

Draft Determination

Application for Authorisation

lodged by

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

to negotiate on behalf of newsagents with the publishers of newspapers and magazines and to engage in collective boycott activity with regard to those publishers; and
to negotiate on behalf of newsagents with the suppliers of soft gambling products

Date: 13 June 2003

Authorisation No:

A90804

Commissioners:

Fels

Bhojani

Jones

Martin

McNeill

Willett

Public Register No:

C2001/1439

Executive Summary

The application

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

On 29 April 2002, the ANF and the QNF jointly lodged an amended application. Further substantial amendments limiting the scope of the proposed arrangements were made by letter dated 29 August 2002 (the Amended Application).

The authorisation process

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

The TPA recognises, however, that competition may not always be consistent with the most efficient outcome. It therefore allows the Commission to grant immunity from the TPA for anti-competitive arrangements or conduct in certain circumstances.

One way parties may obtain immunity is to apply for what is known as an 'authorisation' from the Commission. Broadly, the Commission may 'authorise' parties to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

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

The proposed arrangements

The ANF has sought authorisation to:

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

Authorisation was sought to negotiate on a national basis for a period of five years. In regional areas or on regional issues, the ANF submitted that it proposed to undertake negotiations on behalf of members with the assistance of newsagents' associations in each State and Territory.

Assessment of public benefit and anti-competitive detriment

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

In the past, the Commission has, on occasion, granted authorisation to collective negotiation arrangements. Generally, the Commission considers that the anti-competitive detriment of collective negotiations is likely to be lower where:

- the current level of competition is low (due, for instance, to the structural features of a particular market);
- there are opt-out mechanisms for members;
- the arrangements do not have industry-wide coverage; and
- the arrangements set up multiple groups of similar acquirers with independent advisers/representatives.

Although the Commission understands that some of these features are present in relation to some aspects of the conduct for which authorisation is sought, the Commission is of the view that the Amended Application is extremely broad (given that the arrangements are intended to be implemented industry-wide without any apparent restriction). The breadth of the proposed arrangements means that they have the potential to be highly anti-competitive. The burden of demonstrating a public benefit that outweighs the anti-competitive detriment is therefore a heavy one and cogent evidence supporting the public benefit claims will be required. This is particularly important with regard to the collective boycott aspect of the arrangements for which authorisation is sought, as the Commission considers that, generally, collective boycott activity is likely to generate significant anti-competitive detriment.

Having considered the submissions from the ANF and interested parties, the Commission has formed the view that the ANF has failed to demonstrate that the proposed collective bargaining arrangements result in a net benefit to the public. For example, the Commission notes that one public benefit claimed by the ANF related to the ongoing provision of an efficient home delivery system. The Commission considers that it is likely to be in the interest of publishers to provide such a system, and that publishers are likely to act in accordance with this interest. Accordingly, the Commission considers that in the absence of the proposed arrangements, an efficient home delivery system is still likely to be provided.

Further, the Commission notes that the proposed arrangements were not supported by any publishers or distributors, and were also not supported by some soft gambling bodies. The Commission is of the view that many of the benefits that, at times, flow from collective bargaining may be less likely to arise where suppliers and acquirers do not, together, support the proposed arrangements.

The Commission considers that the proposed collective boycott activity will not give rise to any benefit to the public.

The Commission assessed the application in light of the deregulated nature of the industry, which has seen individual agreements put in place in many instances. The Commission considers that the implementation of collective negotiation arrangements may reduce the level of competition that has developed in the industry over the past five years.

The Commission considers that some anti-competitive detriment is likely to result from the proposed collective bargaining arrangements, and a significant anti-competitive detriment is likely to result from the proposed collective boycott

arrangements. These anti-competitive effects are likely to manifest themselves as higher prices for newspapers/magazines (or higher costs for advertisers), the misallocation of resources, discouragement of efficiencies and innovation and the economic disruption associated with boycott activity. In particular, boycott activity has the potential to cause significant detriment given the scope of the proposed arrangements, as a collective refusal by newsagents to deal with a smaller publisher could severely damage that publisher's business and consequently harm consumers.

In light of the foregoing, the Commission is **not** satisfied that the proposed arrangements give rise to public benefits sufficient to outweigh the detriment constituted by the likely anti-competitive effects of these proposed arrangements.

Draft determination

The Commission therefore proposes at section 11 of this draft determination, subject to any pre-determination conference requested under section 90A of the Act, to **deny** authorisation to application A90804.

The Commission will now invite the ANF and any other interested parties to lodge further written submissions in relation to this draft determination. The Commission will consider any submissions received as it deliberates on its final decision.

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1. Introduction

Introduction to authorisations

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

The Application

- 1.10. On 12 October 2001, the QNF lodged application A90804 (“the Original Application”) with the Commission.
- 1.11. On 24 December 2001, the QNF informed the Commission that the ANF would take over the Original Application. On 29 April 2002, the ANF and QNF jointly lodged an amended application. Further substantial amendments, limiting the scope of the proposed arrangements, were made by letter dated 29 August 2002 (inclusively referred to as “the Amended Application”).
- 1.12. The Amended Application was made under subsection 88 (1) of the TPA¹ and sought authorisation to make and/or give effect to a contract, arrangement or understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.
- 1.13. Broadly, under the Amended Application authorisation is sought to:
- engage in collective negotiations on behalf of newsagents with the publishers of newspapers and magazines (“publishers”) and the suppliers of soft gambling products (“soft gambling bodies”); and
 - engage in a collective boycott of publishers where negotiations break down.
- 1.14. Authorisation is sought for a period of five years.

The Applicant²

- 1.15. The ANF is a national industry association representing specialist newsagents. There are approximately 4500 newsagents in Australia, of which 3272 are members of the ANF. ANF membership comprises State industry associations and individual newsagent members (who are also members of the State industry associations).
- 1.16. The ANF submitted that the approximate proportion of newsagents who are members of the ANF in each state is as follows:
- | | |
|------------------------|---------------------------|
| ▪ Queensland: 90% | ▪ Western Australia: 61% |
| ▪ NSW/ACT: 85 – 90% | ▪ Northern Territory: 95% |
| ▪ Victoria: 70 – 75% | ▪ Tasmania: 75% |
| ▪ South Australia: 99% | |
- 1.17. The QNF is the Queensland state association representing specialist newsagents. It is a member of the ANF.

¹ The application has also been considered as an application under the Competition Code.

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

Chronology

1.18. A chronology of the Commission's assessment of the Original Application and the Amended Application is below.

Date	Action
12 October 2001	QNF lodged the Original Application.
5 November 2001	QNF lodged a submission supporting its application for interim authorisation.
9 November 2001	The Commission sought the views of interested parties on QNF's application for interim authorisation.
21 November 2001	The Commission denied the application for interim authorisation, deciding that the circumstances were not exceptional.
21 December 2001	The QNF informed the Commission that the ANF would take over the Original Application.
15 March 2002	The Commission asked the ANF to lodge a submission supporting the Original Application, in order to progress consideration of the Original Application.
29 April 2002	The ANF and the QNF lodged an Amended Application and a submission in support of same.
29 May 2002	The Commission sought further information from the ANF.
31 May 2002	The Commission sought submissions on the Amended Application from interested parties.
16 July 2002	The Commission provided the ANF with copies of the submissions received, and invited the ANF to comment.
29 August 2002	The ANF lodged further amendments to the Amended Application and provided further submissions in relation to soft gambling, newspapers and magazines.
27 September 2002	The Commission sought comments on the ANF's further submission from interested parties.
20 December 2002	The Commission provided the ANF with copies of the submissions received in relation to soft gambling products, and invited the ANF to comment.
30 December 2002	The ANF provided comments on the submissions received from interested parties.
14 January 2003	The Commission provided the ANF with more submissions received from interested parties in relation to soft gambling products.
19 February 2003	The ANF provided comments on the submissions received from interested parties in relation to soft gambling products.
13 June 2003	The Commission issued a draft determination

2. Background³

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

Newspapers and magazines

- 2.7. Broadly, the publishers of major newspapers usually distribute them to newsagents, whilst the publishers of magazines generally use the services of a specialist distributor to place their products in newsagencies.
- 2.8. The main newspaper publishers are News Ltd and Fairfax, which publish the highest selling metropolitan daily newspapers (such as the Herald Sun and Daily Telegraph in the case of News Ltd and the Sydney Morning Herald in the case of Fairfax). The major magazine publishers are ACP Publishing Pty Ltd and Pacific Publications, which publish the highest selling mainstream magazine titles (such as *Woman's Day*, *Dolly* and *Cosmopolitan*).
- 2.9. Newsagents are paid a proportion of the cover price for each newspaper they sell. Other fees are payable to newsagents in relation to additional services such as the provision of home delivery.

³ Information in this section is sourced from the ANF's supporting submissions (29 April 2002 and 2 September 2002); the ANF's website at www.australiannewsagents.com.au; previous Commission determinations in relation to the industry; and Australian Competition Tribunal decisions in relation to the industry.

- 2.10. 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

- 2.11. 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.
- 2.12. Because the system involved an agreement between competitors, concerns arose that the system breached the TPA. Newsagency councils therefore sought and obtained authorisations from the Commission's predecessor, the Trade Practices Commission ("the TPC").
- 2.13. Over the following years, doubts were expressed as to whether the authorised system for distributing newspapers and magazines in each state remained in the public interest. Ultimately, on 12 December 1997, the Commission revoked several newsagency council authorisations, but granted substitute authorisations until 1 February 2001 to allow the parties time to formulate new arrangements consistent with the TPA.
- 2.14. On the 18 November 1998, the Australian Competition Tribunal ("the Tribunal") made its determination in similar terms to the Commission's decision.⁴ However, it decided to grant a shorter transition period. The Tribunal concluded that the system should continue until:
- 1 July 1999: for the distribution of magazines generally and for the supply of newspapers to 'look-alike' newsagencies (non-authorised specialist newsagencies largely located in Victoria);
 - 1 February 2000: for the supply of newspapers to sub-agents; and
 - 1 February 2001: for home delivery of newspapers.
- 2.15. 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.
- 2.16. Following the Tribunal's decision, the Federal Government asked the Commission to consult with industry stakeholders and report to the Government as to the best way forward for the industry in regard to distribution arrangements.
- 2.17. The concerns raised by stakeholders during this consultation process gave rise to an application for authorisation from the ANF that was lodged on 13

⁴ *Re: 7-Eleven Stores Pty Ltd & ors* [1998] ACompT 3 (18 November 1998).

April 1999. The ANF sought authorisation in relation to proposed negotiations with twelve nominated publishers as to the terms and conditions of contracts between newsagents and the publishers, for a period of six months.

