

Application for Authorisation

lodged by

Golden Casket Agents' Association Ltd

in respect of

**negotiations on behalf of its members in relation to terms and
conditions of agency agreements and arrangements with
Golden Casket Lottery Corporation in Queensland**

Date: 4 September 2003

Authorisation No: A90853
Public register: C2002/1512

Commissioners: Samuel
Bhojani
Martin
McNeill

Summary

The application

On 17 October 2002 the Golden Casket Agents' Association (the Association) lodged application for authorisation (No. A90853) with the Australian Competition and Consumer Commission (the Commission).

The authorisation process

A key objective of the *Trade Practices Act 1974* (the Act) 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 Act recognises that compliance with the competition provisions of the Act may not always be consistent with the most efficient outcome. It therefore allows the Commission to grant immunity from the Act for anti-competitive arrangements or conduct in certain circumstances.

One way businesses may obtain immunity is to apply for what is known as an 'authorisation' from the Commission. Broadly, the Commission may 'authorise' businesses 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 Association seeks authorisation to conduct negotiations on behalf of its members in relation to the terms and conditions of agency agreements and arrangements with Golden Casket Lottery Corporation Limited (the Corporation), including:

- commissions paid to Casket agents;
- handling fees;
- agency application fees;
- support service levies;
- freight charges;
- product ordering fees;
- equipment hire costs (in relation to terminals and validators);
- retail image design;
- agency subsidy and insurances; and
- changes to the Agents' Manual.

Assessment of public benefit and anti-competitive detriment

In its draft determination issued on 28 April 2003, the Commission expressed the view that the proposed arrangements would result in some lessening of competition between Casket agents in the provision of distribution services to the Corporation. The Commission believed

this anti-competitive detriment may result in the possibility of increased retail prices of certain lottery products for consumers and/or a reduction in monies returned to the community by the Corporation by way of contributions to community groups.

Having considered information provided since the draft determination the Commission maintains the view that the proposed arrangements could result in some lessening of competition. However, having regard to the voluntary nature of the proposed arrangements, the absence of boycott conduct, the regulated nature of the industry and the limited degree to which Golden Casket agents are able to compete (both with and without the proposed arrangements) the Commission believes any anti-competitive detriment would be negligible.

In its draft determination issued on 28 April 2003, the Commission expressed the view that the Association had failed to demonstrate that the proposed collective bargaining arrangements would result in a benefit to the public. Having considered information provided by the Association and interested parties since the draft determination, the Commission is prepared to accept that the proposed arrangements will give rise to certain public benefits although small.

In particular, the Commission accepts the submissions that there seem to be low levels of negotiation between the Corporation and individual Casket agents. In these circumstances it is possible that important contractual issues are not addressed. While the Commission is of the view that associations can legitimately raise many issues of concern on behalf of its members it may be limited or may feel it is limited under the competition provisions of the Act from raising all matters.

The Commission believes that the community generally has an interest in Casket agents benefiting from having increased effective input into contracts in situations where there is such a clear disparity in bargaining power. The Commission therefore believes there may exist some benefit in allowing the Association to negotiate with the Corporation on behalf of its members.

Determination

On balance, the Commission believes that while the Association has demonstrated little public benefit associated with the proposed arrangements, that benefit is sufficient to outweigh the negligible anti-competitive detriment. For the reasons outlined above, the Commission, at Section 11 of this determination, **grants** authorisation to application A90853 for a period of 5 years.

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1 Introduction

- 1.1 The Australian Competition and Consumer Commission (the Commission) is the Commonwealth agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.1 The Act recognises that compliance with the competition provisions of the Act may not always be consistent with the most efficient outcome. It therefore allows the Commission to grant immunity from the Act for anti-competitive conduct in certain circumstances.
- 1.2 One way businesses may obtain immunity is to apply for what is known as an ‘authorisation’ from the Commission. Broadly, the Commission may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.3 The Commission conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.
- 1.4 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.
- 1.5 The Act requires that the Commission then issue a draft determination in writing proposing to either 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 submissions received from interested parties.
- 1.6 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.
- 1.7 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.
- 1.8 This document is a determination in relation to application for authorisation A90853 (the Application) lodged with the Commission by the Golden Casket Agents’ Association Ltd (the Association). The Association seeks authorisation to conduct negotiations in relation to the terms and conditions of agency agreements and arrangements with Golden Casket Lottery Corporation Limited (the Corporation).

2 The Application

Collective bargaining arrangement

- 2.1 On 17 October 2002 the Association lodged the Application with the Commission. The Association is a representative body for Golden Casket agents (Casket agents) in Queensland. The Application was made by the Association for and on behalf of itself and its members under section 88(1) of the Act for the Association and its members to make and give effect to a contract, arrangement or understanding, a provision of which has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 2.2 In particular, the Association seeks authorisation to conduct negotiations through its representative Council on behalf of members in relation to terms and conditions of agency agreements and arrangements with the Corporation, including:
- commissions paid to Casket agents;
 - handling fees;
 - agency application fees;
 - support service levies;
 - freight charges;
 - product ordering fees;
 - equipment hire costs (in relation to terminals and validators);
 - retail image design and agency subsidy and insurances; and
 - changes to the Agents' Manual.
- 2.3 Agency agreements take the form of standard franchise agreements across the industry. The form of agency agreements must be approved by the industry regulator, the Queensland Office of Gaming Regulation (the QOGR).
- 2.4 The Agents' Manual is produced by the Corporation and covers such issues as:
- the agency appointment process;
 - sale of an agent's business;
 - termination of agency agreements;
 - the agent's agreement to commit to an annual business plan;
 - achievement of minimum sales levels;
 - any requirement to extend trading hours; and
 - training requirements.
- 2.5 The Agents' Manual may be amended by the Corporation from time to time.
- 2.6 Authorisation is also sought to negotiate in relation to matters currently not included in agency agreements and matters currently unforeseen. The Association does **not** seek authorisation for members to take collective action in the form of boycotts or

otherwise against the Corporation as a means of strengthening their bargaining position.

2.7 Authorisation is sought for a period of five years.

Interim authorisation

2.8 On 17 October 2002 the Association applied for interim authorisation to conduct collective negotiation of commissions to be paid to Casket agents in relation to the introduction of internet Gold Lotto in Queensland. The Association's request for interim authorisation was based upon its understanding that amendments to the *Lotteries Act 1997*, allowing internet Gold Lotto to occur, would be implemented by 31 December 2002. The Queensland Office of Gaming Regulation advised the Commission that the relevant legislative amendments are proposed to occur in the first half of 2003.

2.9 In light of the information as to the likely timing of the introduction of internet Gold Lotto, on 5 December 2002 the Commission deferred its consideration of the Association's request for interim authorisation.

2.10 The Commission received no further advice regarding the likely timing of the introduction of internet Gold Lotto in Queensland.

The Applicant

2.11 Formed in 1952, the Association is a public company, the members of which are Casket agents. The Association is governed by a representative Council. Its objects include:

- to encourage, protect and promote Casket agency business;
- to promote the interests of Casket agents;
- to promote the consideration and discussion of matters affecting the sale of Golden Casket products; and
- to present the general views of Casket agents to the Corporation and government agencies and direct liaison with the government and opposition members and other industry groups.

Golden Casket Lottery Corporation

2.12 The Corporation is a corporatised Queensland government entity which currently holds the exclusive licence to run lotteries in Queensland until 2009.

2.13 Five Queensland Ministers (two voting and three non-voting) hold shares beneficially for the Queensland Government. The Queensland Government, as shareholder, provides the Corporation with broad policy direction and sets key performance targets.

