



AUSTRALIAN  
COMPETITION  
& CONSUMER  
COMMISSION

# Statement of Reasons

In respect of a notification lodged by

TSG Franchise Management Pty Ltd

in respect of

collective negotiation with  
British American Tobacco Australia Ltd

Date: 19 December 2019

Notification number: CB10000472

Commissioners:

Ridgeway  
Rickard

## Summary

The ACCC does not object at this time to the collective bargaining notification lodged by TSG Franchise Management Pty Ltd (**TSG**).

TSG proposes to negotiate terms of a supply agreement on behalf of TSG franchisees with British American Tobacco Australia Limited (**BATA**). This includes negotiating with BATA on rebates and discounts on tobacco products.

The ACCC considers that the notified conduct is likely to result in public benefits in the form of transaction cost savings and enabling better input into contracts. There is likely to be minimal, if any, public detriment from the notified conduct.

The ACCC has decided to allow the notification to remain in force for a period of three years, as requested by TSG. The notification came into force on 29 November 2019 and will remain in force until 14 November 2022, unless it is withdrawn or revoked.

## The notification

1. On 15 November 2019, TSG Franchise Management Pty Ltd (**TSG**) on behalf of itself and current and future franchisees, lodged a collective bargaining notification<sup>1</sup> to enable TSG to collectively negotiate with British American Tobacco Australia Limited (**BATA**) on the terms and conditions of a supply agreement between TSG franchisees and BATA (the **Notified Conduct**).
2. The notification is available on the [ACCC's public register](#).
3. The Notified Conduct does not include a collective boycott.

TSG requests that the notification continue for 3 years.

## Background

4. The TSG franchisees supply tobacco and tobacco related products at approximately 470 locations throughout metropolitan and regional areas of Australia.
5. TSG has an exclusive dealing notification in place (N99319).<sup>2</sup> Under the exclusive dealing notification, TSG grants a TSG franchise to franchisees on the condition that franchisees agree to use certain goods and services nominated by TSG from time to time in the conduct of the franchised business; and only acquire those goods and services from approved suppliers. On 19 September 2016, the ACCC allowed the notification to stand.
6. As franchisor, TSG typically negotiates supply agreements with suppliers prior to approving the sale of their products in franchisee stores. Once a supply agreement has been agreed between TSG and a supplier, the supplier will enter into individual agreements with each TSG franchisee on terms and conditions which are consistent with the agreement reached with TSG. Where a supply agreement is not in place between TSG and a supplier, TSG (under the terms of the franchise

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<sup>1</sup> Businesses can obtain protection from legal action under the *Competition and Consumer Act 2010* (CCA) for collective bargaining including associated collective boycotts by lodging a collective bargaining notification with the ACCC. Protection for collective bargaining (which does not involve a collective boycott) will generally commence 14 days after the collective bargaining notification is lodged.

<sup>2</sup> Available at the [ACCC Public Register](#)

agreement with franchisees) may remove a supplier from the list of approved suppliers franchisees can obtain products from.

7. BATA is a major supplier of tobacco products, along with Philip Morris Australia and Imperial Tobacco Australia.
8. TSG advised that the existing supply agreement between TSG and BATA expired on 1 October 2019, and negotiations between TSG franchisees and BATA in respect of a new supply agreement have stalled. BATA has entered into separate supply agreements with some TSG franchisees as an interim measure, while TSG and BATA seek to negotiate the terms of a supply agreement. TSG advised that notwithstanding that there is no current supply agreement between TSG and BATA, TSG has not prevented franchises from selling BATA's products in their stores.
9. Tobacco products are subject to substantial regulation in Australia, and Australia's laws include tobacco advertising bans, plain packaging laws, laws on smoking in public, and age limits on who can buy tobacco. Tobacco is also subject to taxes to make them less affordable. The tobacco excise rate is indexed based on average weekly ordinary-time earnings to ensure they do not become affordable over time.<sup>3</sup> Approximately 70 per cent of the retail value of licit tobacco products sold in Australia is comprised of excise or customs duty and goods and services tax.<sup>4</sup>

## Consultation

10. The ACCC invited submissions in respect of the notification from a range of interested parties, including the target, retailers of tobacco products, wholesale suppliers of tobacco products, and Commonwealth and state and territory departments of health.
11. The ACCC received submissions from BATA, Philip Morris Ltd, and Cignall Pty Ltd. These submissions are briefly outlined below.
12. BATA, the target, does not oppose the Notified Conduct on the basis that it does not include a collective boycott. BATA submits that:
  - The Notified Conduct will not result in any public benefit, as TSG currently negotiates on behalf of its franchisees, and this will not change with the notification.
  - It is continuing to negotiate with TSG on behalf of its franchise group regarding a new supply agreement.
13. Philip Morris Ltd, a supplier of tobacco products, does not object to the Notified Conduct and submits that:
  - It is not uncommon for franchisors to negotiate supply agreements on behalf of franchisees in this industry.
  - The benefits from the Notified Conduct are likely to include increased input into contractual negotiations, and transaction cost savings.
14. Cignall Pty Ltd, a franchisor group and competitor of TSG, opposed the Notified Conduct, submitting that they are supportive of settling terms with BATA, but are not supportive of the process of collective bargaining to achieve these outcomes.

