolution process involving meetings, negotiation and the involvement of POAAL representatives. Licensees are also able to access a second dispute resolution process as set out in the Franchising Code of Conduct.¹⁰

Senate Inquiry and Consultative Agreement

30. In 2014, a Senate Committee Inquiry¹¹ into Australia Post and the LPO network in the Australian Postal System, made a number of conclusions, including:¹²
 - The significantly different postal environment, which continues to experience rapid change, no longer reflects the market that existed when many LPOs originally negotiated their services agreements with Australia Post.
 - It had received much evidence from licensees which pointed to difficulties in having issues resolved and the attitude of some Australia Post employees to the LPO network.

¹⁰ Australia Post submission dated 26 May 2017, page 15.

¹¹ The Senate Environment and Communications Legislation Committee inquiry into the performance, importance and role of Australia Post in Australian communities, the challenges it faces in the immediate and longer term, its operations in relation to licensed post offices, and the importance and role of the LPO network in the Australian Postal System.

¹² Tabled on 24 September 2014 – available online at:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Australia_Post_in_Australian_communities/Report

31. In response to the Senate Committee Inquiry, Australia Post established the LPO Forum, comprising of LPOG, POAAL, and the Australia Post Licensees Advisory Council, to conduct consultation and address the recommendations of the Senate Committee Inquiry.¹³ Australia Post also extended its discretionary consultation practices to include LPOG, by formally entering into a written Consultative Agreement with LPOG, in similar terms to its agreement with the other industry association, POAAL.¹⁴
32. Notwithstanding these developments, Australia Post's Consultative Agreement dictates that discussions with Australia Post pursuant to the Consultation Agreement must be treated as commercial-in-confidence by LPOG. As such, details of any discussions cannot be shared by LPOG with its members.¹⁵

Consultation

33. The ACCC invited submissions from potentially interested parties including Australia Post, LPOs, POAAL, relevant regulatory bodies and relevant industry organisations.

Prior to the draft determination

34. The ACCC received six public submissions and five confidential submissions from interested parties, and further submissions from the Applicants in response to those submissions:
 - A number of LPOs provided submissions outlining a range of concerns with the contractual terms of the LPO Agreement.
 - Australia Post submitted that it “neither supports nor opposes the authorisation”.¹⁶ Australia Post submitted that authorisation is not required to facilitate consultation, that the scope of the authorisation will be misunderstood by licensees, and that any ‘boycott’ may be abused by the Applicants.
 - POAAL opposed the applications. POAAL submitted that LPOs can negotiate individually with Australia Post, and over 30% of LPOs have exercised that right.
 - Mr Malcolm Roberts supported the applications, submitting that authorisation may lead to more efficient outcomes for both LPOs and Australia Post.

Following the draft determination

35. The ACCC received a submission in response to the draft determination from Australia Post.¹⁷ Australia Post made clear its position that it neither supports nor opposes authorisation. However, Australia Post commented on a number of

¹³ Australia Post extended the definition of ‘Association’ in the LPO Agreement to any licensee representative group and a formal Consultative Agreement was entered into between Australia Post and LPOG.

¹⁴ Applicants’ submission, dated 11 May 2017, page 19.

¹⁵ Applicants’ submission dated 21 June 2017, page 1.

¹⁶ Australia Post submission dated 6 September 2017, page 1.

¹⁷ Australia Post submission dated 6 September 2017.

sections of the ACCC's draft determination including the 'future with and without', material cost savings, fees and commissions, and public detriments sections. These comments are addressed below.