2.14 It is the practice of the Corporation to seek input from the Association as to the content of agency agreements and the Agents' Manual.¹

Chronology

2.15 The Commission's consideration of the Application is summarised below.

Date	Action
17 October 2002	Application for authorisation received from the Association. At this time, the Association applied for interim authorisation to conduct negotiations of the commissions to be paid to Casket agents in relation to the introduction of internet Gold Lotto.
30 October 2002	Letters seeking comment on the substantive application and request for interim authorisation sent to interested parties. The closing date for submissions in relation to interim authorisation and the substantive application was 8 and 29 November 2002 respectively.
26 November 2002	Received additional information from the QOGR in relation to interim authorisation.
5 December 2002	Commission decided to defer its consideration of the Association's request for interim authorisation based on information received from QOGR.
14 January 2003	Submission received from the Corporation.
6 February 2003	Received response to submissions from the Association.
28 April 2003	Draft determination issued proposing to deny authorisation.
6 June 2003	Pre-determination conference.
28 July 2003	Submission on the draft determination received from the Association.
25 August 2003	Received letter from the Corporation in response to issues raised in the Association's July submission.
4 September 2003	Determination issued granting authorisation.

¹ Golden Casket Agents' Association submission in support of the application for authorisation, 17 October 2002, pp4,6.

3 Background to the Queensland lottery industry

Lottery products

3.1 The following lottery products are available in Queensland:

- Saturday Gold Lotto;
- Oz Lotto;
- Powerball;
- The Soccer Pools;
- Wednesday Gold Lotto;
- Instant Scratch-Its; and
- Casket and Winners Circle (a customer loyalty program).

3.2 The first four listed lottery products above are available nationally. The remaining products are available in Queensland only.

3.3 Lottery products available Australia wide are not administered nationally. The various state based lottery entities, via national lottery bloc arrangements, jointly pool prize amounts. From a regulatory point of view each state and territory based lottery entity conducts a separate lottery in accordance with its own state or territory based licences and legislation. The only distinction is that there is only one physical draw.

3.4 In 2001/2002, lottery sales in Queensland totalled approximately \$728 million. Sales achieved for the Corporation's lotto portfolio namely, Saturday and Wednesday Gold Lotto, Powerball, Oz Lotto, the Pools and Super 66 were approximately \$506 million. Instant Scratch-It sales were approximately \$221 million.²

3.5 During 2001/02 lotteries tax revenue totalled approximately \$187 million.³ Comparatively, for 2000/2001 lotteries tax revenue amounted to \$157.8 million.⁴

Gambling Community Benefit Fund⁵

3.6 The Queensland government returns taxes received from gambling to the community via two ways:

- the Consolidated Fund, which is the funding source for many public services and systems; and
- the Community Investment Fund (CIF).

3.7 8.5 per cent of lotteries tax is contributed to the CIF.

3.8 Money from the CIF is allocated to three areas:

- the Gambling Community Benefit Fund (GCBF);

² *Golden Casket Corporation 2001-02 Annual Report.*

³ *Ibid.*

⁴ *Queensland Gambling Report 2000-2001, Queensland Treasury.*

⁵ *Annual Allocation Report 2001-02 Gambling Community Benefit Fund, Investing in Queensland's Communities.*

- responsible gambling research and initiatives; and
 - programs of state-wide significance.
- 3.9 The Queensland government established the GCBF in 1994 to provide direct non-recurrent funding to community groups in Queensland. The GCBF Committee is responsible for making recommendations to the Treasurer regarding the allocation of grants from the fund on a quarterly basis.
- 3.10 The five highest grants (in dollars) from the GCBF during 2001/02 were received by the following organisations:
- Endeavour Foundation (\$801 031);
 - Queensland Police Citizens Youth Welfare Association (\$493 159);
 - Queensland Country Women's Association (\$469 632);
 - St Vincent's Community Service (\$449 884); and
 - Rural Fire Brigade (\$423 546).
- 3.11 Additionally, the Corporation launched a community benefits program, 'Rainbow Kids', in July 2001. This program incorporates a range of activities including fundraising events and annual grants. In 2001/02 the Corporation's annual donation totalled \$1.5 million. The Royal Children's Hospital Foundation and the Mater Children's Hospitals received \$500 000 and the remaining \$500 000 was distributed to child health projects throughout the State by the Queensland Department of Health.

Casket agents

- 3.12 Casket agents sell lottery products to the Queensland public. As at 30 June 2002, there were over 1120 Casket agents in Queensland.⁶
- 3.13 Currently, there are 802 Casket agents with membership of the Association. Approximately 90 per cent are newsagents. The remainder are mixed businesses including tobacconists, gift shops, general stores (in rural areas) and petrol stations.
- 3.14 The distribution of Association members across Queensland as at October 2001 is as follows: 42 per cent of Casket agents were located in the Brisbane CBD and suburbs, 9 per cent on the Gold Coast, 21 per cent in provincial cities, 7 per cent in large towns, 6 per cent in medium towns and 7 per cent in both small towns and localities.⁷
- 3.15 The revenue from the sale of lottery products varies from agency to agency. The Association estimates that the percentage of earnings of Casket agents attributable to the sale of lottery products varies from 30 to 60 per cent, with many of its members averaging 50 per cent of revenue from lottery products.⁸
- 3.16 The Association estimates that the margin on sales of lottery products, at an average of 7.6 per cent, is significantly lower than for other products sold by Casket agents.

⁶ Golden Casket Lottery Corporation Limited Annual Report 2001-02.

⁷ Golden Casket Agents' Association submission in support of the application for authorisation, 17 October 2002, p2.

⁸ Golden Casket Agents' Association submission in support of the application for authorisation, 17 October 2002, p6.

In particular, the margin on other products lines are 25 per cent for magazines, 85 per cent for cards, 20 per cent for cigarettes and 100 per cent and above for gift lines.⁹

- 3.17 Casket agents are divided into two categories by the Corporation – on-line agents and off-line agents – according to the lottery products sold and average weekly sales. On-line agents are agents with an on-line gaming terminal (used to process Gold Lotto, Powerball, Oz Lotto, Super 66, The Pools and Casket entries) and an Instant Scratch-Its validation unit which checks Instant Scratch-Its' barcodes for prizes.
- 3.18 The Corporation further divides on-line agents into three categories, namely those with average weekly sales of:
- \$20 001 or more;
 - \$10 000 to \$20 000; and
 - less than \$10 000.
- 3.19 Other agents sell only Instant Scratch-It products, with or without a validation unit. These agents are mainly located in Brisbane suburbs, provincial cities and localities in Queensland.

Becoming a casket agent

- 3.20 Only small business owners may apply to the Corporation to become Casket agents. The Corporation assesses applications for agencies based on criteria including the ability to generate new sales. Agents must also maintain a minimum weekly sales volume. The Corporation conducts annual reviews of sales performance.
- 3.21 Purchasers of an agent's business must also apply for appointment as an agent – appointment is not guaranteed with the purchase of a new business.

Regulation of the industry

- 3.22 The lottery industry in Queensland is regulated by the Queensland Office of Gaming Regulation (QOGR), in accordance with the *Lotteries Act 1997* (the Lotteries Act), the *Lotteries Regulation 1997* and the *Lotteries Rule 1998*.
- 3.23 The regulatory scheme covers a wide range of issues, including:
- the application for issuing of and suspension and cancellation of lottery licences;
 - the application for issuing of and suspension and cancellation of key person licences;
 - the suitability of licensees, key employees and operators and lottery agents;
 - the terms and termination of agency agreements (under Part 4 of the Lotteries Act);
 - the payment of lottery tax and licence fees; and
 - the conduct and promotion of lotteries, including the price of lottery tickets, the drawing of the lottery and the quantum and payment of prizes.

⁹ Ibid.

