



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

**Office Choice Limited, Office National Limited and
Office Products Depot Limited**

in respect of

collective bargaining with office products suppliers

Date: 8 August 2007

Authorisation no: A91058

Public Register no: C2007/1468

Commissioners: Samuel
Sylvan
Martin
King
Smith
Willet

Summary

The ACCC proposes to grant authorisation to the Office Group to represent its current and future members in collective negotiations with office products suppliers for 6 years.

The authorisation process

The Australian Competition and Consumer Commission (ACCC) can grant immunity from the application of the competition provisions of the *Trade Practices Act 1974* (the Act) if it is satisfied that the benefit to the public from the conduct outweighs any public detriment. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

The application for authorisation

Office Choice, Office National and Office Products Depot, collectively the Office Group, applied for authorisation to collectively negotiate, and/or appoint a representative to collectively negotiate on their behalf, the terms and conditions on which office products are sold by suppliers to them and to their present and future franchisees and members (Members).

Assessment of public benefit and detriment

The ACCC considers that the proposed arrangements generate a small level of public detriment. The proposed arrangements will reduce the level of direct negotiation between individual Office Group Members and office products suppliers compared to the situation where each franchisor negotiates separately with suppliers.

However, the ACCC considers that the voluntary nature of the arrangements, the size of the bargaining group and existing competition between office product wholesalers and their customers, mitigate against the arrangements resulting in any significant change in bargaining power between Office Group Members and suppliers.

The ACCC considers that the proposed arrangements are likely to result in some benefit to the public. The proposed arrangements, by allowing Office Group Members terms and conditions of supply to be negotiated through a single process, may enable suppliers to provide office products to them at a lower cost than would otherwise be the case. Similarly, the proposed arrangements are also likely to result in transaction cost savings to Office Group Members and suppliers.

Given existing competition in the retail market for office products, these cost savings are likely to be reflected in lower prices and/or improved quality of service for consumers.

Overall, the ACCC considers that in all the circumstances, the likely public benefit generated by the proposal will outweigh the likely public detriment.

Draft determination

The ACCC proposes to grant authorisation for a period of 6 years to the Office Group to collectively negotiate, on behalf of their Members, the terms and conditions for the supply of office products.

Interim authorisation

The ACCC also grants interim authorisation for the Office Group to commence collective negotiations with office product suppliers for the 2008-09 supply year. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

In making this decision, the ACCC was influenced by the voluntary nature of the arrangements, the absence of collective boycotts and the assurance that should the ACCC deny authorisation any agreements entered into will not be binding.

The next steps

The ACCC will now seek further submissions from the applicants and interested parties in relation to this draft determination prior to making a final decision. The applicants and interested parties may also request that a conference be held to make oral submissions on the draft determination.

Contents

1. INTRODUCTION	1
AUTHORISATION.....	1
2. THE APPLICATION FOR AUTHORISATION	2
THE APPLICANTS	2
THE APPLICATION.....	2
INTERIM AUTHORISATION.....	3
THE OFFICE PRODUCTS INDUSTRY IN AUSTRALIA	4
CHRONOLOGY	5
3. SUBMISSIONS RECEIVED BY THE ACCC	5
4. THE NET PUBLIC BENEFIT TEST	6
5. ACCC EVALUATION	8
THE MARKET	8
THE COUNTERFACTUAL.....	9
PUBLIC DETRIMENT	10
The applicants.....	10
ACCC view	10
PUBLIC BENEFIT	14
The applicants.....	14
ACCC view	15
BALANCE OF PUBLIC BENEFIT AND DETRIMENT	17
LENGTH OF AUTHORISATION	17
6. DRAFT DETERMINATION	18
THE APPLICATION.....	18
THE NET PUBLIC BENEFIT TEST	18
CONDUCT FOR WHICH THE ACCC PROPOSES TO GRANT AUTHORISATION	18
CONDUCT NOT AUTHORISED.....	18
INTERIM AUTHORISATION.....	18
FURTHER SUBMISSIONS	18

List of abbreviations

BPGI	Business Products Group International
Members	All current and future franchisees or members of Office Choice, Office National or Office Products
Office Choice	Office Choice Limited
Office Group	Refers to Office Choice, Office National and Office Products Depot collectively
Office National	Office National Limited
Office Products	Office Products Limited
The Report	BIS Shrapnel, <i>The Australian Office Products Market</i> , 7 th Edition, 2006-2008

1. Introduction

Authorisation

- 1.1. The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government 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 a greater choice for consumers in price, quality and service.
- 1.2. The Act, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.
- 1.3. The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.4. The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.5. After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.
- 1.6. This document is a draft determination concerning application for authorisation A91058 lodged by Office Choice Limited (Office Choice), Office National Limited (Office National) and Office Products Depot Limited (Office Products), collectively the Office Group.
- 1.7. Once this draft determination is released, the applicants or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicants and interested parties to lodge written submissions commenting on the draft.
- 1.8. The ACCC 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 final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

2. The application for authorisation

The applicants

- 2.1. Office Choice is a franchisor of a chain of franchises that operate in the retail office products market. There are more than 80 Office Choice franchises nationally.
- 2.2. Office National is also a franchisor of a chain of independently owned franchises that operate in the retail office products market. It also licences the use of Office Product branding and intellectual property from Office Products for use in Australia by some franchisees.
- 2.3. Office National states that it is the largest independent business to business provider of office products and business technology solutions in Australia.¹
- 2.4. Office Products is a franchisor of a chain of independently owned franchises in the New Zealand office products market.
- 2.5. Office Products' franchisees do not directly compete with Office Choice and Office National in Australian retail markets, except for the licence arrangement referred to above. Its franchisees do source office products from Australian suppliers.

