



**Australian
Competition &
Consumer
Commission**

Determination

Application for Authorisation

Australian Newsagents' Federation Ltd

to negotiate on behalf of newsagents with publishers

Date: 16 March 2000

Application No
A30196
File no:
CA99/7

Commissioners:
Fels
Asher
Bhojani

**Martin
Cousins**

Summary

The Commission has considered an application for authorisation lodged by Australian Newsagents' Federation Ltd (ANF) in relation to ANF negotiating with twelve publishers on the terms and conditions of contracts between each publisher and newsagents. ANF did not seek authorisation to negotiate in relation to commission payments between publishers and newsagents or common newsagent territories. Authorisation was initially sought for a period of six months. The application was subsequently amended to seek authorisation until 1 February 2000. A further amendment sought authorisation to negotiate with four of the original twelve publishers nominated in the application until 30 May 2000.

The application was lodged on 13 April 1999 and interim authorisation was granted on 16 April 1999. On 16 February 2000 the original interim authorisation was revoked and interim authorisation granted to the amended application.

The application was made in the context of changes to distribution of newspapers and magazines required following a decision of the Australian Competition Tribunal in November 1998. The Tribunal made a determination setting a timetable for the revocation of authorisations that allowed certain publishers to agree on common distribution arrangements. The arrangements involved a prominent role for newsagencies in the distribution functions.

The Commission considered the application in the context of an industry in transition involving the issue of negotiation on terms and conditions between small businesses and larger entities. The Commission drew upon precedent decisions involving other industries for example, chicken growers and owner-drivers to cart concrete.

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 does not provide any protection in relation any primary boycott. It also noted that any agreements between ANF and publishers would not bind individual newsagents and that would not prevent other groups or individuals negotiating with publishers. The fact that authorisation was sought for a short period only was also factored into the Commission's assessment.

Public benefits were identified in the form of ANF representatives bringing a depth of experience to the process of adapting to new contracts and the negotiations were likely to take the industry to a stable situation sooner than without them.

The fact that the arrangements did not prevent parties other than ANF holding discussions with publishers was seen as a mechanism to address concerns that ANF being placed in an advantageous position relative to others with an interest in distribution activities. That mechanism was also seen as a device to address concerns that arrangements may be pivotal in reintroducing the horizontal agreements between publishers that had existed in the past.

The commission was satisfied that the public benefit likely to result from the arrangements outweighs any likely anti-competitive detriment.

The Commission granted authorisation until 30 May 2000 in respect of application A30196.

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1. Introduction

1.1 On 13 April 1999 Australian Newsagents' Federation Ltd (ANF) lodged an application for authorisation with the Commission in relation to proposed negotiations with nominated publishers about the terms and conditions of contracts between newsagents and the publishers.

1.2 The application was made under section 88(1) of the Trade Practices Act (the Act) for an authorisation to make a contract or arrangement or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act and give effect to the conduct. ANF describes the conduct relevant to application A30196 as an arrangement or understanding between ANF and newsagents. Under the arrangement or understanding ANF agrees to negotiate with individual publishers the terms and conditions of the contracts proposed to be entered into between the publisher and each newsagent.

1.3 ANF did not seek authorisation in relation to common territories for each newsagent and the rates of commission to be paid to each newsagent. ANF also said that it is aware that its application did not provide protection to the making or giving effect to any contract, arrangement or understanding containing an exclusionary provision as defined in section 4D of the Act and that ANF would not encourage its members to engage in such conduct.

1.4 ANF nominated the following publishers and distributors of newspapers and magazines as the parties it sought to have negotiations with:

| | |
|----------------------------------|-------------------------------|
| Australian Consolidated Press | John Fairfax Holdings Pty Ltd |
| Australian Provincial Newspapers | NDD Distribution Pty Ltd |
| FPC Magazines | News Ltd |
| Gordon & Gotch Limited | Pacific Publications |
| Horwitz Group | Rural Press Ltd |

1.5 ANF requested interim authorisation in respect of the application.

1.6 It is the convention in this industry to refer to publishers and distributors of newspapers and magazines collectively as 'publishers'. That convention will be followed in this determination.

2. Background

2.1 ANF was formed in 1990 as an industry association representing nationally newsagents who sell and distribute newspapers and magazines. Its membership consists of state associations of newsagents and individual members. Individual members are newsagents or news vendors who are members of a state association.

2.2 There are some 5 000 newsagents in Australia, of which 1 300 are in NSW/ACT, 1 100 in Queensland and 1 000 in Victoria. Most newsagents operate businesses which function as retailers of newspapers and magazines, home deliver mainly newspapers but also some magazines and supply newspapers and magazines to sub-agents. Some newsagency businesses do not undertake all three distribution functions. There are retail only newsagents as well as specialist delivery newsagents who do not have retail operations. News vendors are typically country stores, they are appointed by publishers but do not have a newsagency agreement or a defined territory, as newsagents do. They may or may not provide home delivery services to local areas. News vendors are also found at street stands in capital cities. Newsagencies and news vendors (other than at street stands) are also retailers of an assorted range of goods and providers of miscellaneous services, they are typically associated with retailing of stationery and greeting cards but can be found associated with very diverse product and service ranges.