- 2.18. The Commission considered the application in the context of an industry in transition, in particular with respect to the issue of negotiation on terms and conditions between small businesses and larger entities. The Commission also drew upon earlier decisions involving other industries.
- 2.19. The Commission's assessment of the potential anti-competitive effects of the arrangements took into account that authorisation would not cover negotiations on commissions paid to newsagents or common territories for newsagents and would not provide any protection in relation any primary boycott. It also noted that any agreements between the ANF and publishers would not bind individual newsagents and that other groups or individuals would not be prevented from negotiating with publishers. The short period for which authorisation was sought was also significant to the Commission's assessment.
- 2.20. The Commission accepted that public benefits would arise from the conduct, namely that ANF representatives would bring a depth of experience to the process of adapting to new contracts and that collective negotiations were likely to speed the industry's progress to stability.
- 2.21. Authorisation was granted, and expired on 30 May 2000.
- 2.22. In South Australia, an interim authorisation for the distribution arrangements was granted by the Commission until 1 February 2001. With regard to WA, the Commission revoked the authorisation in relation to the system for distributing newspapers and magazines in Western Australia, to take effect from 15 September 2002. Distribution arrangements in Tasmania and the Northern Territory are not currently the subject of any authorisation.

Soft gambling products

- 2.23. Soft gambling products include such items as lottery tickets and instant lottery tickets. Broadly, legislation in each state and territory regulates the sale of soft gambling products. Suppliers are required to be licensed, and to then appoint retailers (such as newsagents) as their agents.
- 2.24. The price at which soft gambling products may be sold is determined by State/Territory gaming authorities. Newsagents receive a commission on sales of such products.
- 2.25. Some products are supplied and administered on a national basis by suppliers forming 'lotto blocks' such as:
 - The Australian Lotto Bloc (runs Saturday Night Lotto)
 - National Lotto Block (runs Oz Lotto)
 - Powerball Bloc (runs Powerball); and
 - Australian Soccer Pool Block (runs The Pools).

- 2.26. However, it is State and Territory entities that are responsible for the regulation soft gambling products. State and Territory arrangements are discussed below.

*Queensland*⁵

- 2.27. In Queensland, the lottery industry is regulated by the Queensland Office of Gaming Regulation (QOGR) pursuant to the *Lotteries Act 1997* and related regulations. The Golden Casket Lottery Corporation (Golden Casket) is an incorporated government entity which currently holds the exclusive licence to run lotteries in Queensland.
- 2.28. Golden Casket appoints agents who are responsible for the supply of soft gambling products to the Queensland public. The regulatory scheme governs matters such as the suitability of agents and the terms and termination of agency agreements. Agents are small businesses that enter into agreements that are in the form of franchisee agreements. The Commission understands that, generally, individual agents are subject to standard form agreements and are not able to negotiate or amend these agreements with Golden Casket.
- 2.29. On 17 October 2002 the Golden Casket Agents' Association (the Association) sought authorisation to conduct negotiations on behalf of its members in relation to the terms and conditions of agency agreements and arrangements with Golden Casket.
- 2.30. On 28 April 2003 the Commission issued a draft determination proposing to deny authorisation to the Association's application. The Commission was of the view that the proposed arrangements would result in some anti-competitive detriment in the form of increased retail prices of certain lottery products for consumers and/or a reduction in monies returned to the community by Golden Casket by way of charitable contributions.
- 2.31. Notably, the Association did not satisfy the Commission that the proposed arrangements generate efficiencies or cost savings for industry participants or that the broader public may benefit from the arrangements.

*South Australia*⁶

- 2.32. In South Australia, soft gambling products are regulated by the Lotteries Commission of South Australia (SA Lotteries) pursuant to the *State Lotteries Act 1966*.
- 2.33. Soft gambling products are sold by agents appointed by SA Lotteries, with newsagents being responsible for 50.8% of total sales of such products in 2002. Other agents include supermarkets, pharmacies and licensed premises.

⁵ Information in this section is sourced from the Commission's draft determination of Application for Authorisation No A90853, lodged by Golden Casket Agents' Association Ltd.

⁶ Information in this section is sourced from submission provided by the South Australian Minister for Government Enterprises, the Hon Patrick Conlon, on 13 December 2002.

*New South Wales/Australian Capital Territory*⁷

- 2.34. In NSW, NSW Lotteries is the State corporation responsible for regulating soft gambling products pursuant to the *Public Lotteries Act 1996*. Under this Act, NSW Lotteries holds licenses to conduct various lotteries in NSW and, with the approval of the ACT Government, in the ACT. Each of the licenses sets out the conditions on which the relevant soft gambling product is to be sold.
- 2.35. NSW Lotteries appoints agents to sell soft gambling products on its behalf. The agreements between NSW Lotteries and its agents contain provisions which mirror the terms of the licence held by NSW Lotteries. Changes to key terms, such as the commission rate paid to agents or the price at which soft gambling products will be sold, must be approved by the NSW Minister for Gaming and Racing.

Victoria

- 2.36. In Victoria, the suppliers of soft gambling products must be licensed pursuant to the *Public Lotteries Act 2000*, and may appoint subsidiaries to supply those products to the public.
- 2.37. The Minister for Gaming assesses applications for licences and may impose any conditions he or she sees fit. Subsidiaries must be approved by the Victorian Casino and Gaming Authority.

*Western Australia*⁸

- 2.38. The WA Lotteries Commission has the responsibility for conducting lotteries in WA, pursuant to the *Lotteries Commission Act (1990)*. The Lotteries Commission appoints agents to sell soft gambling products to the public. Matters such as the price of soft gambling products and the terms of supply of such products are determined by the Lotteries Commission

*Tasmania*⁹

- 2.39. In Tasmania, the sole licensed supplier of soft gambling products is currently Tattersall's Sweeps Pty Ltd ("Tattersall's"), which appoints agents to sell its products to the Tasmanian public. The Lottery Agents Association Tasmania (LAAT) conducts negotiations with Tattersall's on behalf of its members. Currently, the LAAT has 84 members of which 68 are newsagents. The LAAT does not negotiate on the purchase of soft gambling products, but does negotiate on other commercial matters such as application to become agents.
- 2.40. Agents acquire soft gambling products from Tattersall's individually, but on a uniform price basis.

⁷ Information in this section is sourced from the NSW Lotteries submission dated 15 November 2002.

⁸ Information in this section is sourced from the WA Lotteries submission, dated 21 November 2002.

⁹ The information in this section is sourced from the Tasmanian Department of Treasury and Finance's submission, received on 15 November 2002.

Northern Territory

- 2.41. In the Northern Territory, soft gambling is regulated by the Racing, Gaming and Licensing Directorate pursuant to the *Gaming Control Act*. The Act provides that persons who wish to operate lotteries may do so only by written agreement with the Minister for Racing, Gaming and Licensing.
- 2.42. The Director of the Racing, Gaming and Licensing Directorate may also conduct lotteries through the appointment of agents to sell products on behalf of the Director.

3. The Original Application & the Amended Application

The Original Application

- 3.1 As outlined at paragraphs 1.10 – 1.14, the QNF first lodged its Original Application for authorisation on 12 October 2001.
- 3.2 The Original Application was made under subsection 88(1) of the TPA and sought authorisation to make and/or give effect to a contract, arrangement or understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA. The Original Application was made on a Form B as provided for in Schedule 1 of the Trade Practices Regulations.
- 3.3 Broadly, authorisation was initially sought to engage in collective negotiations on behalf of newsagents with suppliers of goods and services to newsagents. Under the Original Application authorisation was sought for the QNF to:
 - engage in collective negotiation on behalf of newsagents with suppliers (including the suppliers of soft gambling products, tobacco, stationery, greeting cards, consumables (including confectionery), and in particular the suppliers and distributors of major and regional newspapers and magazine publishers); and
 - engage in a collective boycott of publishers and distributors of newspapers and magazines, should negotiations break down.
- 3.4 At the time of lodging its original application, the QNF sought interim authorisation to negotiate on behalf of its members for:
 - the home delivery fees of Queensland Newspapers (News Ltd); and
 - the distribution and retailing of the Cairns Post and Townsville Bulletin (News Ltd) and Australian Provincial Newspapers publications.
- 3.5 The Commission was not satisfied that the circumstances were sufficiently exceptional to warrant granting interim authorisation. In particular, the Commission noted that if new contracts were negotiated by QNF during the period of interim authorisation, they could not be undone if the Commission later denied authorisation proper. Accordingly, the Commission denied interim authorisation.
- 3.6 In addition, no submission in support of the application was received from the QNF at the time the application was lodged in October 2001. Instead, the Commission received a submission from the ANF in support of the amended application (discussed below) on 29 April 2002. This submission related only to newspapers and magazines. The ANF provided a further submission in relation to soft gambling products on 29 August 2002.

The Amended Application

- 3.7 On 24 December 2001, the QNF informed the Commission that the ANF would take over the Application. On 29 April 2002, the ANF and QNF jointly lodged the Amended Application. Further substantial amendments, limiting the scope of the proposed arrangements were made by letter dated 29 August 2002.
- 3.8 The Amended Application was made under subsection 88(1) of the TPA and sought authorisation to make and/or give effect to a contract, arrangement or understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA. The Amended Application was made on a Form B as provided for in Schedule 1 of the Trade Practices Regulations.
- 3.9 Broadly, under the Amended Application authorisation is sought to:
- engage in collective negotiations on behalf of newsagents with the suppliers of soft gambling products and newspaper and magazine publishers and distributors; and
 - engage in a collective boycott of publishers and distributors of newspapers and magazines should negotiations break down.
- 3.10 Authorisation is sought to negotiate on a national basis for a period of five years. In regional areas or on regional issues the ANF proposes to undertake negotiations on behalf of members with the assistance of the State Associations. The State Associations are as follows:
- QNF;
 - Newsagents Association of New South Wales;
 - Victorian Accredited Newsagents Association Ltd;
 - Newsagents Association of South Australia Ltd;
 - Western Australian Accredited Newsagents Association;
 - Newsagents Association of Northern Territory; and
 - Tasmanian Newsagents Association Ltd
- 3.11 The ANF sought authorisation on its own behalf and on behalf of the parties above to engage in collective negotiations with suppliers on behalf of current and future newsagent members of the ANF. With regard to existing contracts, the ANF submitted that authorisation is sought to allow collective negotiation in relation to matters arising for re-negotiation, and where newsagents seek to vary existing contracts.
- 3.12 In the accompanying submission, the ANF indicated that the negotiations contemplated do not include the negotiation of common newsagent territories between publishers. Further, the ANF submitted that negotiations will not bind individual publishers or newsagents who wish to negotiate different terms and conditions.

Newspapers and magazines

- 3.13 The negotiations for which authorisation is sought will be in relation to:

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

3.14 Issues to be negotiated with magazine publishers include:

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

Soft gambling products

3.15 With regard to soft gambling products, the ANF submitted that it sought authorisation to negotiate with the suppliers of such products in relation to:

- the commission rates paid to newsagents;
- the guidelines for determining which outlets should be appointed as lottery agents;
- terms of supply, including rights of termination and requirements for fit-out; and
- matters currently not included in supply contracts and matters currently unforseen.