3.24 Relevantly, Part 4 of the Lotteries Act deals with the arrangements between the Corporation and Casket agents. Specifically, the legislation provides that:

- the Corporation may appoint a lottery agent for the purpose of selling lottery tickets, paying prizes, promoting lotteries and other purposes;¹⁰
- the Corporation may only enter into an agency agreement if it is in relation to a small business owned and controlled by an individual who is eligible to be a lottery agent.¹¹ The Lotteries Regulation provides that an individual is eligible to be a lottery agent if the person owns and controls a small business that is a retail business or is operated from retail shopping premises;
- the Corporation may only enter into an agency agreement if it is in a form approved by the chief executive.¹² The power of the chief executive has been delegated to the Executive Director of the QOGR;
- the QOGR must not require the inclusion of a provision in an agency agreement unless it believes that the inclusion of the provision is reasonable and necessary to ensure the integrity of the conduct of the lotteries and the public interest is not affected in an adverse and material way;¹³
- an agency agreement may only be amended with the written approval of the QOGR;¹⁴
- the price at which lottery tickets are to be offered for sale is approved by the QOGR,¹⁵ and
- the Corporation or lottery agent must not offer lottery tickets for sale at a price other than the price approved by the QOGR.¹⁶

3.25 As outlined above, the retail price of lottery products is approved by the QOGR. In relation to lotteries (except for Instant Scratch-Its and Casket), when the QOGR approves the prices of lottery tickets they approve the:

- sale price;
- the actual price of the lottery product (known as the ‘subscription’ price); and
- the commission (or handling fee, depending on the product) to be paid to the agents.¹⁷

3.26 The Commission is advised that under the Lotteries Rule, the concept of ‘subscription’ price is used to determine certain regulatory aspects of the conduct of lottery products. By setting the subscription price and the sale price, the difference is the commission or handling fee, which is the amount a lottery agent is entitled for processing the entry for consumers.¹⁸

¹⁰ Section 78 of the Lotteries Act.

¹¹ Section 79(1) of the Lotteries Act.

¹² Section 79(3)(a) of the Lotteries Act.

¹³ Section 79(4) of the Lotteries Act.

¹⁴ Section 81 of the Lotteries Act.

¹⁵ Section 126(1) of the Lotteries Act.

¹⁶ Section 126(2) of the Lotteries Act.

¹⁷ The Golden Casket Lottery Corporation submission to the Commission, 14 January 2003, pp4,5.

¹⁸ Ibid.

- 3.27 In relation to Instant Scratch-Its, the price at which the ticket is sold to the public is set by the QOGR. The legislation does not expressly deal with the issue of commissions to be paid to agents on Instant Scratch-Its, although there is some discussion on this issue in the agency agreement and Agent's Manual.
- 3.28 The average net handling fee on sales of Gold Lotto, Oz Lotto, Powerball, Super 66 and the Pools is 7 to 8 per cent. Commissions on other products (excluding GST) are between 8 to 10 per cent, depending on the ticket price of the product. The Association estimates that the average commission during 2000/01 was 7.6 per cent. Commission rates may be changed by the Corporation at any time.¹⁹
- 3.29 During 2001/02 the Corporation paid \$55.4 million in commissions and handling fees to the network of Casket agents.²⁰

Agency agreements²¹

- 3.30 The Corporation enters into an agency agreement with Casket agents in the form which has been approved by the QOGR.
- 3.31 Agency agreements take the form of franchise agreements, and are standard for all agents in the industry. The Commission understands that generally, there is no negotiation and amendment of agency agreements for individual agents.
- 3.32 Under the agreement, Casket agents are prohibited from selling competitive soft gambling products. In addition, agents are required to sell all products (limited to all Instant Scratch-It products in the case of Instant Scratch-It only agencies) and cannot choose to sell only those products on which higher rates of commission are earned.
- 3.33 Agents which entered into agency agreements prior to 1997 have 'life' agreements. Approximately 70 per cent of members of the Association have life agreements. Agency agreements made since 1997 (including agreements with new purchasers of life agencies) are for a period of five years. Five year agreements are reviewed prior to the date of expiration, and re-appointment is not guaranteed.
- 3.34 Agents are required to comply with a Retail Image Policy determined by the Corporation. The Retail Image Policy requires exterior décor and signage and internal shopfit. Currently existing agents comply with a 1990 Retail Image. New and re-locating agents must comply with the 1997 Retail Image. The 1990 Retail Image has an expiry date of June 2006, requiring all existing agencies to upgrade to the 1997 Retail Image. The Corporation requires plans to be submitted to it for approval. The cost of shopfit is estimated at between \$15 000 to \$40 000.
- 3.35 Agents are also charged for hire of the gaming terminal (at \$22 per week) and validators (at \$13.20 per week). In addition, for agents appointed after 1 April 1997, a contribution of 0.9 per cent (and 0.5 per cent for life agencies) of net on-line Lotto sales (not including Casket) is payable as a support services levy.

¹⁹ The Golden Casket Agents' Association supporting submission, 17 October 2002, p6.

²⁰ The Golden Casket Lottery Corporation Annual Report 2001/02.

²¹ The Golden Casket Agents' Association supporting submission, 17 October 2002, pp5,6.

4 Statutory test

- 4.1 The Act provides that the Commission may only grant authorisation where the public benefit test in section 90 of the Act is satisfied. In this case, the Association has applied under subsection 88(1) of the Act and the Competition Code for authorisation for it to make and give effect to a contract, arrangement or understanding, a provision of which has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 4.2 The relevant formulation of the public benefit test is found in sub-section 90(6) of the Act, which provides that the Commission shall not grant such an application unless it is satisfied in all the circumstances:
- that the provision of the proposed arrangement would result, or be likely to result, in a benefit to the public (the public benefit); and
 - that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, from the proposed arrangements (the anti-competitive detriment).
- 4.3 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.
- 4.4 Public benefit is not defined by the Act. However, the Australian Competition Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:
- anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.²²
- 4.5 Similarly, anti-competitive detriment is not defined in the Act but the Tribunal has given the concept a wide ambit. It has stated that the detriment to the public constituted by a lessening of competition includes:
- any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency...²³
- 4.6 In assessing an application for authorisation, the Commission is not required to form a view about whether the Association's arrangements breach section 45. It is only required to determine whether the relevant public benefit test has been satisfied.
- 4.7 Section 91(1) of the Act allows the Commission to grant authorisation for a specific period of time. The Commission's usual practice is to make use of this provision so as to provide it with an opportunity to review authorisations in the light of any changed circumstances. The period for which the Commission grants authorisation will depend on the specific circumstances of each case.
- 4.8 Section 88(12) of the Act provides that the Commission does not have the power to grant authorisation to past conduct.

²² *Re 7-Eleven Stores Pty Ltd (1994) ATPR 41-357 at 42,677.*

²³ *Re 7-Eleven Stores Pty Ltd (1994) ATPR 41-357 at 42,683.*

5 The Association's supporting submission

5.1 The Association claimed that the proposed arrangements give rise to significant public benefits which would outweigh any anti-competitive detriment.

Public benefit

5.2 Specifically, the Association submitted the arrangements for which authorisation is sought will produce the following public benefits:

- promotion of equitable dealings in the market place and countervailing power to small business;
- maintenance of the existing system for sale of soft gambling products;
- assistance to efficient small business, particularly in the form of transaction cost savings;
- increased supplier efficiency; and
- certainty for small business representatives in their ability to negotiate.

5.3 Further detail in relation to the public benefits claimed by the Association is provided in Section 10 of this determination.