2.3 Authorised newsagents almost exclusively undertake home delivery of daily metropolitan newspapers. An exception is The Canberra Times in the Australian Capital Territory and environs, the publisher makes direct home delivery as well as supplying newsagents for their home delivery operations. In Western Australia the publisher of the West Australian newspaper makes home delivery contractor appointments independent of the local newsagency council. Home delivery of regional newspapers which have a cover price are made by a variety of arrangements which include authorised newsagents and independent deliverers. Authorised newsagents are generally not involved in home delivery of free newspapers.

2.4 Newsagency businesses are sometimes characterised as retailing five core products: newspapers; magazines; stationery; greeting cards; and soft gambling. However, not all newsagents offer a complete range of newspapers and magazines, the range of magazines offered by each newsagent varies, so too with stationery, greeting cards and soft gambling products. Businesses that are not newsagencies also offer those five categories of products but rarely in combination and with the same presentation as that of newsagencies.

2.5 Newsagencies as a group lack a high degree of homogeneity. They vary substantially in:

the range of products and services they offer

the products they retail in addition to newspapers and magazines

the location and presentation of their retail businesses – mall locations have a substantially different style of presentation to most suburban strip businesses

the local markets they serve range from high traffic locations usually in metropolitan locations and large regional centres to small general stores in outlying areas of rural Australia

the market value of newsagency businesses varies significantly from the \$100 000 mark to businesses which trade for over \$1million

the costs of operating newsagencies and the returns to the operators vary considerably.

2.6 The majority of businesses that sell newspapers and magazines in Australia are not, in fact, newsagents or news vendors. There is a substantial divergence in the supply of newspapers and magazines for retail to outlets which are not authorised newsagents. The larger supermarket chains are supplied direct by magazine suppliers, some convenience stores and look-alike newsagencies receive some magazine supplies on a direct basis and others on a shared commission basis. Look-alike newsagencies are not authorised newsagencies but physically present to the market as conventional newsagencies in terms of their product range and trading hours, they tend to be located in larger shopping centres. Smaller supermarkets tend to be supplied on a sub-agency basis.

2.7 Where daily metropolitan newspapers are supplied to major supermarkets they are usually supplied on a sub-agency basis, an exception being The Canberra Times in Canberra and environs. For the most part daily metropolitan newspapers are supplied to retailers who are not authorised newsagents on an indirect basis as sub-agents to authorised newsagents. Regional newspapers are variously supplied to retailers who are not authorised newsagents by local newsagents or the publisher. Convenience stores groups have been prominent in raising issues of poor supply to convenience store outlets. An industry group of look-alike newsagents has also been active in drawing attention to problems and inequities with supply through local newsagents.

2.8 The publishers generally make initial distribution of major newspapers to newsagents. Magazine publishers generally use the services of a specialist distributor to put their product in the market. The major magazine distributors are Gordon and Gotch Pty Ltd, Newsagents Distribution Company (an entity associated with a major publisher of magazines associated with the Australian Consolidated Press (ACP) group) and Retail Delivery Service (an entity associated with Eastern Suburbs Newspapers group).

2.9 Most sales of newspapers and magazines are made in metropolitan areas. Daily metropolitan newspapers have a geographic market which comprises the State or Territory of the relevant metropolis. In terms of both advertising and readership markets metropolitan markets are most significant for publishers. Larger provincial centres are also of some significance but less so than metropolitan markets. The costs of distribution to rural and country areas exceed the costs of distribution in metropolitan areas on a per unit basis.

2.10 The newspaper publishers have made comments that they are committed to maintaining home delivery of newspapers. The newspaper publishers particularly view home delivery as a key aspect of their marketing arrangements.

2.11 Authorisations were granted in the 1980s relating to the distribution of newspapers and magazines in most States in Australia. In NSW/ACT (1980), Victoria (1982), Queensland (1986), Western Australia (1986) and South Australia (1988) the authorisations provided for horizontal arrangements between publishers of daily metropolitan newspapers and, variously among the states, magazine publishers. The authorisations were granted on the

basis of public benefits identified in relation to a low cost efficient home delivery service and a greater availability of newspapers and magazines.

2.12 The authorisations protected publishers who were members of the councils from penalties for breaches of certain provisions of the Act and related to newsagency council rules that provided for newsagents to be accredited by the councils. The market for distribution services for newspapers and magazines has been significantly influenced by the existence of the authorisations. It is common practice for newspaper and magazine suppliers who are not parties to the authorised arrangement to undertake distribution consistent with the parties granted authorisation – to piggy-back the system. The authorised newsagents perform a significant majority of distribution services relating to home delivery and supply to sub-agents. Local newsagents usually undertake supply to sub-agents and home delivery on an exclusive territory basis.

2.13 In July 1993 the Commission authorised arrangements relating to the distribution of newspapers and magazines in Victoria which varied from the authorisation granted in 1982. The Trade Practices Tribunal reviewed the Commission's determination and it made its determination in November 1994. The Tribunal set aside the Commission's grant of authorisation.