36. Australia Post had previously raised concern regarding the scope of the authorisation given that it applied to negotiations about 'any material changes implemented by Australia Post', as this term was subjective and potentially very broad in scope.¹⁸ Following the draft determination, Australia Post submitted that if the ACCC is minded to grant authorisation to LPOG to collectively bargain about 'material changes' with Australia Post, the scope of authorisation should be limited to material changes that "affect the LPO network as a whole".¹⁹
37. The Applicants also lodged a submission following the draft determination.²⁰ In response to a request by the ACCC to clarify the scope of 'material changes' for which the exclusivity provision will apply,²¹ the Applicants advised that 'material changes' relate to issues that have a substantial likelihood of affecting the viability of the LPO network.
38. Specifically, the Applicants submit that 'material changes' would include, but are not limited to:²²
- the commencement of any new products and services or discontinuation or modification of products or services by Australia Post
 - initiatives by Australia Post that are likely to result in the termination of the LPO Agreements or closure of LPOs amounting to more than one percent of the LPO network.
 - changes in business, operations, capital or control of Australia Post or to the supply of products or services to LPOs, and
 - loss of primary suppliers of Australia Post resulting in the inability to obtain products of a similar function, quality and cost.
39. The ACCC considers that the additional information received by the Applicants has addressed ambiguity around the proposed exclusivity arrangements, and consider that the exclusivity provision will be triggered when proposed changes to the LPO Agreement affect the LPO network as a whole.
40. Further information in relation to the applications for authorisation, including all public submissions received by the ACCC, may be obtained from the ACCC's website www.accc.gov.au/authorisations.

ACCC assessment

41. Pursuant to subsections 90(7) and 90(8), the ACCC must not make a determination granting authorisation in relation to conduct unless it is satisfied in all the circumstances that the conduct would result or be likely to result in a

¹⁸ Australia Post submission dated 8 August 2017, pages 1-2.

¹⁹ Australia Post submission, dated 6 September 2017.

²⁰ Dated 28 September 2017.

²¹ Please see discussion of the exclusionary provision at paragraph 4 above.

²² Applicants' submission dated 28 September 2017, page 3.

benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the conduct.²³

42. In order to assess the effect of the proposed collective negotiations and the public benefits and detriments likely to result, the ACCC identifies the relevant areas of competition and compares the likely future with and without the proposed conduct.

The relevant areas of competition

43. The ACCC considers that relevant areas of competition affected by the proposed conduct are:
- the national supply of postal distribution services to Australia Post
 - the regional retail supply of postal products and services to consumers, including postage assessment, mail acceptance and delivery, parcel processing, storage and delivery, and
 - the regional retail supply of other incidental products and services to consumers, including, banking services and BillPay, general stationery products, books and magazines, and gift cards.
44. The Applicants broadly accept the relevant areas of competition for assessing the proposed collective negotiations as those identified by the ACCC above.²⁴
45. The ACCC considers the precise identification of the relevant areas of competition is not required for the purpose of assessing the application for authorisation. The ACCC can consider the areas of competition in a broad sense when assessing the public benefits and detriments that would likely result from the proposed collective bargaining arrangements.

The future with and without the proposed conduct

46. The ACCC compares the public benefits and detriments likely to arise in the future if the proposed conduct occurs, against the future in which the proposed conduct does not occur.
47. The Applicants submit that the future without the proposed collective negotiations is likely to be one where the Applicants will not be able to engage in meaningful negotiation with Australia Post in relation to the LPO Agreement, and LPOG will not be able to negotiate with Australia Post on their behalf. In essence this is a continuation of the status quo.
48. Australia Post submits that there will not be a material difference in the form of contract between Australia Post and LPOs in the future with the authorisation, compared to the future without the authorisation. In both scenarios, the standard form LPO Agreement will continue to apply.²⁵
49. In the future without the proposed collective negotiations, the ACCC considers that it is likely that:

²³ As a cartel provision applies to the proposed conduct, subsection 90(7)(a) does not apply: section 90(8).

²⁴ Applicants' submission, dated 11 May 2017.

²⁵ Australia Post submission, dated 6 September 2017, page 2.