Anti-competitive detriment

5.4 The Association claimed there is no detriment to the public caused by a lessening of competition flowing from the proposed arrangements, and in any event, detriment is likely to be limited because:

- if collective negotiations were to result in an increase in commissions to agents, competition at the retail level from casinos and other venues is a constraint upon the ability of the Corporation to increase retail prices;
- there is scope for the Corporation to absorb any increase in commission rates paid to agents, due to commissions and handling fees paid to Casket agents being a small percentage of the retail price of lottery products;
- nothing in the current application for authorisation seeks to prevent individual agents from negotiating directly with the Corporation; and
- it does not seek authorisation to take any retaliatory action in the form of boycotts or otherwise against the Corporation.

6 Submissions from interested parties prior to the draft determination

- 6.1 Upon receiving the Association's application and supporting submission, the Commission invited interested parties to comment on them.
- 6.2 The Commission received a small number of submissions from, among others, the Corporation and the QOGR.
- 6.3 An overview of all public submissions is provided below. Copies of all non-confidential submissions are available from the Commission's Public Register.

The Corporation

- 6.4 The Corporation is of the view that, if authorisation is granted to the proposed arrangements, it will be able to effectively work with the Association in addition to continuing with the existing communication and consultation processes that it presently has in place with its agency network.²⁴

Summary of other submissions

- 6.5 The Queensland Office of Gaming Regulation (QOGR) provided a short submission to the Commission. The QOGR is of the view that while collective negotiations may have some benefits, agency agreements should continue to be between the Corporation and individual agencies. In addition, authorisation for collective negotiations should not prejudice the interests of agents that are not members of the Association.
- 6.6 In addition, the Commission received a submission in support of the Association's Application from Julia Creek News. It submits that the proposed arrangements are mainly directed towards streamlining the current agency agreements between individual agents and the Corporation.
- 6.7 The Motor Trades Association of Australia and the Australian Service Station and Convenience Association have no objection to the Association's application for authorisation.

²⁴ Additional submission from the Golden Casket Lottery Corporation, 14 March 2003, p2.

7 Following the draft determination

Draft determination

- 7.1 On 28 April 2003, the Commission issued a draft determination in relation to the Application. The draft determination proposed to deny authorisation.

Pre-determination conference

- 7.2 In accordance with section 90A of the Act, the Association requested that a pre-determination conference be held in relation to the draft determination.
- 7.3 The conference was held in Brisbane on 6 June 2003. The Association and the QOGR were represented at the conference. A record of conference proceedings is available from the Commission's Public Register.

Submissions

- 7.4 The Commission received one submission in response to the draft determination from the Association. The Association's submission is discussed, where relevant, in Sections 9 and 10 of this determination.
- 7.5 Broadly, the Association, both at the pre-determination conference and in its written submissions, made the following comments as summarised below.
- The Association submitted that the Commission placed undue emphasis on the issue of agent commissions and fees in assessing the Application whereas the Association sought to negotiate other terms and conditions as well.
 - The Association submitted that the Commission had misstated the current situation and the most likely future situation. In particular, the Association submitted that without authorisation, the Association would be limited in its ability to consult or provide input in relation to pricing issues.
 - The Association submitted that the Commission had placed undue weight upon the ability of the QOGR to protect agents advising that it was not the role of the QOGR to be a watchdog of commercial arrangements between the Corporation and Casket agents.
 - The Association submitted that the Commission had not given sufficient weight to its own previous statements about anti-competitive detriment where authorisation for collective bargaining is sought absent collective boycott activity.
 - The Association submitted that the draft determination overstated the likelihood of detriment to the public in the form of increased retail prices and reduced charitable contributions by the Corporation.
 - The Association submitted that the Commission's interpretation of public benefit is too narrow and does not give sufficient recognition to the importance the community places upon the ability of small business to negotiate with large and powerful suppliers and compete.

- The Association submitted that the Commission had placed too high an onus on the Association to demonstrate public benefits beyond those which had been demonstrated in similar applications.
 - The Association submitted that the Commission had accepted that the Corporation's submissions at face value while largely disregarding those of the Association.
- 7.6 The Commission also received additional correspondence from the Corporation and the QOGR in response to queries raised by the Commission.
- 7.7 The QOGR confirmed its role in relation to the provision of lottery services in Queensland. It also confirmed that the relevant legislation did not in any way prevent individual negotiations between the Corporation and Casket agents. This was also confirmed in the Association's submission.
- 7.8 The Corporation confirmed its previously expressed view that the current level of communication and consultation between it and the Association would continue and that it would therefore not benefit from any increased efficiency from the proposed arrangements. The Corporation also made further comments in relation to the role of its retail executives, commission rates, equitable dealings, regulatory issues surrounding the price of lottery products and its coverage in regional and rural Australia.

8 Commission assessment – introduction

- 8.1 The Commission's evaluation is in accordance with the statutory test outlined in Section 4 of this determination. As required by the test, it is necessary for the Commission to assess the likely public benefits and detriments flowing from the proposed arrangements.
- 8.2 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.
- 8.3 The Commission has also made public submissions to the *Dawson Review*²⁵ 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.
- 8.4 On 16 April 2003, the Dawson committee handed down its report, making recommendations similar to those of the Commission.
- 8.5 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 to satisfy the Commission that the likely public benefits will outweigh any anti-competitive detriment.

The relevant market

- 8.6 Defining the markets affected by conduct proposed for authorisation assists in assessing public benefit and public detriment from any lessening of competition from that conduct. However, depending on the circumstances, the Commission may not need to comprehensively define the relevant markets as it may be apparent that a net public benefit will or will not arise regardless of how the market might be defined.
- 8.7 Therefore, in the authorisation context, it is only necessary for the Commission to delineate the relevant market to the extent needed to assess the public benefits and detriments of the proposed conduct.
- 8.8 In this instance, 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 possible variations in precise market definition.
- 8.9 In considering the markets affected by the proposed arrangements it is instructive to consider the areas in which Casket agents compete and indeed with whom else they compete.

²⁵ The Federal Government's *Review of the Competition Provisions of the Trade Practices Act 1974*.

The provision of distribution services to the Corporation

- 8.10 Casket agents appear to supply distribution services to the Corporation for the retail of its soft gambling products in return for commissions on the sale of those products. In the draft determination the Commission described this area of competition as the acquisition of soft gambling products. Conversely, and perhaps more conveniently, the area of competition can be described as the provision of distribution services by Casket agents to the Corporation. Casket agents would appear to compete between each other and other prospective agents in the provision of these services (although the limited nature of this competition is discussed at Section 9).
- 8.11 The Corporation is the monopoly supplier of lottery products in Queensland and as such, the monopsony acquirer of these distribution services.

The supply of soft gambling products to consumers

- 8.12 Casket agents also compete with each other in the retail of soft gambling products (as agents) to consumers. The limited extent of competition between individual Casket agents in the retail of lottery products is discussed in greater detail below at Section 9.
- 8.13 In its recent submission, the Association submitted that soft gambling products were part of a wider market for gambling products including gambling products offered by casinos.
- 8.14 The Association provided extracts from a report prepared by Access Economics / Giles Consulting International (October 2001) which it argued supported the proposition that various gambling products were substitutable for each other. The extracts provided details of a reducing value over time of soft gambling as a proportion of overall spending on gambling products. The Commission does not accept that these statistics necessarily support arguments of substitutability. Rather it simply reflects the mathematical position that as the amount spent on other forms of gambling increases (for example the introduction of casinos in 1985/86) the proportion of total gambling constituted by soft gambling products, all other things being equal, would fall.
- 8.15 The Commission does, however, note the Productivity Commission's report of 1999²⁶ which recognised that, in the past, gambling products have not been highly substitutable but that gambling products have converged over time and are becoming more substitutable.
- 8.16 In the context of this application, the Commission does not believe it necessary to form a definitive view on the substitutability of gambling products. First of all, the area of competition most affected by the proposed arrangements is the provision of distribution services to the Corporation. It is not an option for Casket agents to offer the same services to other forms of gambling. The extent to which other forms of gambling may however constrain the anti-competitive effects in the retail of gambling products is of course relevant. However, for the reasons discussed in the following section, the Commission believes these effects to be negligible in any event.
- 8.17 Also relevant to the assessment of the market is the fact that soft gambling markets are heavily regulated in some respects (such as to the retail price of soft gambling

²⁶ Productivity Commission (1999), *Australia's Gambling Industries: Inquiry Report*

products). Regulation can create barriers to competitive entry. For example, the relevant state legislation supports the view that markets are likely to be at the widest, state based.