2.14 The Tribunal found that there were significant anti-competitive detriments and negligible public benefits associated with the system operating under the 1982 authorisation. It also found that the conduct authorised in 1993 did not adequately address the bad features of the system. The Tribunal suggested that the bad features of the system be removed within some three years.

2.15 The Commission took into account the comments of the Tribunal in relation to the system operating in Victoria and that the systems in NSW/ACT and Queensland were substantially similar to the system in Victoria. In 1996 it commenced a formal review of the authorisations for NSW/ACT, Queensland and Victoria.

2.16 In December 1997 the Commission made a determination revoking the authorisations for NSW/ACT, Queensland and Victoria. As part of the same decision it granted a substitute authorisation for the existing arrangements to continue until February 2001 to allow transition to deregulated distribution arrangements.

2.17 On application from persons dissatisfied with the Commission's decision to allow the transition period, the Australian Competition Tribunal (the successor to the Trade Practices Tribunal) reviewed the Commission's determination. The Tribunal made its determination in November 1998. The Tribunal's decision affirmed the Commission's determination to revoke the authorisations. The Tribunal set aside the Commission's decisions to grant authorisation of current arrangements until February 2001. The Tribunal's determination provided for further authorisation of the arrangements covered by the authorisations revoked according to a timetable of progression to new arrangements.

2.18 The Tribunal's decision provided for authorisation to continue:

| | | |
|------------------------------|---|---|
| <i>until 1 July 1999</i> | - | in respect of distribution of magazines and also in respect of supply of newspapers to look-alike newsagencies; |
| <i>until 1 February 2000</i> | - | in respect of newspapers for sub-agents; and |
| <i>until 1 February 2001</i> | - | in respect of newspapers for home delivery. |

2.19 Following the Tribunal's decision the Commission was requested by the Federal Government to consult with industry stakeholders. The Government said it was

seeking a way forward which takes account of the Government's commitment to the maintenance of a newspaper home delivery system and achieves an equitable and commercially viable outcome for the industry.

2.20 The Commission consulted extensively with industry stakeholders and on 31 March 1999 made its report to the Government. During the consultation process the Commission, inter alia, facilitated discussions between newsagents from NSW/ACT, Queensland and Victoria who are state directors of ANF along with the chief executive officer of ANF and various newspaper and magazine publishers. At those discussions the newsagents made comments on their own behalf and not as representatives of any other members of ANF. The position was that there was seen to be a risk of breach of the Act if the newsagents were to act collusively in discussions with suppliers during the consultation phase. Each of the suppliers participated in discussions as individual entities.

2.21 Newsagents participating in the consultation process commented on the diverse range of views and the levels of understanding of relevant issues held by members of the newsagency industry. They expressed the view that very few newsagents had a good appreciation of and had made an individual assessment about relevant issues.

2.22 The newsagents participating in the consultations also expressed the view that unless protective arrangements were put in place it was inevitable that newsagents with superior commercial instincts would take advantage of newsagents with less capacity.

2.23 During the consultations the newsagents expressed reservations about the difference in bargaining strength between individual newsagents and individual publishers and the timeframe in which to make new agreements. This application for authorisation is an endeavour of ANF to allow it to negotiate with suppliers on behalf of newsagents.

3. The application

3.1 The application for authorisation lodged would allow ANF to make an arrangement or arrive at an understanding with newsagents whereby ANF would negotiate with nominated publishers on behalf of newsagents. The mechanics of newsagents communicating a conscious decision to enter into the arrangements or arrive at the understanding have not been explained in the application. The negotiations would relate to the terms and condition of supply by publishers to newsagents. The application specifically excludes ANF from negotiating in respect of terms and conditions relating to common territories for each newsagent and the rates of commission to be paid to each newsagent.

3.2 ANF originally believed that a period of six months was necessary to allow the required negotiations to be finalised. ANF also asserted that newspaper publishers had indicated that it is their intention not to wait to the end of the expiry date of the authorisations granted by the Tribunal in 1998 but expect to also give effect to new arrangements over the next six months.

3.3 By letter dated 21 September 1999 ANF amended its application, seeking authorisation until 31 December 1999. ANF cited the need for further negotiations with some suppliers as the reason for the amendment. Before that amendment could be considered, by letter dated 28 September 1999 ANF further amended its application by seeking authorisation until 1 February 2000. It cited the likely disruption to business during the Christmas/New Year period and the possibility of further negotiations in the run-up to the new arrangements for newspaper distribution to sub-agents as the reasons for the amendment.

3.4 The suppliers nominated by ANF for negotiations were:

- the metropolitan daily and regional newspaper publishers: Australian Provincial Newspapers, John Fairfax Holdings Pty Ltd, News Ltd and Rural Press Ltd; and
- the magazine publishers: Australian Consolidated Press, FPC Magazines, Gordon & Gotch Pty Ltd, The Horwitz Group, NDD Distribution Pty Ltd and Pacific Publications.