3.16 The ANF named the following as the suppliers of soft gambling products with which it intends to negotiate:

- Golden Casket Lottery Corporation Ltd (QLD);
- New South Wales Lotteries;
- Tattersall's Sweeps Pty Ltd (VIC, TAS, ACT, NT)
- South Australian Lotteries Commission; and
- Western Australian Lotteries Commission.

Collective Boycott

3.17 The Amended Application also sought authorisation for the collective (or primary) boycott of the publishers and distributors of newspapers and magazines, in the form of a collective decision to withdraw services to publishers and distributors of newspapers and magazines should negotiations break down.

3.18 The ANF provided further details of the proposed boycott arrangements on 3 January 2003. The ANF proposed that any boycott would be subject to the following conditions:

- Where the ANF and the relevant publisher/distributor are unable to reach agreement on any key term of the contract, the ANF will give

notice to the publisher/distributor outlining the issue on which agreement cannot be reached.

- The parties will endeavour, in good faith, to resolve the dispute. If the dispute is not resolved within 21 days of the delivery of the notice, either party may refer the dispute to the Institute of Arbitrators and Mediators Australia for conciliation.
- If conciliation fails, the ANF Board will convene to consider whether or not to recommend to members that they agree to refuse to provide services to the relevant publisher/distributor, pending resolution of the dispute.
- If such a recommendation is made, the ANF will notify members and the publisher/distributor. Members participating in any boycott will give 14 days notice to the publisher/distributor.

3.19 The Commission notes that the ANF is not seeking authorisation for collective negotiation on condition that primary boycott activity is also authorised, and that the two aspects of the application can be determined separately if necessary.

4. Submissions

ANF's supporting submissions

- 4.1. The ANF provided a submission in support of the Amended Application on 29 April 2002, and a further submission in relation to soft gambling products dated 30 December 2002.

Public Benefits – Newspapers and Magazines

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

Effect on competition – Newspapers and Magazines

- 4.3. The ANF contended that there are no likely anti-competitive effects flowing from the proposed arrangements as the ANF is concerned about the ability of individual newsagents, acting independently, to conduct meaningful negotiations with publishers and distributors. To mitigate any anti-competitive effects, the ANF has proposed that the Commission may authorise the application subject to individual newsagents being at liberty to opt out of the collective bargaining if they considered it appropriate to do so.
- 4.4. The ANF contended that there are increased business efficiencies arising from a consistent (national) approach to issues and that publishers are not

disposed to negotiate individually with a number of State Associations and a large number of small businesses.

- 4.5. The ANF further submitted that the ability to negotiate collectively with publishers will not have the anti-competitive effect of putting newsagents in an advantageous position, but will simply ‘level the playing field’ so that newsagents are in a position to compete effectively.
- 4.6. The ANF acknowledged that collective negotiation may result in an increase in commission rates to newsagents. The ANF submitted, however, that this did not necessarily mean that the price to the consumer would increase. The ANF submitted that the competitive influence of the large supermarket chains and franchised conglomerates (with regard to both supply and demand) was likely to minimise retail price rises.

Submission dealing with soft gambling products

- 4.7. Following its submission in support of the Amended Application, the ANF lodged a submission specifically dealing with issues relating to soft gambling products. The ANF submitted that the supply of such products is regulated, and is to a large extent under the control of governments. The ANF therefore submitted that if collective negotiation does result in an increase in the commission paid to newsagents, an increase in retail price will not necessarily follow.
- 4.8. Further, the ANF submitted that the public benefits outlined above in relation to newspapers and magazines also apply equally to negotiations with soft gambling suppliers.
- 4.9. The ANF also submitted that it is currently the practice of soft gambling suppliers to adopt a standard contract with lottery agents, and in most States representations from State Associations are sought in relation to the terms of agency agreements. Accordingly, the ANF contended that collective negotiation by the ANF will reflect the practice already adopted by soft gambling suppliers.

Submissions from interested parties

- 4.10. In assessing the Amended Application, the Commission considered submissions from the ANF and from various interested parties. The Commission maintains a Public Register from which submissions may be obtained.
- 4.11. Relevant aspects of the submissions outlined below are discussed further at section 5 of this draft determination.

Submissions supporting the Amended Application – Newspapers and Magazines

- 4.12. Submissions supporting the Amended Application were received from:
 - Newsagents Association of the Northern Territory (the NANT);
 - Newsagents Association of NSW and ACT Ltd (NANA);
 - Newsagents Association of South Australia (NASA);

- Kenmore Tavern Plaza News;
 - Garbutt News;
 - Kirwan News; and
 - Victorian Authorised Newsagents Association Limited (VANA).
- 4.13. The Commission also received approximately 60 copies of a form letter in support of the Amended Application, signed by individual newsagents who requested that their anonymity be preserved.
- 4.14. The submissions supporting the Amended Application raised the following issues:
- the complexity of existing supply contracts is a problem for individual newsagents, who may be unable to afford legal advice;
 - suppliers have refused to negotiate with regard to the supply contracts; and
 - collective negotiation will assist in the formation of equitable contracts.

Submissions opposing the Amended Application – Newspapers and Magazines

- 4.15. Submissions opposing the Amended Application were received from:
- Village Newsagency (Village);
 - NDD Distribution Pty Ltd (NDD);
 - Gordon and Gotch Australia Pty Ltd (Gordon and Gotch);
 - West Australian Newspapers Ltd (WAN);
 - Pacific Publications Pty Ltd (Pacific);
 - ACP Publishing Pty Ltd (ACP);
 - APN Newspaper Pty Ltd (APN);
 - EMAP Australia (EMAP)
 - Australasian Association of Convenience Stores (AACCS); and
 - Trading Post Group Pty Ltd (Trading Post).
- 4.16. Broadly, the submissions opposing the Amended Application raised the following issues:
- the ANF is not the most appropriate bargaining agent;
 - if the industry balance is tipped too far, it could adversely affect small individual publishers that distribute special interest magazines;
 - the transition to deregulation has already occurred, and collective bargaining is not needed to facilitate this process;
 - efficient home delivery does not rely on newsagents nor on the ability of newsagents to negotiate prices for home delivery;
 - there is no evidence that newsagents do not have bargaining power in relation to individual publishers;
 - there is little or no evidence to support the public benefit claims made by ANF, nor to support the conclusion that any benefits would be passed on to consumers;

- it is questionable whether publishers (particularly magazine publishers) would benefit from the arrangements;
- individual newsagents will have little incentive to offer publishers more competitive distribution services (such as in-store displays or promotions);
- the proposed conduct will allow the exchange of price and operation information between ANF members and to suppliers, which may support other anticompetitive conduct;
- primary boycotts would have a profound anti-competitive effect and are more likely to be used against smaller publishers;
- existing legislation already protects ANF members (eg sections 46 and 51AC of the TPA);
- deregulation has progressed beyond the point at which collective negotiation could be said to be necessary or desirable;
- a national approach to newspaper distribution is neither necessary nor desirable;
- although individual members may choose not to participate in collective boycott activity, there will be pressure on members to do so;
- collective negotiation of a fixed delivery fee would destroy competition between newsagents in the market for home delivery services;
- newsagents already have significant countervailing power in relation to magazine publishers and distributors; and
- the likely outcomes of collective bargaining are higher delivery fees and commissions (resulting in higher prices to consumers and/or advertisers), less regional flexibility and reduced territorial competition between newsagents, and an increase in newsagents' bargaining power to the detriment of other competitors such as supermarkets and convenience stores.

Submissions in relation to soft gambling products

- 4.17. The Commission also sought the views of interested parties in relation to the ANF's submission on soft gambling products.
- 4.18. A submission supporting the Amended Application in relation to soft gambling products was received from the ACT Gambling and Racing Commission (ACTGRC). The ACTGRC submitted that the suppliers of soft gambling products are typically large organisations with significant bargaining power, and individual newsagents may have little influence over the terms and conditions presented to them as a result.
- 4.19. Submissions opposing the Amended Application in relation to soft gambling products were received from:
- Golden Casket;
 - Tasmanian Department of Treasury and Finance;

- NSW Lotteries Corporation;
- Hon Patrick Conlon MP, SA Minister for Government Enterprises;
- Tattersall's Sweeps Pty Ltd; and
- WA Lotteries Commission.

4.20. The following issues were raised in relation to soft gambling products by parties opposing the Amended Application:

- in Queensland, the agreement between newsagents and the suppliers of soft gambling products must be approved by the relevant gaming authority, and cannot be amended without written approval;
- the price of soft gambling products is set by gaming authorities and so is non-negotiable;
- as the sale of soft gambling products is already regulated, the Amended Application does not provide any additional benefit with regard to consumer protection;
- collective negotiation will increase the price paid by the consumer, and is likely to reduce government revenue (by reducing the number of tickets sold);
- gaming authorities already provide information and assistance to lottery agents;
- a national approach to collective bargaining would not take account of the differing business and cost structures in relation to soft gambling products in each state or territory;
- there is no evidence that newsagents lack sufficient information or bargaining expertise;
- the proposed arrangements give rise to no public benefit with regard to identifying and limiting problem gambling; and
- the proposed arrangements may result in unfair treatment of lottery agents who are not newsagents.

4.21. The Queensland Office of Gaming Regulation (QOGR) noted that agreements in relation to soft gambling products would still need to be between the supplier and the newsagent, regardless of collective negotiation. QOGR also submitted that collective negotiation should not prejudice the interests of retailers of soft gambling products that are either not newsagents or not members of the ANF.

The ANF's response to the submissions from interested parties

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

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

4.24. The ANF further submitted that:

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

Response in relation to soft gambling products

4.25. On 19 February 2003, the ANF provided a response to the submissions received from interested parties in relation to soft gambling products. The ANF submitted that:

- the current regulatory framework does not determine all commercial aspects of the agreements between suppliers and agents;
- it is not for the Commission to determine whether the ANF is the most appropriate bargaining agent; and
- an increase in commission fees may cause a rise in retail prices for soft gambling products, but commission fees are not the only matter for which authorisation is sought to negotiate.

5. Statutory Background

The Amended Application

- 5.1. As noted at paragraph 3.8 above, the Amended Application was made under sub-section 88(1) of the TPA to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the TPA.
- 5.2. The Commission notes that ordinarily, an application for authorisation of collective boycott activity would be lodged as an application for authorisation to make and/or give effect to a contract, arrangement or understanding, a provision of which would be or might be an exclusionary provision within the meaning of section 45 of the TPA. Such an application would be lodged using Form A, Schedule 1 of the Trade Practices Regulations 1974.
- 5.3. The Commission is mindful of the need to consider an application's substance rather than its form.
- 5.4. Nevertheless, in these circumstances, there may exist some doubt as to whether the Applicant has sought the full extent of immunity it in fact intended. The Applicant may choose to address this issue prior to the Commission making its final determination.