The future with-and-without the proposed arrangements

- 8.18 The Commission uses the ‘future with-and-without test’ established by the Australian Competition Tribunal to identify and measure the public benefit and anti-competitive detriment generated by arrangements proposed to be authorised.²⁷
- 8.19 Under this test, the Commission compares the public benefit and anti-competitive detriment likely to be generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the Commission to make a reasonable forecast about how the relevant markets will react if authorisation is not granted. This forecast is often referred to as the counterfactual.

The future situation without the proposed arrangements

- 8.20 The Association submits that the Commission should consider that a ‘future without the proposed arrangements is not one where agents have any significant input into their agreements through negotiation, but one where terms and conditions may be unilaterally imposed by the Corporation.’²⁸
- 8.21 The Association submits it is unaware of any case where an individual agent has successfully sought amendment to a standard agency contract.
- 8.22 The Corporation submits that it currently provides significant support and ongoing communication to its retail network of Casket agents through a variety of processes. If authorisation was not granted to the arrangements, the Corporation submits that it:
- ...is confident it could continue to utilise and further develop these processes to provide adequate and appropriate consultation arrangements between Golden Casket and its agents.²⁹
- 8.23 In its draft determination, the Commission expressed the view that the most likely situation without the proposed arrangements is the current situation, namely, the continuation of standard form agency agreements and Agents’ Manuals being offered by the Corporation with input from the Association on terms and conditions from time to time.
- 8.24 In its submission following the draft determination, the Association argued that the Commission had overstated the extent to which consultation would occur without authorisation. The Association submitted that consultation was not as extensive as the Commission might have thought. The Association also submitted that while in the past, it may have had input into issues such as fees and commissions, it would not in the future, absent authorisation provide input in relation to matters such as fees etc.
- 8.25 Having considered the submissions before it, the Commission believes the situation without authorisation is likely to be the extensive use of standard form contracts with continued consultation with the Association to a certain extent. The Commission accepts that without authorisation, it is likely that the Association will be less likely to have input in relation to matters involving fees and commissions etc.

²⁷ See, for example, *Re Australasian Performing Rights Association* (1999) ATPR 41-701.

²⁸ The Golden Casket Agents’ Association supporting submission to the application, 17 October 2003, p8.

²⁹ The Golden Casket Lottery Corporation submission to the Commission, 14 January 2003, p7.

The future situation under the proposed arrangements

- 8.26 The Application seeks authorisation for the Association to collectively negotiate terms and conditions of agency agreements and arrangements with the Corporation. The Application does not seek authorisation to engage in boycott activity.
- 8.27 In granting authorisation, the Commission would not (and could not) require the Corporation to take part in negotiations with the Association. In this instance, the extent to which collective negotiations would alter the status quo would depend upon the willingness of the Corporation to take part in negotiations or to take notice of collective representations.
- 8.28 In a second submission to the Commission,³⁰ the Corporation states that if authorisation was granted by the Commission it would be able to effectively work with the Association in addition to continuing with the existing communication and consultation process that it presently has in place with its agency network.
- 8.29 However, in its first submission the Corporation also highlights the regulatory background of agency agreements, namely that they must be in a form that is approved by the QOGR and that the price that soft gambling products are offered to consumers for sale must also be approved by the QOGR.
- 8.30 In this regard, the Association submits the Lotteries Act does not prescribe the terms and conditions of agency agreements. In addition, it seeks authorisation in relation to other matters of pricing such as support services levies, freight charges, product ordering charges and equipment hire costs for terminals and validators. Further, a number of important matters are also dealt with in the Agents' Manual and not in agency agreements.
- 8.31 Having regard to the forgoing, the Commission considers that with authorisation, the Association will continue to consult with the Corporation in relation to the terms and conditions of contracts. The Commission is, however, of the view that with collective negotiations it is more likely that the Association will have input in relation to matters involving fees and commissions etc. While making no comment in relation to the extent to which the Corporation engaged in a consultative process in the past, the Commission also believes that in general, parties are more likely to actively engage in effective consultation where it is subject to a more formalised collective bargaining process rather than ad-hoc or less formal processes.

³⁰ The Golden Casket Lottery Corporation submission to the Commission 14 March 2003, p2.

9 Commission assessment – effect on competition

- 9.1 As discussed in Section 4 above, the Commission must assess the extent to which the proposed arrangements give rise to detriment to the public constituted by any lessening of competition that flows from the proposed arrangements.

Current level of competition

- 9.2 As mentioned previously, the Commission must compare the levels of competition in the future with the proposed arrangements and in the future without the proposed arrangements.
- 9.3 While the Corporation seeks the view of the Association in relation to terms and conditions of agency agreements and arrangements, the Corporation currently imposes standard form contracts, including terms of payment to Casket agents.
- 9.4 The Commission accepts that as the monopoly supplier of soft gambling products in Queensland (and therefore acquirer of lottery distribution services), it is in a strong bargaining position vis-à-vis individual Casket agents.
- 9.5 There appears to be minimal competition between Casket agents in the provision of distribution services to the Corporation having regard to the relevant fees and commissions or in respect of any other aspects that are conceivably capable of individual negotiations by Casket agents and the Corporation.
- 9.6 As mentioned previously, the price that lottery products are offered for sale to consumers is ultimately determined by the QOGR. As such, there is essentially no retail price competition between Casket agents (because of the regulated nature of retail prices). The Commission has not been made aware of high levels of non-price competition.

Submissions from the Association and the Corporation

- 9.7 The Association claims the proposed arrangements will not result in a detriment to the public and, in any event, any public detriment would be limited by the nature of the proposed arrangements and the features of the relevant market. In particular the Association considers:
- if collective negotiations were to result in an increase in commissions to agents, competition at the retail level from casinos and other venues offering electronic gambling services is a constraint upon the ability of the Corporation to increase retail prices; and
 - there is scope for the Corporation to absorb any increase in commission rates paid to agents, due to commissions and handling fees paid to Casket agents being a small percentage of the retail price of lottery products.
- 9.8 In addition, the Association submits that nothing within the Application seeks to prevent individual agents from negotiating directly with the Corporation should they wish and should the Corporation be minded to engage in such negotiations.

- 9.9 In this regard however, the Corporation notes that under Queensland lottery regulations, the QOGR is responsible for approving the:
- sale price to consumers;
 - the actual price of the lottery product (this is known as the ‘subscription’ price); and
 - the commission (or handling fee, depending on the product) to be paid to the agents.
- 9.10 By setting the subscription price and the sale price, the difference is the commission or handling fee, which is the amount a lottery agent is entitled for processing the entry for consumers. Therefore, the Corporation submits that any increase in the selling fee paid to Casket agents in relation to lottery products, other than Instant Scratch-Its, would result in an equivalent increase in the price to consumers.
- 9.11 In a subsequent submission, the Association stated that ‘an increase in the selling fee would affect the retail price of certain products, unless there was a corresponding decrease in the subscription price.’³¹

Commission assessment of anti-competitive effect

- 9.12 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.
- 9.13 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.
- 9.14 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.
- 9.15 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.
- 9.16 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 Act.
- 9.17 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.
- 9.18 Agreements, therefore, between Casket agents which fix, control or maintain prices at which they provide distribution services to the Corporation could well give rise to a

³¹ Golden Casket Agents’ submission to the Commission, 6 February 2003, p3.

lessening of competition (at least relative to a situation where individual Casket agents negotiate their own rates of payment).