3.5 By letter dated 31 January 2000 ANF further amended the application. It sought authorisation to negotiate with Australian Provincial Newspapers, NDD Distribution Pty Ltd, News Limited and Rural Press Ltd until 30 May 2000. ANF reported that it had endorsed a form of contract with ACP and the vast majority of newsagents had signed. In respect of Gordon and Gotch Limited ANF said that it had completed negotiations subject to the sighting of a final copy of the contract and advice that the ACCC had no competition concerns. Negotiations were said to have been completed with Fairfax subject to advice from the ACCC and receipt of final documentation. No comment was made about negotiations with FPC Magazines, The Horwitz Group or Pacific Publications.

3.6 ANF submitted that it had proceeded with negotiations under the interim authorisation as expeditiously as possible but progress had been slow because of the complexity of issues and difficulty in resolving matters. ANF said that it had responded promptly to the many drafts put forward by publishers but it had not been possible to complete the process by 1 February 2000.

3.7 The parties originally nominated by ANF for consultations are different to the suppliers who were part of the arrangements authorised in the 1980's. Not all publishers who supply the market with newspapers and/or magazines are part of the negotiations with ANF.

3.8 The parties originally nominated by ANF for negotiations comprise the two publishers who dominate the daily metropolitan newspaper market in Australia as well as the two major regional newspaper publishers. The magazine publishers relevant to this application include the three major distributors who distribute for the major magazine publishers in Australia and for overseas sourced magazines.

3.9 The outcome of negotiations undertaken under the authorisation may result in contracts to be offered to newsagents by the publishers containing terms and conditions agreed between ANF and each publisher individually. The terms and conditions need not be common to each publisher. Whether or not an individual newsagent accepts the terms and conditions of individual publishers is a matter for separate decision.

3.10 This application relates to distribution of newspapers and magazines supplied by the publishers nominated by ANF. The distribution of newspapers and magazines has been characterised by a high degree of "piggy-backing" whereby suppliers tend to adopt the distribution modes used by prominent players. For that reason the Commission considers it relevant to regard this application as relating to distribution arrangements for a very large proportion of newspapers and magazines offered for sale in Australia.

3.11 The application does not relate to any contract arrangement or understanding containing an exclusionary provision. ANF has acknowledged that it is aware the application does not provide protection for boycott conduct and has advised that it would not encourage its members to engage in such conduct.

3.12 The Commission granted interim authorisation on 16 April 1999. In deciding to grant interim authorisation the Commission noted the timetable for change from the old authorised system, of 1 July 1999 for magazine supply and supply of newspapers to look-alikes. It also noted that newspaper publishers were reported to intend to move from discussions and dialogue on relevant issues to negotiating contracts and finalising matters so that the industry could move forward. On 16 February 2000 the original interim authorisation was revoked and interim authorisation granted to the amended application.

4. Statutory tests

4.1 This application was made under sub-section 88(1) of the *Trade Practices Act 1974* in respect of arrangements that might substantially lessen competition within the meaning of section 45 of the Act. The Act provides that the Commission shall only grant authorisation if the applicant satisfies the relevant test in sub-sections 90(6) or (7) of the Act.

4.2 Sub-sections 90(6) and (7) provide that the Commission shall grant authorisation only if it is satisfied in all the circumstances that:

- the provisions of the subject arrangements or conduct have resulted or would result or be likely to result, in a benefit to the public; and
- the benefit outweighs the detriment to the public constituted by any lessening of competition that has resulted, or would result or be likely to result, from the arrangements or conduct.

4.3 In deciding whether it should grant authorisation, the Commission must examine the anti-competitive aspects of the arrangements or conduct, the public benefits arising from the arrangements or conduct, and weigh the two to determine which is greater. Should the public benefits or expected public benefits outweigh the anti-competitive aspects, the Commission may grant authorisation or grant authorisation subject to conditions.

4.4 If this is not the case, the Commission may refuse authorisation or alternatively in refusing authorisation, indicate to the applicants how the applications could be constructed to change the balance of detriment and public benefit so that authorisation may be granted.

5. The submissions

5.1 A range of parties was identified as having an interest in this matter and were invited to comment on the application lodged by ANF. The main issues raised in the submissions are outlined below. Copies of the submissions are on the public register maintained by the Commission in respect of the application, except for those granted confidentiality.

Competition effects

ANF

5.2 The application and submission in support of the application by ANF made no reference to anti-competitive detriments likely to arise from conduct the subject of the application. ANF specifically excluded from the application negotiations relating to the terms and conditions concerning common territories for each newsagent and the rates of commission to be paid to each newsagent. By a facsimile letter dated 14 April 1999 ANF stated, in effect, that it was aware that the application did not provide protection in relation to arrangements that constitute a boycott by newsagents. ANF also stated that it would not encourage its members to engage in such conduct.

5.3 ANF contended that the process of changing the form of arrangements between publishers and newsagents constituted exceptional circumstances that warranted special consideration by the Commission. ANF asserted that it was relevant that the changes were to occur over a short timeframe.

5.4 ANF argued that the circumstances raise the question of relative market power of major publishing companies offering a range of new contracts and individual newsagents who have limited negotiating power and in most cases lack the expertise or ready access to specialist advice to ensure they are not disadvantaged by entering into the offered new arrangements..