The Statutory Test

- 5.5. Under subsection 90(6) of the TPA, the Commission may grant authorisation in respect of a proposed contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
 - the contract, arrangement or understanding would be likely to result in a benefit to the public; and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.
- 5.6. Under subsection 90 (8) of the TPA, the Commission may grant authorisation in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision if it is satisfied that the proposed contract, arrangement or understanding would result or would be likely to result in such a benefit to the public that it should be allowed to be made and given effect to.
- 5.7. In the past, the Tribunal has observed that the tests required by subsections 90 (6) and 90 (8) are, in substance, the same.¹⁰ The Commission would therefore, in practice, employ the same test for both.

¹⁰ *Re Media Council of Australia (No 2)* (1987) ATPR ¶40-774 at 48,418. See also *Re 7-Eleven Stores* (1994) ATPR ¶41-357 and *Australasian Performing Rights Association* (1999) ATPR ¶41-701.

Other Relevant Provisions

- 5.8. Section 88(10) of the Act provides that an authorisation may be expressed so as to apply to or in relation to another person who becomes a party to the proposed arrangements in the future.
- 5.6 Section 88(13) of the TPA provides that an application for authorisation for specific arrangements may be expressed to be made also in relation to other arrangements that will be in similar terms. The Commission may grant a single authorisation in relation to all such arrangements. The Commission notes that the Amended Application was not expressed to apply in relation to other arrangements.

6. Commission Evaluation - Introduction

The Commission's past consideration of collective negotiation

- 6.1. In recent years, the Commission has considered a number of applications for authorisation in respect of collective bargaining arrangements and has granted authorisation for a number of those applications, including those lodged in relation to chicken growers, concrete carters and dairy farmers, where it has been demonstrated that a net public benefit will result.
- 6.2. The Commission also made public submissions to the *Dawson Review*¹¹ recommending a notification process in relation to collective bargaining arrangements by small business in their dealings with businesses with a substantial degree of market power, in certain circumstances.
- 6.3. On 16 April 2003 the Dawson committee handed down its report, making recommendations similar to those of the Commission.
- 6.4. Having regard to the Commission's previous consideration of collective bargaining, it is apparent that the Commission accepts that in certain circumstances, collective bargaining arrangements are in the public interest. The Commission must, however, consider each application for authorisation on its merits and it is incumbent on applicants (under the authorisation process) to satisfy the Commission that the likely public benefits will outweigh any anti-competitive detriment.
- 6.5. In this instance, the scope of the authorisation sought by the ANF is extremely broad. For example, the proposed arrangements are not subject to any restrictions either geographically or in terms of the suppliers with whom negotiations will be entered into. Past authorisations granted by the Commission in respect of collective bargaining have largely involved arrangements that are confined in some way, either because they relate only to negotiations with one supplier (such as CSR Ltd¹² or Inghams¹³), involve small bargaining groups, or will occur only in one particular area of Australia.
- 6.6. In addition, past authorisations in respect of collective bargaining agreements have often been within the context of continuing existing arrangements or providing a means for smoothing the transition to new arrangements. In this instance, the transition to deregulation has already occurred, with individual contracts already in place. Past authorisations in relation to newsagents have now expired. As a result, the arrangements for which authorisation is sought would, if authorisation is granted, create new restrictions on competition that the ANF would need to justify within the context of the industry in which they would occur.
- 6.7. Further, the Commission notes that the proposed arrangements were not supported by any publishers or distributors, and were also not supported by

¹¹ The Federal Government's *Review of the Competition Provisions of the Trade Practices Act 1974*.

¹² Authorisation A90769, CSR Ltd (WA), final determination 3 February 2003.

¹³ Authorisation A90826, Inghams Enterprises Pty Ltd, final determination 22 January 2003.

some soft gambling bodies. The Commission is of the view that many of the benefits that, at times, flow from collective bargaining may be less likely to arise where suppliers and acquirers do not, together, support the proposed arrangements.

- 6.8. In short, the burden of satisfying the Commission that authorisation should be granted in this instance is a heavy one and cogent evidence supporting the Amended Application would be required. This is particularly important with regard to that aspect of the Amended Application that is seeking authorisation for collective boycott activity, which the Commission generally considers is likely to give rise to significant anti-competitive detriment. These issues are discussed further in the Commission's assessment of anti-competitive detriment later in this draft determination.

Future with and without test

- 6.9. The Commission's evaluation is in accordance with the statutory test outlined in section 5 of this draft determination. As required by the test, it is necessary for the Commission to assess and weigh the likely public benefits and detriments flowing from the proposed arrangements.
- 6.10. In order to identify and assess the public benefits and anti-competitive detriment generated by the proposed arrangements, the Commission applies the 'future with-and-without test' that was first established by the Tribunal.¹⁴ This requires a comparison of the public benefit and anti-competitive detriment that the proposed arrangements would generate in the future if the authorisation is granted with the position if the authorisation is not granted. The scenario in which authorisation is assumed not to have been granted is often referred to as the counterfactual.

The future without authorisation

- 6.11. The Commission is of the view that, in the absence of authorisation of the proposed collective negotiations, those negotiations will not proceed. Similarly, in the absence of authorisation of the proposed collective boycott activity, that activity will not occur.
- 6.12. The ANF appears to submit that without authorisation it or its state representative bodies would be prevented (under the competition provisions of the TPA) from contributing to or having input into the relationships between newsagents and publishers/distributors or newsagents and soft gambling bodies.
- 6.13. The ANF appears to submit that this would be a departure from past practices where the ANF and the relevant state representative provided input into contractual terms and conditions between members and publishers/distributor or between members and soft gambling bodies.
- 6.14. The extent to which persons are exposed to the competition provisions of the TPA is ultimately a matter for individual parties to assess. For its part,

¹⁴ See, for example, *Re Australasian Performing Rights Association* (1999) ATPR ¶41-701.

however, the Commission is of the view that, up to a point, the ANF or relevant state representatives providing input into the relationships between its members and publishers/distributors (or soft gambling bodies) does not necessarily give rise to concerns about possible contraventions of the TPA. Certainly, providing input into pricing issues (to the extent that conduct falls close to that which is prohibited under section 45A of the TPA) is more likely to raise concern, but raising concerns over possibly harsh or unfair terms is clearly less likely to be an issue.

- 6.15. An industry association such as the ANF is, of course, able to represent and assist its members to the extent concordant with the law. This may include providing assistance to members to ensure that they are able to gain access to appropriate legal or financial services, or making representations to major suppliers in relation to issues of concern to members.
- 6.16. In fact, the Commission notes that News Ltd submitted that its associated publishers regularly hold meetings with state newsagents associations to discuss industry issues and the improvement of the relationship between individual newsagents and publishers. In addition, Gordon and Gotch submitted that it also discussed relevant issues as to the formulation of their new contracts with ANF representatives.
- 6.17. Following industry reform, the current situation with respect to arrangements between newsagents and publishers appears to be individually negotiated contracts. The extent to which contracts are negotiated is discussed in section 7 of this document. The Commission believes the future situation absent authorisation will be a continuation of individually negotiated contracts between newsagents and publishers with legitimate input by the ANF and state representative bodies and quite possibly an increase in the level of negotiation and variation in contracts.
- 6.18. With respect to the various soft gambling bodies in respective states, the current situation appears to involve agreements between newsagents and the relevant soft gambling body with a low level of negotiation and a low degree of variation in contractual arrangements. The extent of this negotiation and variation is discussed at section 9 of this document. The Commission believes the future situation absent authorisation will be a continuation of contracts between newsagents and soft gambling bodies with a low level of negotiation and a low degree of variation in contractual arrangements with legitimate input by the ANF and state representative bodies.

The situation with authorisation

- 6.19. Identifying the likely situation under the proposed arrangements is more problematic.
- 6.20. Although the ANF informed the Commission that it considered collective negotiation and collective boycott activities to be separate, the Commission notes that without authorisation of collective negotiation, there is unlikely to be any avenue for collective boycott. The Commission may however choose to authorise collective negotiation but not collective boycott activity.

- 6.21. There would therefore appear to exist two possible situations should authorisation be granted, namely:
- the situation where the Commission authorised collective negotiation but not collective boycotts; or
 - the situation where the Commission authorised both collective negotiation and collective boycotts.
- 6.22. Where the Commission authorised collective bargaining but not collective boycotts there exists some uncertainty as to the likely outcome. In granting authorisation, the Commission would not (and could not) require publishers or suppliers of soft gambling products to take part in negotiations. The extent to which collective negotiations by themselves altered the status quo would depend on the willingness of those parties to take part in negotiations or to take notice of collective representation.
- 6.23. The Commission is of the view that even where suppliers might have a large degree of bargaining power, they may choose to either:
- take part in collective negotiations; or
 - take into account (to some extent) collective representations of acquirers even where they choose not to engage in active negotiation.
- 6.24. Therefore, while the Commission is of the view that absent the ability to engage in collective boycott activity the situation with collective negotiations is less certain, it should not be assumed that collective negotiations by themselves would not result in different outcomes to the status quo.
- 6.25. In contrast, where the Commission authorised both collective negotiations and collective boycotts, it is more likely that the future situation with the proposed arrangements would involve greater participation by publishers and suppliers of soft gambling products in any collective negotiations and more likely to result in different outcomes to the status quo.

The relevant market - newspapers and magazines

- 6.26. Defining the markets affected by the arrangements proposed for authorisation assists in assessing the public detriment from any lessening of competition from the arrangements. The Commission will generally only define a market to the extent necessary to undertake the required analysis.
- 6.27. With regard to the Amended Application, the ANF did not provide any submission on the issue of market definition. In this case, the Commission is of the view that it is not necessary to comprehensively define the relevant markets. The Commission considers that its assessment will not be significantly affected by the possible variations in precise market definition.

- 6.28. The Commission's view as to market definition is informed by the 1994 and 1998 Tribunal decisions. In its 1994 decision, the Tribunal identified two markets in relation to newspaper and magazine distribution¹⁵:
- the market for the publication and distribution of metropolitan daily newspapers (which offer two products: news, information and entertainment; and advertising); and
 - the market for magazine publication and distribution (which also offers two products, namely content and advertising).
- 6.29. In 1998, the Tribunal affirmed this view and further stated that it still considered that the relevant markets were State-wide in geographic terms (with regard to distribution). In 1994 the Tribunal had also stated that with regard to retailing, the markets were geographically characterised by a series of local markets.
- 6.30. The Commission considers that the relevant areas of competition in relation to newspapers and magazines are likely to be those identified by the Tribunal and has conducted its analysis accordingly.
- 6.31. For the purpose of this analysis, it is probably more instructive to consider the areas in which the applicants – newsagents – compete and indeed with whom else they compete.
- 6.32. It is clear that newsagents supply distribution services to publishers of newspapers and magazines in return for commissions on the sale of those publications. In this regard, newsagents compete with each other and with other suppliers of distribution services such as supermarkets, petrol retailers and convenience stores.
- 6.33. It is also clear that newsagents compete in the retail of goods and services (including publications on commission) to consumers. Again, newsagents compete with each other and with other retailers such as supermarkets, petrol retailers and convenience stores.