- 9.19 The Association submits that the application may result in increased commissions and handling fees paid to Casket agents in the medium to long term.³² Higher commission rates could result in an equivalent increase in the price of certain lottery products for consumers (see paragraphs 9.9 to 9.11) and/or a reduction in monies being put back into the broader community by the Corporation by way of charitable contributions. These effects could demonstrate some anti-competitive detriment assuming current arrangements were at efficient levels.
- 9.20 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:
- voluntary participation;
 - restrictions on the coverage, composition and representation of bargaining groups; and
 - no boycott activity.
- 9.21 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.
- 9.22 In the context of the current application, the Association has advised that the proposed arrangements do not seek to prevent members from opting out. However, the Commission acknowledges that in relation to the current application, individual negotiations will generally not be considered by the Corporation. This would prevail with or without authorisation.
- 9.23 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.
- 9.24 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.
- 9.25 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.
- 9.26 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.

³² Golden Casket Agents’ Association submission to the Commission, 28 July 2003, p2.

- 9.27 In this matter, the Association represents a large proportion of the lottery industry in Queensland. Based on figures provided by the Association, the Commission estimates that it currently represents around 72 per cent of the Casket agent network. 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 Commission however acknowledges that this issue is less relevant in a regulated market. The Application does not envisage or propose the setting up of multiple groups for collective negotiations.
- 9.28 Aside from the direct disruptive costs of boycott activity, the availability of boycott activity significantly increases the anti-competitive effects of collective negotiations. Absent boycotts, the other party (in this case the Corporation) 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.
- 9.29 The Application does not involve any boycott activity in the form of a collective decision to withdraw distribution services from the Corporation.
- 9.30 The Commission may also consider the anti-competitive effects of collective negotiations to be more limited where the current levels of competition are low (due, for instance, to the structural features of the market) and the difference between the level of competition with and without collective bargaining would be small. The Commission notes however that it may be the case that where markets are characterised by low levels of competition, some public benefits such as transaction cost savings or other efficiencies may not endure in the absence of the discipline of competition. In this regard, each case will be considered on its merits and submissions need to carefully articulate why the current level of competition is relevant to the assessment of anti-competitive effect.
- 9.31 As discussed above, the Commission is of the view that the current level of competition in the acquisition of lottery products by Casket agents is very limited.
- 9.32 The Commission may also have regard to the inefficiencies that may flow from harm to competitors. Where a group of businesses engage in collective bargaining with a business holding market power, the members of that group may well obtain more attractive terms as a result of their increased bargaining position. Where the other party, however, has a degree of market power, it may be in a position to seek to recover their loss (or part thereof) from businesses not members of the collective bargaining group. Even where no additional cost is borne by non-participating businesses, they can still be placed at a disadvantage when competing in downstream markets. In either case, the effects upon non-participating businesses can result in inefficient outcomes and may constitute an anti-competitive effect.
- 9.33 In the context of this application, the Commission would have regard to any disadvantage the collective bargaining arrangements had on non participating Casket agents and in particular Casket agents that were not members of the Association and inefficiencies associated with any disadvantage. In this regard, the Commission notes the submissions made by the QOGR to the effect that the collective negotiations should not prejudice the interests of agents that are not members of the Association.

- 9.34 In the context of the current application, the Commission believes the likelihood of any detrimental effect of collective negotiations on non-participating agents is minimal for two reasons. First, taking into account the position of the QOGR that negotiations should not prejudice these businesses and having regard to QOGR's role in relation to approving agency contracts, the QOGR may well be in a position to safeguard the position of non-participating Casket agents. Second, the Commission accepts that while not required under legislation, the Corporation in practice uses standard form agreements. In this respect, non-participating agents are unlikely to be adversely affected by the proposed collective negotiations.
- 9.35 The Commission's assessment must also have regard to the regulatory environment in which soft gambling products are sold. The Commission accepts that at least to some extent, the regulated retail price of soft gambling products may limit the extent to which any prices may increase.
- 9.36 Finally, the Commission often expresses concern that collective negotiations can increase the potential for collusive anti-competitive conduct beyond that authorised. In the context of the current application, having regard to the regulated nature of the industry and the limited area in which Casket agents compete, the scope for further collective conduct is very much limited.
- 9.37 Having regard to:
- the voluntary nature of the proposed arrangements, the absence of boycott activity and the regulated nature of the industry; and
 - the currently limited nature of negotiations and the low likelihood of individual negotiations;
- the Commission believes that anti-competitive effect of the proposed collective negotiations is likely to be negligible.

10 Commission assessment – public benefits

- 10.1 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 benefit must flow from the arrangements for which authorisation is sought.
- 10.2 The Association submits that a number of public benefits will be generated by the proposed collective negotiation arrangements. An assessment of the public benefits claimed by the Association, taking into account the submissions from interested parties, is provided below.
- 10.3 In conducting its assessment of public benefits, the Commission is mindful that the conduct of lotteries in Queensland is regulated by the QOGR. Within its regulatory function, the QOGR assesses social and economic impacts of current policies and new initiatives to ensure that benefits to the community from legalised gambling are maximised and the costs to the community are minimised.

Countervailing power

- 10.4 The Association claims that the proposed arrangements create a countervailing power to the market strength of the Corporation. Arguments based on countervailing power, in the authorisation context, typically involve one party attempting to improve its bargaining position relative to another. In assessing such public benefit claims, the Commission looks at the outcomes of any proposed change in bargaining power, for example, whether savings will be realised to consumers. It will also have regard to the level of competition in the market as this may have implications for the durability and pass through of benefits.
- 10.5 In its submission following the draft determination the Association disagreed with the Commission's view. The Association questioned, having established that collective negotiations increased the bargaining power of small business, why it needed to look further to identify public benefit. The Association's submission was based on the position that the community places some value on the concept of redressing the imbalance of bargaining power between small business and monopoly suppliers.³³
- 10.6 This is not to say that where the imbalance of bargaining power between large and small business was the cause of inefficiencies or demonstrated inequitable dealings that redressing such would not be a public benefit. On the contrary, the Commission has accepted these as benefits in the past including in some recent decisions.
- 10.7 In its submissions, the Association noted that in the Inghams (SA) authorisation³⁴ the Commission stated that 'a market in which participants have unequal bargaining power is likely to operate less efficiently than one in which bargaining power is equal'. The Commission believes this proposition should not be taken to apply in all circumstances. It nevertheless indicates that unequal bargaining power between parties to a transaction can lead to inefficiencies.

³³ Golden Casket Agents' Association submission to the Commission, 28 July 2003, p12.

³⁴ *Inghams Enterprises Pty Ltd* (1997) ATPR 50-245 at 8.20.

- 10.8 In certain market circumstances, for example, there may exist some argument that where supply of goods or services is controlled by a party with a large degree of market power, some competitive benefit may be generated in certain circumstances from the creation of countervailing power.
- 10.9 In a competitive market, prices are set where supply and demand are in equilibrium. Where the supplier, however, has a greater degree of monopoly power, it may set the level of output at levels lower than it would in a competitive market and this is likely to result in higher prices. Where prices are higher and output is lower than would occur in a competitive market, customers are ordinarily worse off. Economic theory also suggests that society as a whole is worse off and there exists a “dead weight loss” associated with under-production.
- 10.10 While the interaction of suppliers and buyers is complex, there may be an argument, in certain market circumstances, that where suppliers with a higher degree of market power meet customers with an increased degree of purchasing power, it may well result in a more efficient outcome.
- 10.11 On the information before it, however, the Commission is not in a position to move from a conclusion as to the existence of an unequal bargaining position to a finding that there currently exists inefficient pricing. Applicants and interested parties proposing such arguments must demonstrate this to the Commission’s satisfaction.