- Australia Post will continue to offer largely standard form contracts to LPOs. Each LPO will have the opportunity to approach Australia Post to individually negotiate contractual terms of the LPO Agreement. Australia Post can use its discretion whether or not to do so.
- The circumstances of some LPOs will continue to trigger the inclusion of additional contractual terms into their LPO Agreements. These terms are incorporated as 'special conditions' to the LPO Agreement.²⁶
- There is limited ability for LPOG to represent its members on issues relevant to these contracts once consultation between Australia Post and LPOG has commenced. Under the terms of the Consultative Agreement between LPOG and Australia Post, matters discussed during consultation with Australia Post will be treated as confidential by LPOG (and POAAL) and not disclosed to its members. LPOs will have little if any involvement or input during the consultation process between Australia Post and LPOG.

Public benefits

50. Public benefit is not defined in the CCA. However, the Australian Competition 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 principal elements ... the achievement of the economic goals of efficiency and progress.²⁷

51. The Applicants submit that the proposed collective negotiations will result in various public benefits. The ACCC accepts that transaction cost savings and increased contractual negotiation and input by LPOs are likely from the proposed collective negotiations. The ACCC's assessment of the likely public benefits follows.

Transaction cost savings

Applicants

52. The Applicants submit that the proposed collective negotiations will be more time and cost efficient than if individual LPOs were to pursue negotiations with Australia Post on a bilateral basis.

53. The Applicants submit that the resources of individual LPOs are relatively limited. The time required to engage with Australia Post detracts from the time LPOs are required to spend on running their businesses and from services provided to consumers.

54. Further, the Applicants submit that the need for individual LPOs to engage their own lawyers or other professionals, including third party experts to conduct

²⁶ Special Conditions may concern fixtures and fittings, the Disability Discrimination Act, security, post office box services, licensee conveyance of post articles, additional insurance, stock ordering arrangements and uniforms.

²⁷ *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.

negotiations²⁸, is removed in collective negotiation. It would be more cost effective for LPOG to bear the costs of collective negotiations and recoup the costs evenly from members in the bargaining group.

Interested parties

55. Australia Post submits that LPOs already have the benefit of the joint negotiation and cost sharing under the current consultative arrangements. Further, that most negotiations relate to the LPOs' individual circumstances, rather than issues of global concern.²⁹
56. Australia Post also submits that with or without authorisation, the standard form LPO Agreement will apply rather than individual contracts and "there are unlikely to be additional, material cost savings".³⁰

ACCC view

57. The ACCC accepts there are transaction costs associated with contracting. The costs to Australia Post of negotiating individual contracts with each of the 2881 individual LPOs would likely be significant. These costs are likely to explain why Australia Post offers a standard form contract. The ACCC accepts that Australia Post is likely to continue to offer a standard form LPO Agreement with or without authorisation. However, the terms and conditions of such an agreement may be different with collective bargaining, and authorisation will provide the statutory protection for LPOs to engage in collective bargaining.
58. The ACCC considers that the proposed collective negotiations are likely to result in a public benefit in the form of transaction cost savings where a single negotiation process is employed. This is likely to increase the number of LPOs participating in the bargaining process, compared to a situation where the LPOs attempt to negotiate individually with Australia Post at a potentially higher cost. This in turn is likely to enable more effective negotiation and result in more comprehensive and efficient standard form contracts of greater benefit to all LPOs.

Improved input into contracts

Applicants

59. The Applicants submit that although some changes have been made to the LPO Agreement since 1993, the obligations of LPOs under the agreement, and the structure of fees, commissions and discounts paid to LPOs under the agreement, have not changed significantly in 24 years. The Applicants submit that this has contributed to LPOs being financially unsustainable and threatens their viability in the medium to long term.
60. Further, despite steps taken by Australia Post to ostensibly include LPOG in the consultative process, LPOG states that its practical experience is that the process is consultative in name only, and has not delivered any meaningful changes to the LPO Agreement for the benefit of LPOG's members.³¹

²⁸ Applicants' submission dated 28 September 2017, page 4.