Common territories and commission rates

5.5 Pacific Publications Pty Limited (Pacific) submitted that authorisation should be made conditional on ANF not negotiating on territories or pricing in respect of contracts and that emphasis be given to informing parties that they are matters solely for the individual publishers and newsagents.

5.6 Independent Newsagents Association (INA) submitted that the anti-competitive detriments would be reduced if the ACCC was to ensure that ANF will not discuss common territories or commission rates.

5.7 Australasian Association of Convenience Stores Inc (AACS) sought clarification of the term 'common territories' as used by ANF in this application.

5.8 AACS submitted that it was relevant for the issue of review (and most likely dismantling) of the existing system for exclusive territories to be addressed. AACS

submitted that the Tribunal determined that territorial exclusivity in its present form is objectionable.

5.9 AACS contended that another major objectionable feature of the existing system is the split on commission rates forced upon sub-agents. AACS argued that requiring sub-agents to source from a nominated newsagent limited negotiation on supply terms.

Boycotts

5.10 Notwithstanding ANF's statements about boycotts, Pacific expressed particular concern that if it declined particular clauses of contracts accepted by other publishers then ANF or its members may boycott Pacific's agreement. Pacific contended that boycotts could be explicit or very subtle through recommendations to ANF's members.

Balance of power

5.11 The Village Newsagent contended that the newspaper publishers Fairfax and News are the only relevant publishers in the industry. It was submitted that the fact that publishers totally dominate newsagents in an environment that demands major reconstruction is most concerning. Magazine publishers and other suppliers to newsagents were asserted to only piggyback the newspaper distribution system. The Village Newsagent submitted that the other suppliers should have no influence on the new newspaper distribution system Fairfax and News want to introduce.

5.12 The Village Newsagent also questioned the capacity of ANF to act on behalf of newsagents. It contended ANF has no authority to negotiate on behalf of authorised newsagents, referred to its membership structure as being unrepresentative of newsagents and alleged it has poor communications with newsagents about its dealings with publishers. It also claimed that ANF has no ability to deliver on what they 'negotiate' with publishers. It claimed ANF does not have the expertise, the financial resources or the desire to adequately negotiate an outcome. The view was expressed that strategies used by the major newspaper publishers and newsagents' organisations since 1974 have been most damaging to the interests of authorised newsagents.

5.13 AACS expressed the view that rather than facilitate the negotiation process, en bloc representation by ANF under its present leadership may have a counter productive effect on the negotiation process. AACS referred to evidence before the Tribunal and comments in the Tribunal's 1998 decision and contended that, at least in relation to magazine distribution, newsagents and the present leadership of ANF has demonstrated a concerted and open hostility to changes suggested by certain magazine publishers.

5.14 Pacific submitted that ANF is one of the several stakeholders in the industry and should be placed in a position no more advantageous than other industry participants.

5.15 INA submitted that empowering ANF to use collective bargaining power to negotiate with publishers in the interests of its members could result in negotiations that discuss the terms of supply to sub-agents and its members could be adversely affected. INA believes ANF will be in a position to bring pressure to bear on publishers as it has done in the past in regard to any proposal for direct supply to look-alike newsagencies and the wider sub-agency community.

5.16 INA submitted that authorisation could mean that its members' attempts to negotiate supply terms are likely to be overwhelmed by the enormous bargaining power granted to their competitors – authorised newsagents. INA contended that its members already have extremely minimal bargaining power in dealing on an individual basis with the major publishing companies. INA claimed that redressing the imbalance of power for newsagents may be used to limit whatever inclinations the publishers might have regarding proposed supply conditions for INA's members.

5.17 INA reported that it had approached publishers requesting they permit INA to take part in discussions that may affect its members. It said that at the time of writing it had received replies from only three publishers. INA assumed that when it comes to look-alikes the publishers' responses were constrained by the strength of the negotiating power granted to ANF by the interim authorisation.

Scope of negotiations

5.18 Pacific expressed concern about the perception in some parts of the industry that the ACCC, through the interim authorisation, has granted ANF the right to negotiate on all matters on behalf of the industry with the publishers. Pacific referred to earlier discussions with ANF where parties went to some lengths to make it clear ANF representatives were not negotiating contracts on behalf of other newsagents. Pacific said that while it was comfortable with continuing discussions with ANF it does not believe that ANF should be placed in a position more advantageous than other industry participants.

5.19 AACS expressed misgivings about the preparedness of ANF to fully embrace reform of distribution arrangements for newspapers and magazines. AACS identified the Tribunal's 1998 determination as a benchmark for the outcome of negotiations involving ANF. It contended that ANF has an agenda to circumvent the findings of the Tribunal. AACS asserted that ANF has a single minded determination to preserve the status quo.

5.20 AACS contended that it was accepted by ANF and the Tribunal that it is possible to reform the system without an attack on the present home delivery service.