Increased effective input into negotiations

- 10.12 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 generate certain outcomes including reducing information asymmetries, creating a greater level of certainty and incentives for optimal capital investment, or reducing the likelihood of any harsh or unfair contractual terms being imposed.
- 10.13 The Association submits that as the exclusive licensee for the sale of soft gambling products in Queensland, the Corporation has market power. Clearly this is so. It submits that strengthening the bargaining power of Association members may increase their input into agency agreements and arrangements, thus reducing the likelihood of harsh or unfair contractual terms. The Association submits that reducing the likelihood of harsh or unfair contractual terms constitutes a benefit to the public.
- 10.14 In support of this claim, the Association referred to the previous ADFP authorisation³⁵ where the Commission took the view that strengthening the bargaining power of dairy farmers may increase their input into the contracts negotiated with processors, and reduce the likelihood of harsh or unfair contractual terms.
- 10.15 As an example of circumstances under the current agency arrangements which might operate in a harsh or unfair manner towards Casket agents, the Association submits that the Corporation may suspend or cancel an agency immediately on notice if the agent breaches its obligations under the agreement, including the obligations to act in good faith and in the interests of the Corporation and to comply with the Agent’s Manual. On suspension, the Corporation may disconnect the agent’s gaming terminal and the agent must cease selling and processing the lottery entries and paying prizes.

³⁵ *Australian Dairy Farmers’ Federation Limited* (220) ATPR (Com) 50-289.

Once a dispute under the agreement is notified, the parties may refer the dispute to mediation.

- 10.16 In addition, the Association contends that the Agent's Manual may be changed by the Corporation at any time. This fundamentally undermines the certainty of the agent's contract and is a potential catalyst for unconscionable dealings. While the agency agreement provides that the Corporation will consult with the Association to explain intended changes and discuss the Association's views, the Association submits that without the power to actively negotiate the changes, this carries little weight and leaves agents in a position of uncertainty.
- 10.17 Conversely, the Corporation is of the view that the rights of agents in relation to the suspension and termination of agency businesses are adequately protected under the terms of the agency agreement. Specifically, the agency agreement provides that except for exceptional circumstances (including insolvency) the agency agreement can only be terminated or suspended on notice. The agency agreement also provides for a dispute resolution process. In addition, the Franchise Code of Conduct adequately protects the rights of Casket agents with regard to termination of franchises and dispute resolution.
- 10.18 Finally, the Corporation advised the Commission that in a network of over 1000 Casket agents, the Corporation has suspended 4 agents and terminated 33 agents since April 1997. Of the terminations:
- 30 related to the termination of agents in circumstances where they were no longer reaching the minimum sales levels required by the Corporation to make a reasonable return on their investments in the agents;
 - two resulted from repeated defaults over a twelve month period by the agent to pay their weekly account balance; and
 - the third was due to the agent losing effective control of the business³⁶.
- 10.19 In its draft determination, the Commission expressed the view that the statutory requirement for the QOGR to approve the form of agency agreements should also serve as a 'check and balance' on the ability of the Corporation to impose harsh or unfair contractual terms. However, the Commission acknowledges that the Agents' Manual, which the Corporation may amend from time to time, is not subject to the same regulation.
- 10.20 In submissions provided after the draft determination, the Association argued that the QOGR was not likely to become involved in commercial arrangements except in exceptional circumstances. This was supported by submissions from the QOGR. The Commission accepts that the extent to which the QOGR acts as a 'check and balance' on the imposition of harsh or unfair terms is limited. The Commission however maintains the view that the regulated nature of the industry is likely to influence the Corporation and the likelihood of harsh or unfair terms.
- 10.21 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 each individual situation need to be considered. In this instance, the

³⁶ The Golden Casket Lottery Corporation submission to the Commission, 14 January 2003, p6.

Commission notes that the parties have not provided any information to indicate that the Corporation's conduct in respect of their dealings with Casket agents has been or is at risk of being unconscionable. In fact, the Commission notes the Association's submission that it does not intend to 'convey criticism of previous conduct of the Corporation, and in particular, the Association has no comment about the specific instances of suspension or termination noted by the Corporation.'³⁷

- 10.22 However, having said that, the Commission accepts the submissions from the Association that the use of standard form contracts and the low prospect of individual negotiations do give rise to some barriers to effective input by Casket agents into contractual terms and conditions.
- 10.23 The Commission also accepts that collective bargaining arrangements would provide a greater opportunity for Casket agents, through the Association, to provide input into those contractual terms and conditions. While, as noted above, the Association may provide a certain degree of input into contractual terms and conditions absent authorisation, the competition provisions of the Act do restrict this to a certain extent.
- 10.24 As noted at paragraph 10.5 above, the Association submitted that the redressing the imbalance of bargaining power between small business and monopoly suppliers may be a public benefit. In this situation, the Commission acknowledges that Casket agents may derive some benefit through increased input into the terms and conditions of agency agreements and arrangements with the Corporation.
- 10.25 The Commission accepts that the community generally has an interest in benefits to Casket agents associated with the collective negotiations arising from their increased effective input into contractual terms and conditions in a situation where there is such a clear disparity in bargaining power.

Maintenance of existing system for sale of soft gambling products

- 10.26 The Association submits that there are strong public policy reasons why the viability of the existing system for sale of soft gambling products should be maintained. In particular, supply through Casket agents is preferable to alternative sources of supply (such as internet trading) which may make soft gambling products too easily available for problem gamblers.
- 10.27 The Association acknowledges however, that it is largely a matter for state and territory legislation. In addition, the Commission notes the introduction of the Corporation's 'Golden Casket Responsible Play Program' in November 2001, which complies with the Queensland Responsible Gambling Code of Practice.
- 10.28 Accordingly, the Commission considers that adherence to statutory obligations, such as responsible gambling requirements, should occur regardless of any authorisation. As a result, the Commission considers the proposed arrangements are unlikely to benefit the public in the manner claimed.

³⁷ The Association's additional submission to the Commission, 6 February 2003, p3.

Assistance to efficient small business, particularly through transaction cost savings

- 10.29 The Association notes that in the Premium Milk authorisation³⁸ the Commission stated that ‘savings on transaction costs are an outcome generally associated with collective negotiations.’ It goes further to note that in the Dairy Farmers authorisation the Commission stated ‘such negotiations may increase the amount of information available to both sides of the negotiation process, allowing them to make more informed choices about the business arrangements that they enter into.’
- 10.30 The Association submits the public benefits identified above apply equally in the current Application. In particular, collective negotiations on commission rates and other issues will assist in small business efficiency by increasing the availability of information to Casket agents, including information about income trends and operating expenses giving them an improved understanding of the effect of wider trends upon their businesses and improve their ability to make better business decisions.
- 10.31 The Commission highlights the context of the above dairy authorisations, both of which were assessed against the background of a deregulating industry. In contrast, industries, such as the Queensland lottery industry, that are not in transition to an environment of uncertainty for individual suppliers, and where there are standard form contracts, are less likely to support arguments of reductions in transaction costs.
- 10.32 The Corporation submits that the Association already provides adequate support and consultation with its network of Casket agents through a variety of avenues. For example, the Corporation’s field representatives provide ongoing business advice and support to agents, through agency visits and holding workshops, with the aim of maximising sales, and therefore commissions, for each agency.³⁹
- 10.33 The Commission also notes the Association’s submission that the Corporation regularly seeks feedback from it in relation to proposed initiatives and changes to the agency agreements and Agents’ Manual. To the extent that the Association is able to disseminate this information to its members, it is the Commission’s view that the Association does not need authorisation to circulate market information, such as operating expenses and income trends, to its members. It is not clear to the Commission how the authorisation would improve either the quality of information disseminated by the Association to its members, or the means by which such information is disseminated.
- 10.34 In its submission following the draft determination, the Association restated its view stating it was obvious that reduced transactions costs flow from collective bargaining. They argue that if agents are required to individually negotiate directly with the Corporation then each agent will incur significant costs associated with legal and financial advice. They also argue that the Corporation would also incur costs associated with individual transactions.⁴⁰
- 10.35 These arguments may well be valid where it was accepted that the situation absent authorisation would be widespread individual negotiations. As discussed above, the Commission believes that without authorisation there is likely to be the extensive use

³⁸ Premium Milk Supply Pty Ltd (supra) at 7,45.