The relevant market – soft gambling products

- 6.34. The Commission received no submissions as to the market definition that should be employed with regard to soft gambling products.
- 6.35. It is the Commission's view that when considering the markets affected by the proposed arrangements in relation to soft gambling products, it is probably more instructive to consider the areas in which the applicants – newsagents – compete and indeed with whom else they compete.
- 6.36. In this regard, newsagents appear to supply distribution services to soft gambling products in return for commissions on the sale of those products. In the Commission's draft determination in relation to the application for authorisation lodged by the Golden Casket Agents' Association Ltd, this

¹⁵ *Re 7 Eleven Stores Pty Ltd* (1994) ATPR ¶41-357 at 42,672.

area of competition was described as the acquisition of soft gambling products. Conversely, and perhaps more conveniently, the area of competition within which the conduct can be assessed can be described as the provision of distribution services by the agent to the soft gambling supplier. Again, newsagents compete with each other and with other suppliers of distribution services such as specialised lottery agents.

- 6.37. Newsagents also compete in the retail of soft gambling products (as licensee) to consumers. Again, newsagents compete with each other and with other retailers such as specialised lottery agents.
- 6.38. The Commission notes that the soft gambling markets are heavily regulated in some respects (such as to the retail price of soft gambling products), and considers that this is likely to affect the level of competition that might be expected to occur in relation to those products. The relevant state legislation supports the view that markets are likely to be state based or narrower.
- 6.39. In addition, the Commission notes the different regulatory frameworks in each state with regard to soft gambling products (as discussed in section 2 of this draft determination).

7. Commission Evaluation - Effect on competition – Newspapers and Magazines

- 7.1. In assessing the Amended Application it is necessary for the Commission to assess and weigh the likely public benefits and detriment (constituted by any lessening of competition) flowing from the proposed arrangements.
- 7.2. This section details the Commission’s assessment of the anti-competitive effects of the proposed collective negotiations and collective boycotts in relation to the distribution of newspapers and magazines by newsagents.

Current level of competition – Newspapers and magazines

- 7.3. In assessing the anti-competitive effects of proposed arrangements, it is important to compare the level of competition that would be likely to exist both with and without the proposed arrangements.
- 7.4. As discussed previously in this document, the Commission believes the likely situation without authorisation is at least the status quo and quite possibly a continued trend towards an increase in the level of negotiation and variation in contracts between newsagents and publishers.
- 7.5. The ANF submitted that there currently exists little competition between newsagents in the supply to publishers of a distribution channel for newspapers and magazines. It was submitted that newsagents, individually, are in weak bargaining positions vis-à-vis publishers and as such publishers are not disposed to negotiate terms and conditions with individual newsagents.
- 7.6. In assessing the ANF’s position, it should first be noted that the Commission believes that even businesses with a higher degree of bargaining power are influenced by demand and supply forces in the manner in which they set their prices. In setting their prices (in this case commissions), publishers are likely to have regard to how much each newsagent is willing to accept. In this respect, newsagents do compete (at least to some extent) with each other.
- 7.7. This is not to say that the competition manifests itself in more overt forms such as bargaining or undercutting. At times it is hard to describe how this less overt form of competition exists. A simple way is to ask the question why publishers do not set a lower rate of commission. Surely, publishers would choose to save distribution costs where they could without reducing the number of newsagents willing to distribute at a lower price. The answer is of course that publishers believe that by setting lower rates, more newsagents will choose not to (or will not be able to) continue to distribute publications at that lower commission. This is reflective of competition (albeit not necessarily high) between newsagents.
- 7.8. In this case, in addition to the less overt manifestations of competition described above, the Commission notes features in the market that suggest

more overt forms of competition exist. This observation departs from the Applicant's submissions.

- 7.9. First, there does exist a degree of choice available to newsagents in terms of the publishers to whom they can provide their distribution services. While certain regions are dominated by one publisher (in relation to newspapers) there do exist choices in terms of national and niche publications. These choices do have limits having regard to consumer loyalty, but nevertheless exist at some level. In relation to magazines, while there may exist a level of brand loyalty and while there exists some concentration in terms of publishers, there does exist a greater level of choice to newsagents. When faced with choice (even if limited), businesses (in this case newsagents) do carry a greater degree of bargaining power than they would without any choice.
- 7.10. Second, and more importantly, since deregulation there appears to have developed a degree of negotiation between certain newsagents and publishers. This is reflected in a number of individual contracts that have been entered into.
- 7.11. For example, News Ltd submitted that it has entered into new standard form contracts with newsagents, or in some cases has engaged in arrangements designed to facilitate the transition to new form contracts.
- 7.12. APN Newspapers Pty Limited ("APN") submitted that it had negotiated extensively with individual newsagents. APN submitted that the QNF had acknowledged APN's willingness to negotiate, stating in the QNF's Special Bulletin No. 198:
- "APN have a policy wherein their individual regional newspapers would endeavour to preserve existing arrangements of supply to newsagents, which varied by region, within their new contract offers..."
- "Some Regional Publishers have detailed preparedness to negotiate these terms to ensure that the Distributor is not disadvantaged on present supply terms?"
- 7.13. ACP Publishing Pty Ltd ("ACP") submitted that it had entered into agreements with newsagents that took account of the individual circumstances of each newsagent (such as the floor plan of the particular newsagency).
- 7.14. The Tribunal's 1994 decision identified the existence of severe anti-competitive detriment in the newsagency industry. Since that time, the industry has been engaged in a process of deregulation and, at least to some extent, has moved to more competitive individually negotiated agreements as noted above.
- 7.15. However, in this respect the Commission notes that the ANF asserted that negotiation did not occur with regard to the standard form contracts employed by publishers and distributors. Further, the Commission received some confidential standard form submissions from individual newsagents who indicated that they had experienced some difficulty in negotiating terms

with major suppliers whom they considered to be indifferent to individual considerations. Further, these submissions suggested that some individual newsagents feared that they may face retribution with regard to supply arrangements if they attempted to negotiate with more powerful suppliers.

- 7.16. There therefore appears to exist some dispute about the prevalence and use of standard form agreements and the degree of negotiation with regard to those agreements.
- 7.17. Nevertheless, having regard to the foregoing, the Commission is of the view that there exists at least some, albeit not necessarily high, level of competition between newsagents in the provision of distribution services to publishers. The Commission is further of the view that, where allowed, continued individual negotiations between publishers and newsagents will further increase competition in this area.

Effect on competition in relevant newspaper and magazine markets

- 7.18. The Commission believes that the proposed arrangements are likely to lessen competition in the relevant markets in the following ways:
- lost efficiencies resulting from collusion;
 - inefficiencies arising from disruptive collective boycott activity; and
 - increased potential for collective activity in other areas.

These are discussed below.

Lost efficiencies resulting from collusion

- 7.19. Competition between buyers or sellers ordinarily directs resources to their most efficient or productive use. Where buyers or sellers collude on the terms or conditions of acquisition or supply, competition can be distorted and resources directed to less efficient uses.
- 7.20. This distortion in competition can often result in increased prices to consumers, less choice, lower quality of product or services and increased costs to producers than would otherwise exist.
- 7.21. Pricing is a key component of negotiations between suppliers and buyers. Price competition, that is, the interaction of the price suppliers are willing to accept with that which buyers are willing to pay will ordinarily direct resources to their most efficient use.
- 7.22. As noted above, agreements between competitors which interfere with the price at which they are willing to supply or acquire goods or services will ordinarily divert resources away from those more efficient uses and towards less efficient uses.

- 7.23. This is the foundation of the principles of competition and as such, Parliament has deemed agreements between competitors as to price to substantially lessen competition in breach of the TPA.
- 7.24. Generally, collective negotiation arrangements that set the terms (and in particular price) on which goods or services are supplied or acquired are likely to lessen competition relative to a situation where the acquirers individually negotiate their own terms.
- 7.25. The ANF submitted that there currently exists little or no competition between newsagents in the supply of distribution services to publishers. The ANF therefore submitted that the agreements as to terms (including price) would not affect (or affect to any great extent) the competitive process.
- 7.26. As discussed above, the Commission does not agree with the ANF's submissions in this regard. The Commission believes that there currently exists some, albeit not necessarily high, level of competition between newsagents in the supply of distribution services to publishers.
- 7.27. While submitting that there would be no likely anti-competitive effects, the ANF did acknowledge that the formation of collective negotiations may result in an increase in commission rates to newsagents. In fact, the ANF submitted that the likely change in commissions would be sufficient to alter the viability of a number of newsagents. In acknowledging such, the ANF does appear to accept that collective negotiations are likely to have some effect on competition between newsagents in the provision of distribution services to publishers.
- 7.28. The ANF went on to submit that any increase in commissions will not be passed on by publishers to consumers due to competitive pressures from other suppliers such as supermarkets.
- 7.29. The Commission however is not confident that any increase in commissions would not be passed on in whole or in part to consumers. In effect, publishers set the price (having regard to supply and demand conditions) for newspapers and magazines which are sold to consumers by agents. Any increase in commissions is equivalent to an increase in distribution costs to publishers. It is likely that at least some publishers, holding some degree of market power, are unlikely to absorb the entirety of that additional cost and would therefore be likely to pass some on to consumers in the price of the publications. Alternatively, the additional cost could be passed on to advertisers in the form of increased advertising fees, or to other distributors in the form of lower commissions.
- 7.30. Each outcome, where different to that which would occur in a competitive market, would be a distortion in the most efficient outcome.
- 7.31. In respect of increased prices to consumers, the Commission notes the submission of ACP to the effect that an increase in commission rates or a change to the conditions upon which such commission rates were payable

would impose an additional cost on magazine publishers and distributors that may be passed through to consumers.