5.21 The Village Newsagent asserted that ANF has a lack of vision about how newsagency will look in five years' time and refused to consider developing a database to facilitate planning for the future. It argued that because of the lack of appropriate planning and activity the restructuring of the newspaper distribution system had the capacity to be mismanaged to the disadvantage of newsagents.

5.22 INA argued that it should be involved in discussions affecting its members supply arrangements. It said it was inappropriate that ANF would be negotiating the terms and conditions affecting INA members.

5.23 INA submitted that the anti-competitive consequences from authorisation are prospectively very high. It asserted that the anti-competitive detriment would be reduced if the Commission were to ensure that ANF:

- does not act as a pivot for reconstruction of the system;
- will not discuss common territories or commission rates; and

- refrains from making arrangements etc that might lead to retention of the elements of the system what would restrict publishers from exploring what might be achieved from the market opportunities presented by look-alikes and other non-newsagency outlets.

Standardisation of contracts

5.24 INA requested the Commission to bear in mind the demonstrated reluctance of newsagents to accept change. INA believes the danger exists that ANF could be 'used as a pivot for reconstruction of the system through parallel agreements with each of the publishers', as warned by the Tribunal in 1994.

5.25 Pacific also addressed comment to this issue. It said that it had gone to some lengths to prepare contracts to meet its own commercial needs. It submitted that it is concerned that ANF in negotiations with each publisher it may, consciously or otherwise, seek to standardise the contracts. Pacific reported that this concept was contained in one of ANF's early proposals. Pacific's particular concern was that if it declines to agree to certain clauses accepted by other publishers ANF or its members may boycott Pacific's contract.

Buying group

5.26 Pacific reported that ANF has made an in-principle decision to set up a national buying group on behalf of newsagents. Pacific submitted that to establish a buying group in light of ANF's privileged position arising from the interim authorisation would raise significant and serious commercial and competition issues for all concerned. Pacific contended that such a buying group would prejudice the continuation of the consultation process.

Period of authorisation

5.27 The only party to address the issue of the period of authorisation was INA who submitted that the six months period of authorisation sought should date from the grant of interim authorisation.

Continuing role for ACCC

5.28 Pacific suggested, to address its concerns, the Commission should continue to assist and instruct ANF as to its legal obligations under the Act with particular care exercised to seek to ensure that contracts are neither directly nor indirectly standardised through the authorisation. Pacific contended that a delicate balance was required in transition to a deregulated environment and that in order to achieve that balance it was appropriate for greater direction to be provided by the Commission to ANF so that the average newsagent has an adequate understanding of its rights and obligations.

5.29 INA submitted that the Commission should ascertain whether ANF intended to negotiate in relation to commission rates and restrictions on supplies to look-alikes and, if so, to consider whether that would breach the Act. INA contended that there is a reluctance of newsagents to accept change and asked the Commission to monitor the on-going discussions and arrangements. INA also asked the Commission to give an undertaking that the interests of INA members would not be jeopardised by the Commission's action in granting the interim authorisation.

5.30 INA also submitted that, in light of its concerns, the Commission should issue stringent guidelines to all parties detailing the manner in which discussions should be conducted.

Conditions on authorisation

5.31 INA submitted that if authorisation was granted it be on condition that any publisher who speaks with ANF on matters impacting on look-alikes also speak with INA.

5.32 Pacific submitted that the following conditions should be considered:

- ANF be required to expressly make newsagents aware that individual newsagents and the various publishers are not obliged to accept terms negotiated by ANF. In particular, newsagents who choose to participate are able to retain, without incurring penalties, the ability to negotiate directly with any or all of the publishers if they wish.
- It be made expressly clear that ANF is not able to negotiate territories or pricing in respect of the contracts and that these matters are solely for individual publishers and newsagents.
- ANF acknowledge that it will not dissuade newsagents from accepting terms offered by individual publishers and that newsagents should consider terms and conditions having regard to their own individual circumstances.

Conclusion – competition effects

5.33 The Village Newsagent submitted that the application should be rejected.

5.34 INA submitted that the proposed arrangements were highly anti-competitive. It also submitted that the anti-competitive detriment could be reduced if ANF did not act as a pivot for reconstruction of the system, will not discuss common territories or commission rates and refrained from conduct that might lead to retention of the elements of the system that would restrict publishers from exploring market opportunities.

Public benefits

ANF

5.35 ANF submitted that the newsagency system has up until now provided the public benefits of widespread availability of circulation product as well as a low cost home delivery service. It contended that there is a substantial public benefit in ANF being able to play a role in the negotiation process to ensure that this ongoing public benefit is maintained and not temporarily or permanently lost should the process of changing arrangements be delayed or falter.

Widespread availability

5.36 INA submitted that in 1994 the Tribunal rejected the public benefit argument in relation to widespread availability. INA quoted the Tribunal as saying *For today's retail over-the-counter service there is no shortage of diverse retailers positively clamouring for the consumers' attention.* It also submitted that in 1998 ANF had the opportunity to again put arguments in this regard but chose not to do so and the Tribunal made no comments in

respect of widespread availability (in its 1998 determination). INA asserted that the Tribunal's 1994 comments therefore must stand.