²⁹ Australia Post submission, dated 26 May 2017, page 10.

³⁰ Australia Post submission dated 6 September 2017, paragraph 3.4

³¹ Applicants' submission, dated 11 May 2017, page 19.

61. The Applicants consider that the proposed exclusivity arrangements will ensure the effectiveness of the proposed collective negotiations and help to realise the public benefits, if members do not individually negotiate with Australia Post for the period of the collective negotiations.
62. The Applicants submit that in an environment where contracts are not negotiated, fees, commissions and discounts provided for under the LPO Agreement have not been sufficient to provide LPOs with fair and reasonable remuneration. The Applicants submit that this has led to current anger and dysfunction between LPOs and Australia Post. Further, the Applicants submit that LPOs rely on Australia Post products and services for the vast majority of their revenue, and the likelihood of LPOs opening and operating sustainable ancillary businesses is also limited by the prohibition on the sale of competing products in the LPO Agreement.³²
63. The Applicants submit that mediation and associated costs under the dispute resolution process are expensive and may not be an option for all LPOs.

Interested Parties

64. LPOs who made submissions noted the greater bargaining power of Australia Post compared with individual LPOs and stated that consequently LPOs have been unable to negotiate appropriate changes to the LPO Agreement. LPOs also raised issues with contractual terms in the current LPO Agreement. However these contractual issues fall largely outside the scope of the ACCC's consideration of authorisation for the proposed collective negotiations.
65. Mr Roberts submits that the proposed collective negotiations are likely to result in efficiencies for LPOs, where current arrangements are inadequate for viable LPO businesses to operate. Further, that rural and remote areas will be most severely hampered if collective negotiations do not occur.³³
66. Australia Post disputes LPOG's submission that consultation with POAAL and LPOG has not resulted in any changes to its original proposals in relation to annual review processes and the introduction of new products or services.³⁴ Australia Post also disputes that LPOs have not had input into the LPO Agreement. They submit that LPOs have negotiated with Australia Post individually, including as part of the annual review process which led to aspects of the LPO Agreement being revised.³⁵
67. Australia Post submits that the proposed collective negotiations will not result in any increase in bargaining power, considering that participation in the negotiations is voluntary, and that LPOG already has the right to be consulted on material matters³⁶ in relation to the LPO network.
68. Australia Post and POAAL submit that 30 per cent of licensees have individually negotiated fee arrangements or special terms with Australia Post, with changes to the LPO Agreement reflected in Special Conditions to those licensees' LPO Agreements. Further, 300 LPOs (predominantly in rural and remote areas)

³² Applicants' submission dated 28 September 2017, page 5.

³³ Mr Malcolm Roberts submission, dated 27 June 2017.

³⁴ Australia Post submission dated 8 August 2017, page 2.

³⁵ Australia Post submission dated 6 September 2017, Page 2.

³⁶ In respect of legislative changes and when new products or services are introduced. This is in addition to Australia Post's annual review of fees, commissions and discounts.

receive minimum income payments from Australia Post to ensure they remain open and viable (in order for Australia Post to fulfil its service obligations).³⁷

69. In response to the Applicants' concerns about viability of LPOs, Australia Post submits that it does consider the interests of LPOs in setting payment rates.³⁸ Australia Post acknowledges the digital disruption facing the industry and submits that it has impacted both Australia Post and LPOs alike. Australia Post submits that to counteract its impact, it is important for both Australia Post and individual licensees to take steps to invest in other ancillary businesses.³⁹
70. POAAL also submits that there is a low level of formal disputes between Australia Post and Licensees, and there have been only two so far in this current financial year.⁴⁰