- 7.32. In respect of increased costs to other forms of distribution, the Commission notes the concerns of the Trading Post who submitted that any increase in the amount of commission paid to participating newsagents would flow on to newsagencies that did not participate in the arrangements.
- 7.33. Similarly, APN submitted that the arrangements would damage the large number of small businesses that compete directly with newsagents in the distribution market and as such would erode the benefits of deregulation to date.
- 7.34. Aside from price, businesses compete on issues such as quality, service and other terms of trade. Just as price agreements stifle competition on price, non-price agreements can stifle competition on areas such as quality and service.
- 7.35. For example, it was submitted by ACP that it had entered into agreements with newsagents that took account of the individual circumstances of each newsagent (such as the floor plan of the particular newsagency).
- 7.36. Where businesses collectively negotiate, the incentive for businesses (in this case newsagents) to innovate or improve their quality or service is reduced. In effect, resources are directed away from innovative businesses to less innovative businesses.
- 7.37. In this regard, the Commission notes the concern of some interested parties to the effect that authorising the proposed arrangements would be a backwards step in terms of the competitive advances that have been made in the industry since the Tribunal's 1998 decision. For example, News Ltd submitted that an "essential feature [and] clearly intended consequence"¹⁶ of the deregulation of the industry was to establish individual agreements between newsagents and publishers.
- 7.38. The Commission notes the submission from Pacific which suggested that if collective negotiations are authorised, individual newsagents will have little incentive to offer publishers more competitive distribution services (such as in-store displays or promotions). Pacific further submitted that collective negotiation would reduce the likelihood that newsagents would engage in competitive conduct, both amongst themselves and in respect of other retail outlets.

¹⁶ News Ltd submission, 8 July 2002, p 3.

- 7.39. Generally speaking, the Commission believes that any anti-competitive effect of collective negotiation arrangements constituted by lost efficiencies are likely to be more limited where the features referred to below are present:
- the current levels of competition are low (due, for instance, to the structural features of the market);
 - voluntary participation;
 - restrictions on the coverage, composition and representation of bargaining groups; and
 - no boycott activity.
- 7.40. As discussed above, the Commission is of the view that there appears to be some, albeit not necessarily high, level of competition between newsagents in the provision of distribution services to publishers with potential for greater competition with the further development of individual negotiations.
- 7.41. A collective negotiation arrangement is voluntary where members of collective negotiation groups are free to opt out of the collective negotiations, preferring to negotiate individually. This provides an element of ongoing competition and as such lessens the anti-competitive impact of the arrangements.
- 7.42. The Commission notes that the ANF has foreshadowed possible opt-out procedures for participating newsagents.
- 7.43. Collective negotiation agreements that limit the coverage, composition and representation of bargaining groups limit the anti-competitive nature of the arrangements in a number of ways.
- 7.44. First, where the size of bargaining groups are restricted, the anti-competitive effect is likely to be smaller having regard to the smaller area of trade directly affected and having regard to the competition provided by those suppliers or acquirers outside the group.
- 7.45. Second, where bargaining groups are limited in scope (either by geography, product range or size etc) negotiations are able to take into account the specific demand or supply characteristics of those particular businesses. This significantly reduces the anti-competitive effects associated with “one size fits all” negotiations and allows competition between groups to provide the competitive discipline that leads to efficient resource use.
- 7.46. Third, where different bargaining groups have common representation, that common representative can act as conduit between the groups and can significantly reduce the competition that might otherwise exist between those groups.
- 7.47. The Commission is of the view that the coverage, composition and representation of the arrangements proposed by the ANF are subject to little restriction. The ANF (and relevant state representative bodies) cover a large

proportion of newsagents. The proposed arrangements are, at their widest national. The arrangements do not propose multiple bargaining groups and in any event would involve common representation by the ANF (or state representative bodies).

- 7.48. The Commission believes that the coverage, composition and representation of the arrangements proposed by the ANF, is likely to maintain or enhance the anti-competitive effects of collective negotiations.
- 7.49. Finally, the ANF has also sought to engage in collective boycott activity. That is, a collective decision to withdraw distribution services to publishers where negotiations break down.
- 7.50. Aside from the direct costs of boycott activity (discussed below), the availability of boycott activity significantly increases the anti-competitive effects of collective negotiations.
- 7.51. Absent boycotts, the other party (in this case the publisher) has greater discretion over the extent to which they participate in negotiations and therefore, the extent to which terms and conditions (including price) might deviate from those that might be expected to prevail absent the collective arrangements.

Opportunity for collective activity

- 7.52. The Commission notes the concern raised by interested parties that information sharing (between newsagents and between newsagents and suppliers) may in fact underpin anti-competitive conduct (such as price-fixing).
- 7.53. In considering collective bargaining arrangements in the past, the Commission has noted concerns that the arrangements may increase the potential for collusive anti-competitive conduct beyond that authorised.
- 7.54. Such increased potential arises where competitors are encouraged to meet, share information and discuss pricing. The Commission has been concerned that in this environment, there may be an increased likelihood of anti-competitive conduct (beyond that which is authorised) occurring.
- 7.55. The Commission is of the view that the likelihood of this occurrence and any subsequent effect is lessened where the arrangements are not industry wide. Further, the Commission is of the view that the likelihood is also reduced where participants are made aware of their obligations under the TPA.

Collective boycotts

- 7.56. In addition to the effect collective boycott activity has on enhancing any anti-competitive effect flowing from collective bargaining, the direct inefficiencies caused by collective boycotts are likely to be significant as collective boycotts have the potential to cause significant disruption to business including downstream and upstream businesses.

- 7.57. Pacific submitted that primary boycott activity would be likely to be directed against smaller publishers, as a boycott of large newspaper publisher would be likely to cause significant commercial harm to newsagents themselves.
- 7.58. Pacific further submitted that newsagents may be more likely to boycott magazine publishers because of the ease of substituting one magazine for another similar magazine aimed at the same demographic (for example, a consumer may accept the substitution of ACP's *Dolly* for Pacific's *Girlfriend*).

Countervailing Power

- 7.59. Much of the ANF's submission relates to the proposition that the proposed arrangements create a countervailing power to the market strength of publishers.
- 7.60. As discussed under the Commission assessment of public benefit below, the Commission does not accept that the mere creation of countervailing power in itself is a public benefit. The Commission looks to the outcomes of any creation of countervailing power when considering these issues.
- 7.61. From a competition point of view, however, in certain market circumstances, some competitive benefit may be generated in certain circumstances flowing from the creation of countervailing power where the acquisition of goods or services is controlled by a party with a large degree of market power.
- 7.62. In a competitive market, prices are set where supply and demand are in equilibrium.
- 7.63. Where the acquirer of services, however, has a greater degree of monopsony power, the prices it pays for those services may be lower than would prevail absent that power or in a more competitive market.
- 7.64. While the interaction of suppliers and buyers is complex, in certain market circumstances, where acquirers with a higher degree of monopsony power meet suppliers with an increased degree of power derived from collective bargaining, the prices (and as such allocation of resources) may better reflect that which would occur in a competitive market.
- 7.65. It therefore may well be argued that an increase in the bargaining power of newsagents under the proposed arrangements could lead to some efficiencies which may to some extent lessen any anti-competitive arrangements.
- 7.66. Ultimately, however, it is a matter for an Applicant to demonstrate to the Commission that the current market operation does not produce competitive outcomes and that the proposed arrangements would lead to more competitive outcomes in the manner set out above.
- 7.67. To date, the Applicants have not provided compelling arguments to this effect.

Conclusion on anti-competitive detriment in relation to newspapers / magazines

- 7.68. Having regard to the foregoing, the Commission's view in relation to the likely anti-competitive effect of the proposed arrangements in relation to competition between newsagents in the supply of distribution services to publishers is set out below.
- 7.69. In relation to collective negotiation arrangements and absent collective boycott arrangements, the Commission is of the view that the anti-competitive effect of the proposed arrangements is likely to be of substance having regard to:
- lost efficiencies that arise from individual negotiations in the form of competition on commissions, service and innovation; and
 - the increased potential for collective activity in other areas.
- 7.70. In relation to collective negotiation arrangements and with collective boycott activity, the Commission is of the view that the anti-competitive effect of the proposed arrangements is likely to be significant having regard to
- lost efficiencies that arise from individual negotiations in the form of competition on commissions, service and innovation (enhanced by the availability of boycott activity);
 - inefficiencies arising from disruptive collective boycott activity; and
 - the increased potential for collective activity in other areas.

8. Commission Evaluation - Effect on competition – Soft Gambling Products

- 8.1. This section details the Commission's assessment of the anti-competitive effects of the proposed collective negotiations in relation to the distribution of soft gambling products by newsagents.
- 8.2. The Commission's assessment of the effect of competition in relation to soft gambling products follows similar principles referred to above in considering the effect in relation to newspapers and magazines and, as such, the following discussion will rely to some extent on earlier discussion.
- 8.3. As discussed above, in assessing the anti-competitive effects of proposed arrangements, it is important to compare the level of competition that would be likely to exist both with and without the proposed arrangements.
- 8.4. As discussed previously in this document, the Commission believes the future situation absent authorisation will be a continuation of contracts between newsagents and soft gambling bodies with a low level of negotiation between newsagent and soft gambling body and a low degree of variation in contractual arrangements.
- 8.5. In each state, the respective agency agreements between soft gambling bodies and newsagents are in the same form. The ANF submits that there is no negotiation of agency agreements with individual newsagents and standard contracts are adopted. The ANF notes, however, that it is the practice of soft gambling bodies to seek input from the representative associations as to the content of agency agreements.
- 8.6. In light of the forgoing, the Commission accepts that there appears to be a very low level of overt competition between newsagents in the supply of distribution channels for soft gambling products. Nevertheless, as discussed in section 7 above, the Commission believes even in the absence of overt competition, there is likely to exist a level of less overt competition (albeit in this case apparently limited having regard to the regulated nature of the industry).
- 8.7. Having regard to what the Commission accepts is a very low level of competition between newsagents in relation to the supply of distribution services to soft gambling bodies the Commission also concludes that the likely effect on competition is also very low.
- 8.8. While the ANF have not specifically submitted that collective negotiations would lead to increased commissions, they did raise the possibility submitting that given the regulatory nature of the industry any increase in commissions would not necessarily be passed on to consumers.
- 8.9. The Commission is of the view, however, that to the extent collective negotiations increased commission rates, an equivalent increase in the price of certain lottery products for consumers (regulation permitting) and/or a reduction in monies being put back into the broader community by way of

charitable contributions from soft gambling bodies could result. These effects demonstrate the possibility of some anti-competitive detriment.

8.10. As discussed above, the Commission considers the anti-competitive detriment of collective bargaining arrangements is likely to be lower where:

- the current level of competition is low (due, for instance, to the structural features of a particular market);
- there are opt-out mechanisms for members;
- the arrangements do not have industry wide coverage; and
- the arrangements set up multiple groups of similar acquirers with independent advisers/representatives.

8.11. As discussed above, the current level of competition between newsagents in the provision of distribution services to soft gambling bodies appears to be low.

8.12. While it is not clear whether or not the ANF proposes to prevent members from opting out, the Commission acknowledges that given the regulatory framework individual negotiations do not appear to be entertained.

8.13. With regard to the coverage of the proposed arrangements, the ANF represents a large proportion of newsagents. The extent of the industry covered by the proposed arrangements therefore maintains what anti-competitive effects may exist in relation to any proposed collective bargaining. The Amended Application does not envisage or propose the setting up of multiple groups for collective negotiations. The Commission again, however, acknowledges that these issues are less relevant in a regulated market.