Low cost home delivery service

5.37 INA submitted that the Commission's determination of 1997 pointed out that there is a lower cost option for home delivery than that provided for under the currently authorised system. INA reported that the case quoted was that of the Canberra Times direct home delivery service that is at a lower cost than the delivery service provided by the local newsagent. INA also submitted that Canberra Times direct is also arguably more efficient as delivery by 6.00am is assured and there is a back up service for missed deliveries.

ANF role to address problems with the bargaining position of newsagents

5.38 Nextra Australia Pty Ltd submitted that some newsagents might be disadvantaged when endeavouring to negotiate by themselves with large and commercially strong publishers. It reported that it intended to initiate steps to negotiate publisher contracts on behalf of its members. It said it agreed in principle with the grant of authorisation.

Conclusion – Public benefits

5.39 AACS submitted that ANF continues to blur the true nature and significance of the Tribunal's decisions in respect of:

- The Tribunal determined in 1994 and 1998 that the existing newsagency system has a number of significant anti-competitive features that there are no public benefits and as a result the system must be dismantled; and
- The Tribunal and ANF have accepted that it is possible to reform the system without an attack on the present home delivery system.

5.40 INA submitted that the 'relative market power' and 'continuance of public benefit' claims did not warrant the granting of this authorisation. It also said that it understood that the Commission is desirous of facilitating of consultation process in order to bring this protracted matter to a speedy conclusion and may be disposed to grant the authorisation. INA said it would not wish to be obstructive in this matter and its only concern is that the interests of its members are not jeopardised by the procedure.

Other submissions

5.41 The Village Newsagent submitted that there was a problem with late delivery of newspapers to newsagents and that there were no incentives under the present system for publishers to ensure timely supply. The Village Newsagent also submitted that reform of distribution arrangements should take place on a state by state basis.

5.42 Pacific submitted that the interim authorisation permitted the parties to engage in joint negotiations and to give effect to those contracts over six months and contended that a significant competition issue may be raised at the end of the six months should ANF seek to standardise the contracts with publishers.

5.43 FPC Magazines, NDD Distribution Pty Ltd and Newsagency Council of Victoria Ltd each advised that they had no objection to authorisation being granted.

5.44 AACS opposed the first amendment to the application. It said that it protested in the strongest manner and cited the following reasons for its position:

- There had been between five years to one year to resolve a relatively simple contractual matter between two commercial parties;
- The Christmas/New Year reason was used last time and the excuse is clearly inadequate; and
- The reality is that the industry was deregulated from 1 July 1999, with the exception of the relationship between publishers and newsagents in a territory.

AACS also said small businesses such as its members are simply retailers trying to negotiate mutually acceptable trading terms on a one on one basis.

5.45 No other party made a submission in respect of the first amendment to the application.

5.46 The second amendment attracted comment from three parties. Rural Press agreed to the amendment. AACS submitted that the amendment was a delaying tactic or a poor reflection on the industry's negotiating expertise. AACS saw no reason to grant the request and asked that it be emphasised to ANF that no more extensions would be granted by the Commission.

5.47 The Village Newsagency opposed authorisation of the amended application, it submitted that abolition of the territorial system of newspaper distribution is fundamental for this industry. It was asserted that the ANF was not competent to negotiate effectively and its involvement had hindered effective industry restructuring. The Village Newsagency contended that the two contracts negotiated by ANF to date are standard documents which act to exercise additional control over newsagents' activities. It suggested that the appropriate outcome of deregulation would be for newsagents to be able to pursue commerce that rewards enterprise and investment.

6 The Commission's evaluation

6.1 The Commission's evaluation of the application is in accordance with the statutory test as set out in section 4 of this decision.

6.2 What ANF is seeking in this application is authorisation to negotiate on an individual publisher by publisher basis the terms and conditions of contracts for newsagents. The Commission proposes to consider the application against the background of the Tribunal's decisions on newspaper and magazine distribution. In relation to those decisions the Commission is conscious of the comments of INA that what is proposed may be pivotal in reintroducing the horizontal agreements between publishers and newsagents that had existed in the past.

6.3 The issue of small business negotiating terms and conditions of trading with larger entities in the context of a changing industry environment, as is the case here, has been considered by the Commission on a number of occasions. In the case of chicken growing the Commission authorised arrangements for terms and conditions of supply between broiler growers and individual processors in South Australia and Tasmania. In the case of concrete-truck owner-drivers the Commission authorised the owner-drivers of CSR in Queensland to negotiate terms and conditions with CSR.

6.4 What distinguishes the current application from the applications mentioned above is that ANF has not sought to negotiate in relation to commission payments between publishers and newsagents. Prima facie that reduces considerably the potential anti-competitive impact of the application. Also, the negotiations do not include the negotiation of common newsagent territories between publishers (identified by the Tribunal as particularly anti-competitive). In addition, the contracts negotiated by ANF will not bind individual newsagents - ultimately it is a matter for each newsagent and publisher to agree the terms and conditions of their contracts. The Commission would expect those individual negotiations to include such things as the amount of commission paid and the split of that commission where the newsagent distributes to other retailers in the newsagent's territory.