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<sup>3</sup> Department of Health, *Smoking and tobacco laws in Australia*, 8 April 2019 <<https://www.health.gov.au/health-topics/smoking-and-tobacco/about-smoking-and-tobacco/smoking-and-tobacco-laws-in-australia>>

<sup>4</sup> The Department of Health, Tobacco excise, 10 May 2018 <<https://www1.health.gov.au/internet/publications/publishing.nsf/Content/tobacco-control-toc-excise>>

15. In response to the submissions received from interested parties, TSG advised that without the Notified Conduct, TSG would be negotiating with BATA in its capacity as franchisor, and not on behalf of franchisees. TSG submits that therefore public benefits will arise from the Notified Conduct.
16. Submissions are available at the [ACCC public register](#).

## ACCC's assessment

17. The ACCC has considered the Notified Conduct in accordance with section 93AC of the *Competition and Consumer Act 2010* (Cth) (**CCA**).
18. In doing so, the ACCC has taken into account:
  - The likely future with and without the Notified Conduct. In particular, the ACCC considers that, absent the Notified Conduct, TSG franchisees are each likely to individually negotiate supply arrangements with BATA. In the absence of collective bargaining, each TSG franchisee would likely enter into a standard form contract on terms decided by BATA.
  - The relevant areas of competition likely to be affected by the Notified Conduct, namely the:
    - o wholesale acquisition of tobacco products by retailers, such as TSG franchisees
    - o wholesale supply of tobacco products by tobacco manufacturers, such as BATA, and
    - o retail supply of tobacco products.

### Public benefit

19. The Notified Conduct is seeking to address the transaction costs associated with TSG franchisees dealing with BATA individually and the inequality of bargaining power between individual franchisees and BATA, which limits the input franchisees would have into the contract terms for the supply of tobacco products.
20. The ACCC considers that the Notified Conduct is likely to result in public benefits from:
  - Transaction cost savings (such as negotiation and contracting costs, including the time taken to negotiate) for TSG and BATA, relative to BATA conducting negotiations with TSG franchisees on an individual basis.
  - Better input into contracts, as collective bargaining may improve the ability for TSG franchisees to have better input into the terms and conditions of the supply agreement than they would be able to achieve on their own.

### Minimal public detriment

21. TSG franchisees compete with each other to acquire tobacco products from BATA and also in supplying tobacco products to customers at the retail level. The Notified Conduct could result in a public detriment by reducing competition in the wholesale acquisition of tobacco products from BATA because TSG franchisees are no longer competing. The Notified Conduct could also reduce competition amongst TSG franchisees at the retail level for the supply of tobacco products if it facilitated coordinated conduct beyond the Notified Conduct.

22. However, the ACCC considers that the Notified Conduct is likely to result in minimal, if any, public detriment:
- Participation in the Notified Conduct is voluntary for BATA.
  - Without the Notified Conduct, franchisees are unlikely to negotiate with BATA for contracts. BATA would likely provide franchisees with standard form contracts, which means that the level of competition between TSG franchisees for the acquisition of tobacco products from BATA is negligible without the Notified Conduct.<sup>5</sup>
  - TSG constitutes a small proportion of tobacco retailers in Australia, such that the Notified Conduct is unlikely to reduce the overall level of competition for the wholesale acquisition of tobacco products by retailers. TSG estimates that it has 35% of the specialist tobacco retail market (with other competitors including Cignall and Freechoice) and estimates that it has 8 – 12% of the broader retail market (which includes competitors such as supermarkets, convenience stores and petrol stations).
  - TSG franchisees are not agreeing with respect to the price products are sold for in their stores, and the conduct is limited to the wholesale supply of products from BATA. TSG franchisees will continue to compete with respect to the range and price of tobacco products, and other products they stock, such as tobacco related products, gifts and convenience items.
  - The Notified Conduct will not increase incentives for consumers to purchase tobacco products.

## Decision

23. The ACCC considers that the benefit to the public that is likely to result from the Notified Conduct will outweigh any detriment to the public that is likely to result.
24. Accordingly, the ACCC does not object to the notification at this time. As with any notification, in accordance with s 93AC, the ACCC may act to remove the protection afforded by the notification at a later stage if it is satisfied that the public benefit does not outweigh the public detriment.
25. Accordingly, the protection provided by notification CB10000472 commenced on 29 November 2019 and will continue until 14 November 2022, unless the notification is withdrawn or revoked.
26. This Statement of Reasons serves as the written notice and written statement of reasons for giving that notice required by section 93AD(6) of the CCA.

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<sup>5</sup> Notification CB10000467, TSG Franchise Management Pty Ltd, 15 November 2019, p. 3.