8.14. In addition to the low competitive detriment identified above, the Commission also notes the detriment constituted by an increased opportunity for collective activity in other areas of competition.

Conclusion on anti-competitive detriment in relation to soft gambling

8.15. Having regard to the forgoing, the Commission is of the view that there may be some anti-competitive effects of the proposed collective bargaining arrangements in the form of increased retail prices of certain lottery products to consumers and/or a reduction in monies being put back into the broader community by way of charitable contributions.

8.16. There may also exist some detriment constituted by an increased opportunity for collective activity in other areas of competition.

8.17. However, the Commission is of the view that that any anti-competitive effect of the proposed arrangements in relation to soft gambling products is likely to be very low. In this respect, the Commission's analysis is similar to that employed in determining the Golden Casket application for authorisation discussed in section 2 of this draft determination.

9. Commission Evaluation - Public Benefits

- 9.1. In order to grant authorisation, the Commission must be satisfied that the proposed arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition arising from the arrangements. The ANF submitted that the proposed arrangements will give rise to a number of public benefits, which are discussed below.
- 9.2. In making its submissions, the ANF did not use a consistent description of the claimed benefits. Various descriptions were used at different parts of the submissions and claimed benefits were grouped in different ways. For this reason, the Commission, in assessing the Amended Application has grouped the claimed benefits as it considers appropriate. All public benefits claimed by the ANF have been considered.
- 9.3. The ANF also did not, differentiate between the public benefits that could be expected to flow from the collective negotiation and the public benefits that could be expected to flow from any collective boycott activity.
- 9.4. The ANF has also submitted that the public benefits in support of arrangements in relation to newspapers and magazines are the same as those in relation to soft gambling. The Commission has, where necessary, separated the assessment of public benefits claimed in relation to newspapers/magazines and soft gambling products.

A national system

- 9.5. The ANF submitted that publishers generally adopt standard contracts across the industry although commission rates may vary from State to State. The ANF noted submissions from certain publishers that they were attempting to establish a consistent national approach to its dealings with newsagents and distributors.
- 9.6. The ANF submitted that the adoption of a national approach demonstrates increased business efficiencies from such and that publishers were not willing to negotiate individually with a number of State Associations and a large number of small businesses.
- 9.7. The ANF acknowledges that for regional publications, a regional rather than national approach is relevant.
- 9.8. The ANF submits that it is inequitable for small businesses in the position of newsagents to be faced with circumstances where only one party to the transaction can negotiate on that wider basis. They submit that if a national approach is adopted, then it is appropriate and efficient for a national representative of newsagents to be in a position to negotiate on an equal footing with publishers.
- 9.9. Although the ANF was of the view that a national approach to bargaining was desirable, APN Newspapers Pty Ltd (APN) submitted that the unique

features of regional markets have been recognised in the past and will continue to shape the development of the deregulated distribution market. APN further noted the innovation that has resulted in Canberra and Darwin, where alternative distribution channels have been developed that, according to APN, have produced lower home delivery fees and better services for consumers.

- 9.10. The Commission is not satisfied that a national approach gives rise to public benefit as submitted by the applicant. In fact, given its potential to stifle innovation and to ignore the legitimate differences between regional areas, a national approach may even constitute a detriment as discussed earlier.
- 9.11. The Commission also notes that this claimed public benefit does not appear to apply in relation to soft gambling products which involve state based soft gambling bodies.

Continued viability of small businesses

Newspapers and Magazines

- 9.12. The ANF submitted that the viability of the home delivery system for newsagents was decreasing. They submitted that the ability of publishers to make “take it or leave it” offers for increases to delivery fees will contribute to the situation where newsagents will consider whether to continue undertaking home delivery.
- 9.13. The Commission notes that, with regard to newspapers, several newsagents submitted that home delivery rates are currently insufficient and in some instances are so inadequate (for example, in rural areas) that home delivery is effectively cross-subsidised by other sales.
- 9.14. The Commission accepts that an increase in countervailing power to newsagents as a result of the authorisation of collective negotiation may assist in the negotiation of a higher home delivery fee, and in turn provide a small increase in the viability of some newsagents in the provision of these services. The Commission would be likely to take the view that this is public benefit to the extent that it would increase the viability of efficient small businesses. However, there is not likely to be a public benefit in the maintenance of inefficient small businesses.
- 9.15. The Commission accepts that to this extent, there may exist some public benefit albeit flowing from the collective negotiations in relation to home delivery terms and conditions rather than the much wider negotiations sought to be authorised.
- 9.16. However, with respect to the claimed benefit of the maintenance of the home delivery system, the Commission notes the view expressed by the Tribunal in its 1994 decision.

We are content to say that, on all the evidence, it is inconceivable that either publisher, acting independently, would fail to promote home

delivery. For it is the loyal delivery customers who give stability to circulation, reassure the advertisers and have no 'returns'.¹⁷

- 9.17. The Commission is of the view that it is in the publishers' best interests to ensure the maintenance of an efficient home delivery system, and it is the Commission's expectation that publishers will act in accordance with this interest. In this regard, the Commission notes the submission from APN that suggested that publishers in Canberra and in Darwin have demonstrated a degree of innovation and flexibility with regard to the home delivery of newspapers that would be less likely to occur if authorisation is granted.¹⁸
- 9.18. In addition, as discussed above, any increase in commissions may in any event be passed on to consumers in the form of increased prices of publications; advertisers in the form of increased advertising fees; or other suppliers of distribution services in the form of lower commissions. Further, the Commission notes APN's submission, which contended that the collective negotiation of a home delivery fee may "[rob] the market of the economies of scope, scale and improved service quality which free competition in the market for home delivery would offer."¹⁹

Soft gambling products

- 9.19. In its submission, the ANF noted that the profit returned to newsagents by way of the supply of soft gambling products was a small proportion of total income. The Commission considers that even a substantial increase in commissions is therefore unlikely to have a significant impact on overall newsagent revenues and viability.
- 9.20. As discussed above, any increase in commissions may in any event be passed on to consumers in the form of increased prices of soft gambling products or reflected in reduced contributions to charity.

Countervailing power

Newspapers and Magazines

- 9.21. The alleged 'need' for collective negotiation can be assessed in light of the deregulation of the newsagency industry. Publishers and distributors appear to have adjusted to the phasing out of the previously authorised systems. New contractual arrangements between publishers/distributors and individual newsagents are now in place. It appears then that many newsagents are becoming increasingly accustomed to negotiating with publishers and distributors.
- 9.22. Despite this, most newsagents are small businesses negotiating with suppliers including large suppliers such as News Ltd or ACP. These large companies could be expected to have significant bargaining power in negotiations with individual newsagents. However, the Commission notes that the authorisation is sought in relation to all publishers and distributors,

¹⁷ Re 7-Eleven Stores Pty Ltd (1994) ATPR ¶41-357 at 42,679.

¹⁸ Submission from APN dated 23 July 2002, p 12.

¹⁹ Submission from APN dated 23 July 2002, p 16.

regardless of their relative size or apparent level of bargaining power, and considers that any claim as to increased countervailing power could not be sustained across such a broad field in any event.

- 9.23. Further, 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.
- 9.24. On the other hand, the bargaining power of major newspaper publishers is further entrenched by the fact that most of the highest selling newspapers are metropolitan newspapers that are specific to a particular region. This suggests that many newspapers carry significant reader loyalty and therefore may be less directly substitutable (that is, a consumer in Brisbane is unlikely to accept substitution of News Ltd's *Courier Mail* with Fairfax's *The Age*). Newsagents unable to source the major metropolitan daily papers from News Ltd or Fairfax would therefore be likely to lose a significant number of customers.
- 9.25. Further, the Commission notes the concerns raised by individual newsagents with regard to the offer of standard contracts by major publishers, which, according to those newsagents, appear to have little room for negotiation.
- 9.26. Pacific submitted that although there may be a case for collective negotiation with regard to newspapers, this does not extend to an argument in favour of collective negotiation with regard to other suppliers.
- 9.27. With regard to magazines, ACP submitted that newsagents already enjoy significant countervailing power in relation to magazine publishers and distributors, as newsagents are a major distribution channel for magazine publishers, and newsagents have discretion with regard to the placement and presentation of magazines.
- 9.28. The Commission accepts that newsagents are not without power in their negotiations with the publishers and distributors of both newspapers and magazines. However, the Commission accepts the contentions of individual newsagents and the ANF that this power is likely to be significantly lower than the power enjoyed by the larger publishers and distributors.
- 9.29. Further, the Commission notes that the consequences of a decision by a major publisher or distributor not to supply its products to a particular newsagent could be damaging to that individual newsagent without significantly affecting the publisher/distributor, given that it appears that newspapers and magazines are the most significant drawcard for consumers to enter newsagencies.
- 9.30. In short, the Commission accepts that the power balance between some publishers/distributors and newsagents is currently unequal, and that collective negotiation may reduce this inequality.
- 9.31. The Commission has, however, previously concluded that the mere creation of countervailing power is not in itself a public benefit. The Commission

looks at the outcomes of any proposed change in bargaining power, for example, whether savings will be realised and passed through to consumers. It is these likely outcomes that are essential to the net public benefit test. For example, inequities in bargaining power that have led to pricing that is below the level that one would expect in a competitive market may give rise to a public benefit where they are addressed through an increase in countervailing power.

- 9.32. The Commission would require further demonstration of the outcomes of increased countervailing power before it could conclude that it constitutes a public benefit. In addition, the Commission would need to consider this claimed public benefit in the context of the existing Amended Application, as it relates to all publishers/distributors rather than just those with whom an unequal bargaining relationship is likely to exist.

Soft gambling products

- 9.33. Similarly, the Commission accepts that the providers of soft gambling products are likely to be in significantly higher bargaining positions than newsagents. This is again reflected in the prevalence of standard form agreements. The ability of newsagents to collectively negotiate with providers of soft gambling products may well increase their countervailing power.
- 9.34. For the same reasons as discussed above, however, the Commission is interested in the outcomes of any increase in countervailing power rather than the increase in itself.
- 9.35. The Commission considers obtaining higher commissions by newsagents may simply result in a transfer of wealth from the soft gambling bodies (or consumers) to newsagents. In particular, higher commission rates could result in an equivalent increase in the price of certain lottery products for consumers. Alternatively, the soft gambling bodies may absorb, in whole or in part, any increase in commission rates. The Commission considers this would ultimately affect monies being put back into the broader community by the soft gambling bodies by way of charitable contributions. This issue has been considered by the Commission in the context of anti-competitive detriment arising from the proposed arrangements.
- 9.36. The Commission is not satisfied that the ANF has demonstrated that public benefits are likely to flow from the potential increase in countervailing power of newsagents.