6.5 The Commission also notes that authorisation is being sought for a limited period and this contributes to reduction in the likelihood that what is proposed will have a significant impact on competition.

6.6 The credentials of ANF to negotiate on behalf of newsagents have been questioned by The Village Newsagent. While the Commission notes the point it takes the view that it is not its role to adjudicate as to whether or not ANF is the best or most appropriate body to negotiate on behalf of newsagents. The issue it is asked to address is whether there is public benefit resulting from the negotiations such as to offset any anti-competitive detriment. On that basis the credentials of ANF is not an issue for the Commission. It may or may not be that ANF is the most appropriate body, given the range of interests that need to be represented, but that is not a matter for the Commission in the context of consideration of this application. Also in the circumstances, it is not appropriate, as suggested by INA and Pacific for the Commission to be a part of the negotiations.

6.7 In considering similar applications in the past the Commission has recognised two particular characteristics of the industries in question, namely, the industries were in a state of transition and there was some need, in the interests of fairness, to redress, at least in the short term, the inequality of bargaining power between the relevant parties.

6.8 In relation to the newsagency system the Tribunal has provided a time frame for new arrangements. What is being proposed in the application is consistent with the decision of the Tribunal. In fact, it is likely that the process of transition will be assisted by allowing ANF to contribute to the proposals of individual publishers as provided for in the application. The ANF representatives have a great deal of experience in distribution of publications and it is likely that the outcome of the negotiations would be different if publishers did not have the benefit of the contribution of operating newsagents. It is likely also that giving the newsagents' representatives the opportunity to take part in negotiations with publishers will in itself contribute to the industry's adaptation to new arrangements.

6.9 The terms of the proposed authorisation sought are limited and do not provide any protection outside the scope of any authorisation that may be granted. Pacific has expressed concern about the perception in some parts of the industry that the ACCC, through the grant of interim authorisation, has granted ANF the right to negotiate on all matters on behalf of the industry. That is not the case as the interim granted is in no wider terms than the terms of the authorisation sought. The applicant is aware that the interim authorisation (and any substantive authorisation) does not provide any protection in relation to negotiation of remuneration in the form of commission rates nor to discussions on common territories between publishers. Nor would the proposed authorisation provide any protection in relation to primary boycotts on the part of newsagents.

6.10 The Commission reiterates its earlier comment that individual newsagents are not bound to accept the terms and conditions negotiated by ANF. The application does not prevent individual newsagents from seeking to negotiate directly with publishers the terms and condition appropriate to their circumstance.

6.11 It has been suggested by INA that if the Commission is disposed to grant authorisation to the application a condition of authorisation should be that publishers also hold negotiations with INA. The Commission does not have the power to do that.

6.12 There is also concern on the part of some parties that ANF may be placed in an advantageous position if authorisation is granted. The Commission does not accept that. Other groups may approach the Commission should they take the view that their contemplated conduct requires authorisation. Any applications will be considered on their merits.

6.13 In spite of the acknowledgment by ANF that the application does not provide protection in relation any arrangement that would constitute a collective boycott and an undertaking by ANF executives that they would not encourage newsagents to engage in such conduct some interested parties continue to have reservations. The Commission would regard any boycott in this industry with great concern and would wish to be informed of any evidence of a possible boycott by any groupings within the industry.

6.14 On balance the Commission is satisfied that the public benefit likely to result from the application outweighs any likely anti-competitive detriment.

6.15 The authorisation does not provide any protection in relation to any negotiations of:

- commission rates (including splits of commission)
- common territories between publishers

and does not provide any protection in relation any primary boycott.

6.16 In the course of any discussions the publishers should be conscious of the their position relative to those they are having discussions with and in such circumstances the Commission would expect publishers to conduct any such discussions in good faith.

6.17 The amendments to the application extend the period of authorisation by some 3.5 months. The Commission believes the amendment does not materially alter the balance of benefits and detriments.

6.18 On the basis of the above the Commission is satisfied there are sufficient safeguards in place to ensure that ANF/individual publishers negotiations will not become pivotal in reintroducing past arrangements.

Draft Determination

6.19 On 23 December 1999 the Commission issued a draft determination proposing to grant authorisation to the application. There was no request for a pre-decision conference to be held in respect of the draft determination.

6.20 The Commission notes that the most recent amendment to the application was made after the draft determination was issued and after the period for requesting a pre-decision conference had expired. The Commission has considered the comments made by interested parties in response to the most recent amendment to the application. It has assessed the submission opposed to the most recent amendment to not raise issues materially different to those formerly raised by the same interested party. It has formed the view that the circumstances do not require another draft determination to be issued.

7. Determination

7.1 For the reasons outlined in Chapter 6, the Commission concludes that it is appropriate to grant authorisation to Australian Newsagents' Federation Ltd in respect of application A30196 until 30 May 2000.

7.2 Interim authorisation granted in respect of this application is revoked.

7.3 This determination is made on 16 March 2000. If no application for a review of the determination is made to the Australian Competition Tribunal, it will come into force on 7 April 2000. If an application for review 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.