³⁹ Golden Casket Lottery Corporation Limited submission to the Commission, 14 January 2003, p7.

⁴⁰ Golden Casket Agents’ Association submission to the Commission, 28 July 2003, p12.

of standard form contracts with continued consultation with the Association to a certain extent. This is consistent with the Association's claims that the Corporation imposes standard form contracts on Casket agents and that the Corporation does not consider individual agency agreements.

- 10.36 Accordingly, the Commission is not convinced that the proposed arrangements will result in a benefit to the public in the form of facilitating the availability of information on operational and pricing issues to Association members or in transaction cost savings.

Increased supplier efficiency

- 10.37 The Association submits that the Corporation will also benefit from the increased efficiency of a collective bargaining process. In particular, it submits that the Corporation will also be assisted by the provision of industry wide information to provide guidance on realistic pricing.
- 10.38 In addition, the Association contends that collective representation will provide certainty for the Corporation of the removal of the need to allocate significant resources to conducting individual negotiations, particularly in rural areas.
- 10.39 In response, the Corporation does not support the Association's broad claim that the provision of industry wide information will provide guidance on realistic pricing. It submits, 'as a commercial organisation, the Corporation has, and will continue to require, access to the necessary information through a variety of avenues.'⁴¹
- 10.40 Furthermore, the Corporation stated in its submission following the draft determination that current communication and consultation processes will continue without authorisation and therefore, it will not benefit from increased efficiency nor will it accrue significant costs.⁴²
- 10.41 In this context, it is difficult for the Commission to conclude that there would exist increased supplier efficiencies arising from the proposed arrangements.

Certainty for small business representatives in their ability to negotiate

- 10.42 The Association submits that while there are circumstances in which an industry body can consult with suppliers, and provide advice to members on contractual conditions, without the need for authorisation, there are often other circumstances where a supplier seeks discussion of other terms conditions. In these cases, it is not clear when "discussion" in fact become "negotiations", and when those negotiations are likely to give rise to a substantial lessening of competition.
- 10.43 In this regard, the Association believes industry representatives are not equipped to make those determinations, and should not be placed in a position of personal risk through seeking to assist their members, at the request of suppliers. Furthermore, it is inefficient and costly for associations to seek legal advice on each occasion.
- 10.44 The Association further submits that industry associations are potentially at risk even in the collection and collation of information to formulate guidance to members and

⁴¹ Golden Casket Lottery Corporation Limited submission to the Commission, 14 January 2003, p7.

⁴² Golden Casket Lottery Corporation Limited submission to the Commission, 11 July 2003, p1.

submissions to suppliers, given that the Council members may also be competitors and therefore limited in their ability to discuss pricing issues amongst themselves.

- 10.45 Should the Association actually be seeking protection for its current representative role, the Commission considers that should be the basis of the application rather than a much wider proposal as is currently proposed.

Summary of the Commission's assessment of public benefits

- 10.46 The Commission is of the view that the Association has not demonstrated more than a small level of public benefit arising from the proposed arrangements. As discussed above, however, the Commission believes the public has an interest in Casket agents benefiting from having increased effective input into contracts in situations where there is such a clear disparity in bargaining power.

Balance of public benefit and anti-competitive detriment

- 10.47 For the reasons outlined above, the Commission concludes there is likely to be negligible public detriment from the Association collectively negotiating on behalf of Casket agents with the Corporation.
- 10.48 Having regard to each of the public benefits claimed by the Association, the Commission considers there is likely to be a small level of public benefit from the proposed arrangements. In particular, the public has an interest in Casket agents having increased effective input into contracts in situations where there is such a clear disparity in bargaining power.
- 10.49 The Commission is satisfied that the public benefits likely to result from the proposed collective bargaining arrangements, although small, will outweigh the negligible anti-competitive detriment that may result.

11 Determination

The Application

- 11.1 On 17 October 2002 the Association lodged application for authorisation A90853 (the Application) with the Commission.
- 11.2 The Application was made under subsection 88(1) of the Act for authorisation for the Association on behalf of its members to make and give effect to a contract, arrangement or understanding, a provision of which has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 11.3 The Association seeks authorisation to conduct negotiations on behalf of its members in relation to the terms and conditions of agency agreements and arrangements with Golden Casket Lottery Corporation Limited (the Corporation).

Statutory test

- 11.4 For the reasons outlined in this draft determination, the Commission believes that the anti-competitive effects of the proposed collective negotiations are likely to be negligible.
- 11.5 While not large, for the reasons identified above, the Commission believes there are some public benefits associated with the proposed arrangements.
- 11.6 The Commission is therefore satisfied that in all the circumstances the making of the contracts and the giving effect to the provisions of the arrangements for which authorisation is sought under subsection 88 (1) of the Act:
- 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.

Determination

- 11.7 The Commission therefore **grants** authorisation to application A90853. Authorisation is granted for a period of five years from the date on which the authorisation comes into force.

Conduct authorised

- 11.8 In particular, the Commission grants authorisation for the Association to conduct negotiations on behalf of its members in relation to the terms and conditions of agency agreements and arrangements with Golden Casket Lottery Corporation Limited (the Corporation), including:
- commissions paid to Casket agents;
 - handling fees;
 - agency application fees,
 - support service levies;

- freight charges;
- product ordering fees;
- equipment hire costs (in relation to terminals and validators);
- retail image design;
- agency subsidy and insurances; and
- changes to the Agents' Manual.

11.9 Pursuant to subsections 88(10) of the Act, this authorisation applies to any collective bargaining group of the Association's members, present or future, represented by the Association, that wish to conduct collective bargaining as outlined above.

Conduct not authorised

11.10 As above, the Commission expects that this authorisation would extend to allow those authorised to opt in to a collective bargaining arrangement. The authorisation does not extend to, and protection is not afforded to, any collective bargaining arrangement whereby the Association's members are compelled to participate in a bargaining group or groups. The Association's members retain the right to negotiate and enter into individual contracts with the Corporation where the Corporation is prepared to do so.

11.11 This authorisation does not in any way allow collective boycott activity in the form of a collective decision by two or more of the Association's members to withdraw distribution services from the Corporation or any other conduct which may constitute an exclusionary provision as currently defined under section 45 and 4D of the Act. In this respect, it is a matter of choice for the Corporation as to the extent to which they participate in collective bargaining arrangements.

The effective date of determination

11.12 This decision is subject to any application to the Australian Competition Tribunal ("the Tribunal") for its review.

11.13 This determination is made on 4 September 2003. If no application for review of the determination is made to the Tribunal, it will come into force on 26 September 2003. If an application is made to the Tribunal, the determination will come into force:

- where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review; or
- where the application is withdrawn – on the day on which the application is withdrawn.