Efficiency

Transaction Cost Savings

- 9.37. While collective negotiation may result in transaction savings when compared to individual negotiations, this will not always be the case.
- 9.38. In this instance, the standard form contracts currently employed by publishers and soft gambling bodies may be of limited cost, particularly if it

is correct that such contracts are unlikely to be the subject of any further negotiation or lack significant variation.

- 9.39. However, the Commission notes the submissions from News Ltd and ACP, which suggested that standard form contracts were negotiable to some extent.
- 9.40. On the basis of the unsupported assertions made by the ANF in this regard, it is difficult for the Commission to accept or reject the claim of transaction costs savings. Ultimately, the Applicant must demonstrate its case.

Information sharing

- 9.41. Although the ANF claimed that collective negotiation would lead to better information sharing between participants in the negotiations, it did not provide information as to how this would occur. Without further information, the Commission is not convinced that authorisation will improve the quality or effective dissemination of information. Further, to the extent that this claim is made in relation to the supply of information to publishers and distributors, the Commission notes that no publisher or distributor supported the ANF's Amended Application.
- 9.42. With regard to the ability of newsagents to obtain appropriate legal or financial advice, the Commission understands that such advice (or other forms of assistance) may well be provided by the ANF regardless of whether or not collective negotiation is authorised.

Industrial harmony

- 9.43. The ANF further claimed that the proposed arrangements are likely to foster industrial harmony. When considering such a claim, the Commission notes the following comment of the Tribunal:
- ...in order...to accept that a public benefit exists, the evidence must clearly establish that the granting of authorisation will lead to significantly greater industrial harmony in the future than a likely alternative.²⁰
- 9.44. In this instance, the Commission considers that is not in receipt of evidence to the effect that industrial harmony will be improved by collective negotiation with publishers or soft gambling bodies, and considers that collective boycott activity in relation to publishers will in fact reduce industrial harmony.
- 9.45. Further, the Commission notes that publishers, distributors and some soft gambling bodies did not support the ANF's Amended Application, and it is therefore difficult for the Commission to conclude that the arrangements for which authorisation is sought will lead to improved industrial harmony.
- 9.46. The Commission therefore does not accept that improved industrial harmony is a public benefit likely to arise from the proposed arrangements.

²⁰ Re Lamont (1990) ATPR ¶41-035 at 51525.

Equitable Dealings

- 9.47. In previous determinations, the Commission has accepted that providing smaller businesses with the ability to provide greater input into the terms and conditions of their contracts with larger businesses might reduce the likelihood of any harsh or unfair contractual terms being imposed.
- 9.48. The ANF has claimed that collective negotiations will promote equitable dealings in the industry.
- 9.49. While the failure to negotiate on the part of a business with significant market power may well be a relevant factor in considering claims of unconscionable conduct, the circumstances of any one matter need to be considered. In this instance, the Commission is of the view that the ANF has not provided sufficient information in relation to conduct in respect of their dealings with publishers or soft gambling products to satisfy the Commission that harsh or unfair dealings have occurred.
- 9.50. In assessing this public benefit claim in relation to both publications and soft gambling products, the Commission notes that while publishers and soft gambling bodies may not always negotiate individually with newsagents, many do seek the views of the ANF in relation to certain terms and conditions. As discussed earlier in this document, there is no reason why legitimate input (i.e. input falling short of contravening the TPA) would not continue to be made by the ANF.
- 9.51. In relation to soft gambling products, the Commission is also of the view that the statutory regimes in each state should also serve, to some extent, as a ‘check and balance’ on the conduct of soft gambling bodies.
- 9.52. The Commission is not satisfied that the ANF has demonstrated any public benefit in relation to equitable dealings.

Benefits to publishers/soft gambling bodies

- 9.53. The ANF submitted that collective negotiations would also benefit publishers in the provision of information and input into contractual terms and conditions. The Commission understands that the ANF makes similar claims in relation to soft gambling products.
- 9.54. In particular, the ANF submitted that it would be inequitable to restrict the ANF from making submissions in response to requests for input by publishers into terms and conditions of standard form contracts.
- 9.55. The Commission notes that the publishers/distributors did not accept that collective negotiations and collective boycott activity would provide any benefits to them. Publishers noted that the desirability of a national approach to negotiation was limited by regional considerations that would exist regardless of any collective negotiations. Further, News Ltd submitted that the costs of implementing new contractual arrangements to take into account the 1998 Tribunal decision have already been incurred, and that there are, as a result, no savings to be gained by publishers in entering into collective negotiations with the ANF.

- 9.56. It is important at this point to distinguish between the ANF's application to represent its members in collective negotiations with publishers and the providers of soft gambling products, with their provision of legitimate input into standard form contracts.
- 9.57. The distinction may be grey at the margins but is nevertheless important. Collective negotiations envisage direct participation by the ANF representing a party (or parties) to the proposed contract and direct involvement in the mechanics of striking a deal between newsagents and their suppliers. This is distinct from the current conduct of the ANF in providing input into the terms and conditions of standard form contracts. The Commission understands that such input primarily takes the form of the ANF providing information and suggestions based on the experiences of their members.
- 9.58. With regard to the supply of better information to suppliers (including publishers), the ANF did not provide evidence as to how the supply of information would be improved by collective negotiation. The Commission is not convinced that such an improvement would occur.
- 9.59. With regard to soft gambling products, the Commission notes the concern raised by the WA Lotteries Commission that allowing the ANF to collectively negotiate as to the terms and/or conditions of supply of soft gambling products could potentially provide the ANF with an opportunity to influence decisions on matters that are appropriate the preserve of regulatory authorities. The Commission has some sympathy with this argument.
- 9.60. The Commission therefore concludes that collective negotiations give rise to little if any benefits to publishers or other suppliers

Conclusion on public benefit

- 9.61. The Commission concludes that, on the information currently before it, collective negotiations with newspaper and magazine publishers and distributors, and with the suppliers of soft gambling products, is unlikely to give rise to significant public benefits. The Commission further considers that collective boycott activity does not give rise to any public benefit.
- 9.62. While there may exist some benefit in the form of increased viability of certain newsagents in relation to home delivery of newspapers, this benefit is relatively narrow having regard to the width of the Amended Application.

10. Commission Evaluation – Conclusion

- 10.1. On the evidence before it, and for the reasons given above, the Commission has reached the following conclusions:
- collective negotiations by newsagents in the supply of distribution services to newspaper and magazine publishers and distributors would not give rise to public benefits sufficient to outweigh the likely anti-competitive detriments of substance flowing from those arrangements constituted by:
 - lost efficiencies that arise from individual negotiations in the form of competition on commissions, service and innovation; and
 - the increased potential for collective activity in other areas.
 - collective negotiation by newsagents in the supply of distribution services to newspaper and magazine publishers and distributors is unlikely to give rise to public benefits sufficient to outweigh the significant anti-competitive detriments flowing from those arrangements constituted by:
 - lost efficiencies that arise from individual negotiations in the form of competition on commissions, service and innovation (enhanced by the availability of boycott activity);
 - inefficiencies arising from disruptive collective boycott activity; and
 - the increased potential for collective activity in other areas.
 - collective negotiations by newsagents in the supply of distribution services to soft gambling bodies would not give rise to public benefits sufficient to outweigh the likely anti-competitive detriment (albeit very low) flowing from those arrangements constituted by the potential for increased prices of soft gambling products or reductions in charitable contributions by soft gambling bodies and the increased potential for collective activity in other areas.
- 10.2. Accordingly, the Commission proposes, at section 11 of this draft determination, to deny authorisation to the Amended Application.
- 10.3. As noted earlier, the Commission considers that the submissions provided by the ANF provide insufficient evidence in support of the application, particularly as it is extremely broad. For example, the Commission is surprised that the ANF chose to rely on the same public benefit claims in relation to the proposed boycott conduct as it did in relation to the proposed collective negotiation conduct, despite the fact that the two forms of conduct are significantly different.

- 10.4. In addition, the breadth of the proposed arrangements means that they have the potential to be highly anti-competitive. In turn, this means that the burden of demonstrating a public benefit that outweighs the anti-competitive detriment is a heavy one and cogent evidence supporting the public benefits claimed will be required.
- 10.5. The Commission notes that this document constitutes a draft decision, and as such is merely indicative of the Commission's current assessment of the application on the evidence presently before it. A different final decision may be reached should the Commission receive sufficiently persuasive evidence that the proposed arrangements should be authorised. In addition, in light of the Commission's earlier comments, the ANF may wish to consider its position with regard to the scope of the conduct for which authorisation is sought.
- 10.6. The Commission will now invite the ANF and interested parties to make further written submissions on this draft determination. In addition, in accordance with section 90A of the TPA, any party that is dissatisfied with this draft determination may request that the Commission hold a pre-determination conference. Such a conference provides parties with the opportunity to make oral submissions on the draft determination to the Commission.
- 10.7. The Commission will then consider any submissions received and release a final determination.

11. Draft Determination

The Application

- 11.1. On 12 October 2001, the Queensland Newsagents' Federation (QNF) lodged application A90804 with the Australian Competition and Consumer Commission (the Commission). On 29 April 2002, the Australian Newsagents' Federation (the ANF) and the QNF lodged an amended application with the Commission. Since that date, the ANF has effectively had carriage of the application.
- 11.2. The application was made under sub-section 88 (1) of the *Trade Practices Act 1974* (the TPA) to make or give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA (Form B, Schedule 1 of the Trade Practices Regulation 1974).
- 11.3. Broadly, authorisation was sought to engage in collective negotiations on behalf of newsagents with suppliers of goods and services to newsagents, namely publishers and distributors of newspapers and magazines and the suppliers of consumables, tobacco, stationery, greeting cards and soft gambling products. Authorisation was also sought to engage in a collective boycott of publishers of newspapers and magazines should negotiations break down.
- 11.4. Authorisation was sought by the ANF and the QNF on behalf of themselves and the following newsagents associations:
- Newsagents Association of New South Wales
 - Victorian Accredited Newsagents Association Ltd;
 - Newsagents Association of South Australia Ltd;
 - Western Australian Accredited Newsagents Association;
 - Newsagents Association of Northern Territory; and
 - Tasmanian Newsagents Association Ltd.
- 11.5. Authorisation was sought for a period of five years.

Statutory Test

- 11.6. For the reasons outlined in section 5 of this draft determination, the Commission **is not** satisfied that in all the circumstances the making of and giving effect to agreements in relation to collective negotiation with the publishers and distributors of newspapers and magazines, and the suppliers of soft gambling products, for which authorisation is sought under subsection 88 (1) of the TPA
- would be likely to result in a benefit to the public; and
 - that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the arrangements.

- 11.7. The Commission therefore proposes, subject to any pre-determination conference requested pursuant to section 90A of the TPA, to **deny** authorisation to application A90804.