ACCC view

71. The ACCC accepts that the current postal environment is rapidly changing and as noted by the Senate Committee Inquiry, the agreements LPOs currently operate under were negotiated during different industry and market conditions.
72. The ACCC also accepts that many LPOs would be at a disadvantage in terms of resources and experience when negotiating with Australia Post. Collective bargaining may help to redress these disadvantages and allow for more effective negotiation and more efficient contracts for members of the collective bargaining group and Australia Post.
73. There is continuing disagreement between the Applicants and Australia Post as to the level of current input and negotiation or consultation that takes place between the LPOs and Australia Post, both individually and collectively. The ACCC considers that notwithstanding that individual LPOs can approach Australia Post and seek to negotiate terms, and the Consultative Agreement includes discretionary provisions for Australia Post to consult with LPOG and POAAL, statutory immunity to allow for collective bargaining between the LPOs with Australia Post, increases the likelihood that LPOs will engage in collective bargaining negotiations.
74. The ACCC considers that collective bargaining provides a greater opportunity to the Applicants and Australia Post for more effective negotiation, where the negotiating parties are more likely to identify and achieve business efficiencies.
75. For example, access to relevant industry information and increased input into contractual negotiations provides a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their businesses, such as addressing common contractual issues in a more streamlined and effective manner.
76. The ACCC considers that, to the extent that LPOs are more likely to participate in collective negotiations and have greater input into the terms of a new or varied LPO Agreement, issues such as the financial sustainability of rural LPOs are more likely to be collectively addressed.⁴¹

³⁷ Australia Post submission, dated 26 May 2017, page 5. POAAL submission, dated 30 May 2017, page 2.

³⁸ Australia Post submission, dated 26 May 2017, page 9.

³⁹ Australia Post submission, dated 6 September 2017, page 4.

⁴⁰ POAAL submission, dated 30 May 2017, page 2.

⁴¹ See paragraph 52 - 55 above and Applicants' submission dated 11 May, page 28.

77. The ACCC notes the submissions of Australia Post and POAAL regarding negotiations of the Special Conditions in the LPO Agreement. The ACCC understands that Special Conditions are activated in the standard form LPO Agreement by reference to the site-specific circumstances of an individual LPO, rather than any significant process of negotiation between LPOs and Australia Post. Further, certain payments may be included under Annexure A to the LPO Agreement to take account of the geographic location or work volumes of the particular LPO.
78. The ACCC considers that the proposed collective negotiations are likely to result in public benefits arising from the opportunities to lower transaction costs and improve the efficiency of negotiations and the quality of input into contracts.

Public detriment

79. Public detriment is also not defined in the CCA 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.⁴²
80. The Applicants submit that the proposed collective negotiations will not result in any detriments, considering:
- there is limited competition between LPOs in relation to the supply of distribution services to Australia Post, and the supply of postal products and services to consumers
 - the proposed collective negotiations with Australia Post are voluntary for both LPOG and Australia Post, and
 - the decision by an LPOG member to be represented by LPOG in collective negotiations with Australia Post will be on a voluntary opt-in basis.
81. LPOG members who decide to engage LPOG's representation in the proposed collective negotiations will be subject to the proposed exclusivity arrangements, outlined below.

Proposed exclusivity arrangements

Applicants

82. The Applicants are seeking authorisation to engage in exclusivity arrangements where participating LPOs will agree not to negotiate with Australia Post on an individual basis while collective negotiations are ongoing in relation to:
- Australia Post's annual review of payments under the LPO Agreement, and
 - material changes implemented by Australia Post outside of the annual review process.⁴³ As set out at paragraphs 37 and 38 above, the

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

Applicants have provided further submissions to clarify the meaning of the term 'material changes' for the purposes of triggering this clause.

83. The Applicants submit that the proposed exclusivity arrangements will only apply to LPOG members:

- during the time period that LPOG is engaged in collective bargaining negotiations with Australia Post, and
- in relation to the issues that are the subject of the collective negotiation between LPOG and Australia Post.⁴⁴

84. The Applicants submit that while the negotiations for each material change will vary, they envisage that negotiations should take less than 6-8 weeks. Some negotiations may need additional time depending on the nature of the material changes proposed and how negotiations will be conducted.

85. The Applicants submit that any detriment from the proposed exclusivity arrangements will be minimal as:

- there are limited negotiations currently between LPOs and Australia Post, and it will therefore not change the competitive dynamics under the status quo, or result in anticompetitive detriment in any market, and
- individual LPO members may opt-out of the collective negotiations at any time should they wish to individually negotiate with Australia Post.

Interested parties

86. Australia Post and POAAL submit the proposed collective negotiations will result in detriment because:

- LPOs will be restricted from individual consultation with Australia Post or consultation via another representative group such as POAAL, and
- it may be used to co-ordinate threats by LPOs of withholding postal or other services. This would affect the delivery of essential services to the public. Australia Post submitted that authorisation should be subject to conditions to mitigate this concern, making it clear that the proposed exclusivity arrangements do not empower LPOs to boycott the performance of services or general adherence to the terms of the LPO Agreement.

87. In response to the draft determination, Australia Post submitted that authorisation may create additional costs to licensees, particularly if LPOG creates unrealistic expectations concerning the outcome of negotiations.⁴⁵

⁴³ Applicants' submission dated 27 July 2017, page 1.

⁴⁴ Applicants' submission dated 27 July 2017, page 3.

⁴⁵ Australia Post submission dated 6 September 2017, paragraph 3.3

ACCC view

88. The ACCC notes Australia Post's submission that authorisation may create additional costs to licensees if "LPOG creates unrealistic expectations concerning the outcome of negotiations."⁴⁶ The ACCC notes that participation in collective bargaining by both parties is voluntary and there is no guarantee as to the outcome of any such bargaining. However, the ACCC does not consider that any material detriment arises from the possibility that some parties have higher expectations than others about the outcome of negotiations.
89. The ACCC considers that the proposed collective negotiations, including the proposed exclusivity arrangements, are likely to result in minimal public detriment for the following reasons:
- a. there is currently limited competition between LPOs for postal services provided to Australia Post (and this is likely to continue to be the case in the future without the proposed conduct)
 - b. the exclusivity arrangements are limited to periods of negotiation for the annual review of payments under the LPO Agreement, and material changes implemented by Australia Post relating to the LPO network as a whole. The proposed exclusivity arrangements are not proposed to be authorised beyond the relevant period of negotiation
 - c. The proposed exclusivity arrangements do not include collective boycott conduct whereby LPOs would collectively withhold distribution services from Australia Post. LPOs will continue to supply distribution services to Australia Post and retail services to the public during the proposed collective negotiations and the proposed exclusivity arrangements. Any collective threat or actual boycott of Australia Post by LPOs would not benefit from the statutory protection provided by this determination.
 - d. LPO members who opt-in to the negotiation group are entitled to opt-out at any time during the collective negotiations (or exclusivity period) to individually negotiate terms with Australia Post if it is no longer in the individual LPO's interests to be in the collective bargaining group
 - e. Australia Post is not obliged to negotiate with the collective bargaining group. The ACCC notes that negotiations were not undertaken between the Applicants and Australia Post with respect to the annual review of payments following the ACCC's interim authorisation decision, and
 - f. it is not a condition of membership with LPOG that members join the collective bargaining group, and LPOG members are not restricted from also joining POAAL or any other group.

⁴⁶ Australia Post submission 6 September, paragraph 3.3, page 6.

90. As the ACCC considers that the public detriments from the proposed collective negotiations will be limited and will be outweighed by the likely public benefits, and the proposed conduct does not include the ability for LPOs to collectively boycott Australia Post, the ACCC does not consider it necessary to impose conditions on the scope of the authorisation.

Balance of public benefit and detriment

91. Broadly, the ACCC must not grant authorisation for the proposed conduct that includes a cartel provision unless it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.

92. For the reasons outlined in this determination, the ACCC considers that the proposed collective negotiations are likely to result in public benefits including transaction cost savings and improved input into contracts, and that these would outweigh any public detriment, including from any lessening of competition. Accordingly, the ACCC is satisfied that the relevant net public benefit test is met.

Determination

The applications

93. Applications A91583 and A91584 were made using a Form A and B, under subsection 88(1) and (1A) of the CCA seeking authorisation to engage in proposed conduct to which certain provisions of Part IV of the CCA would or might apply.⁴⁷ That is, the proposed conduct may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.⁴⁸

94.

95. The proposed conduct is outlined at paragraph 97 below.

The net public benefit test

96. For the reasons outlined in this determination, the ACCC is satisfied, pursuant to subsections 90(7) and 90(8) of the CCA, that in all the circumstances the proposed conduct for which authorisation is sought would result or be likely to

⁴⁷ On 6 November 2017, a number of amendments to the CCA came into effect, including changes to the authorisation provisions in Division 1 of Part VII of the CCA. Pursuant to section 182(3), these changes apply to applications for authorisation under consideration by the ACCC on or after 6 November 2017. Accordingly, the CCA as amended will apply to this application, notwithstanding that it was lodged with the ACCC prior to the amendments coming into effect. Applications for authorisation under subsections 88(1A) and (1) are treated as applications for authorisation under subsection 88(1) of the CCA as amended.

⁴⁸ As s4D has been repealed pursuant to the amendments referenced above it has been excluded from the description of the proposed conduct. The reference to “within the meaning of section 45 of the CCA” includes the making and/or giving effect to a contract, arrangement or understanding or to engage in a concerted practice, any or all of which may have the purpose or effect of substantially lessening competition.

result in a public benefit that would outweigh any detriment to the public that would result or be likely to result from the conduct.⁴⁹

Conduct which the ACCC authorises

97. The ACCC grants authorisation A91583 and A91584 to LPO Group Ltd and its current and future licensed post office members to engage in the proposed conduct i.e., to:

- collectively negotiate, make and give effect to a new agreement with Australian Postal Corporation or vary the agreements that are currently in place for the provision of postal and distribution services by Licensed Post Offices, and
- make and give effect to a limited exclusivity provision whereby members of LPOG who form part of the collective bargaining group will voluntarily agree, for a limited period of time, not to negotiate with Australia Post on an individual basis while the proposed collective negotiations are occurring.

98. The proposed conduct may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.

99. The ACCC proposes to grant authorisation A91583 and A91584 for a period of five years.

100. This determination is made on 9 November 2017.

101. Authorisation does not extend to any form of collective boycott activity.

Length of authorisation

102. The CCA allows the ACCC to grant authorisation for a limited period of time.⁵⁰ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

103. In this instance, the Applicants seek authorisation for five years on the following grounds:

- The LPO Agreement is an ongoing agreement which may need to be renegotiated from time to time due to changes in LPOs commercial circumstances.
- It may take up to five years to establish a good working relationship with Australia Post in order to achieve mutually beneficial industry reforms.
- The business model of LPOs will continue to be under pressure for the foreseeable future, such that ongoing engagement and negotiations with Australia Post may be necessary to achieve public benefits.

⁴⁹ As a cartel provision applies to the proposed conduct, subsection 90(7)(a) does not apply: section 90(8).

⁵⁰ Subsection 91(1).

104. The ACCC considers five years to be an appropriate period given the nature of the LPO Agreement and ongoing negotiations required.

Interim authorisation

105. On 30 June 2017, the ACCC granted interim authorisation under subsection 91(2) of the CCA to enable the Applicants to collectively negotiate, execute and give effect to relevant agreements while the ACCC is considering the substantive application.

106. The scope of negotiations with Australia Post during interim authorisation are limited to changes to licensee payments and commissions as part of the annual review of licensee payments under the LPO Agreement, as well as the appropriate level of remuneration for any new services introduced by Australia Post during the period of interim authorisation.

107. Interim authorisation does not extend to any form of collective boycott activity or exclusivity arrangements.

108. 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.