The application

- 2.6. On 12 July 2007, the Office Group applied for authorisation on behalf of themselves and their respective current and future franchisees (Members) to collectively negotiate, and/or appoint a representative to collectively negotiate, the terms and conditions on which office products are sold to them by suppliers.
- 2.7. The Office Group has applied for authorisation for collective negotiations to take place with its current office products suppliers as well as potential future suppliers. The Office Group's current major suppliers are listed at Appendix A.
- 2.8. The Office Group proposes to engage Business Products Group International (BPGI) to negotiate on behalf of the Office Group and their respective Members.
- 2.9. BPGI states that it is the world's largest consortium of buying groups consisting solely of independent office products dealers. BPGI consists of 20 buying groups in 13 countries including Office Choice and Office National in Australia and Office Products in New Zealand.²
- 2.10. While it is intended that BPGI will be appointed to negotiate with suppliers, Office Choice, Office National and Office Products state that they may also be actively involved in negotiations from time to time.

¹ <http://www.officenational.com.au/about.aspx>

² <http://www.bpgi-llc.com/default.aspx>

- 2.11. The Office Group intends that collective negotiations will concentrate on the:
- price for the acquisition of stock by members
 - terms and conditions of supply – ie payment terms, and
 - level of rebates and discounts to be provided by suppliers.
- 2.12. The Office Group submit they do not intend to jointly centralise purchasing from a particular supplier. The Office Group states that the nature of the market requires the Office Group's Members to purchase from multiple suppliers and purchase like products from competing suppliers to ensure consumers are presented with purchasing choices.
- 2.13. The process for negotiation will vary between different suppliers.
- 2.14. Entering into negotiations and agreements will be voluntary for Office Choice, Office National, Office Products and their respective Members and suppliers. Each applicant and their respective Members will be free to individually contract with a supplier if an agreement cannot be reached. Similarly individual Members of the Office Group and their Members will remain free to negotiate individually with a supplier even if a collective agreement is reached.
- 2.15. The Office Group is not seeking authorisation to engage in collective boycott activities.
- 2.16. The Office Group seeks authorisation for six years.
- 2.17. The Office Group submits buying decisions are generally made one to two years in advance, therefore agreements negotiated in 2008 would impact buying in 2009 and 2010. The Office Group submits that six years is considered appropriate given the long lead in time between planning and buying decisions.

Interim authorisation

- 2.18. In addition to its substantive application, the Office Group also sought interim authorisation to allow it to commence collective negotiations with suppliers while the ACCC considers and evaluates the merits of its substantive application, as purchasing decisions for 2008-09 must be made shortly.
- 2.19. The Office Group submit that in the event that interim authorisation is granted they will ensure that any arrangement negotiated with suppliers during the interim period will not be binding if the ACCC subsequently denies authorisation.
- 2.20. On 8 August 2007 the ACCC granted the Office Group's application for interim authorisation. In making this decision, the ACCC was influenced by the voluntary nature of the arrangements, the absence of collective boycotts and the assurance by the Office Group that any agreements reached during the interim period will be non-binding should the ACCC subsequently deny authorisation.

The office products industry in Australia

- 2.21. Except where otherwise stated, information contained in this section was provided by the Office Group citing BIS Shrapnel, *The Australian Office Products Market*, 7th Edition, 2006-2008 (the Report).
- 2.22. The term ‘office products’ refers to all products regularly used in the functioning and running of offices. Such products include small, expendable daily use items such as stationary, paper clips, staples, hole punches binders and laminators, writing utensils and paper through to computers, printers, fax machines, photocopiers and cash registers, as well as office furniture such as cubicles.
- 2.23. Typically a retailer may provide up to 10,000 different products for sale to consumers.
- 2.24. The office products industry in Australia was estimated to be \$6.48 billion in 2005 (valued at consumer prices).
- 2.25. There are numerous retailers of office products in Australia. The Office Group submits that office products retailers can be broken into three broad categories:
- Contract Dealers that deliver direct from warehouses to businesses (controlling 20 percent of the market)
 - Commercial Dealers - “independent operators” generally consisting of small independent operators that deliver to small, medium and large businesses in their immediate local area (controlling 18 percent of the market), and
 - Large retailers that consist of large chains such as Officeworks, Big W and Harvey Norman (controlling 49.3 percent of the market).
- 2.26. The Office Group submits there is a strong trend towards centralisation/rationalisation of purchasing and this trend is projected to continue.
- 2.27. The Office Group also submits there are numerous suppliers of office products in Australia, many selling competing products. Annexure B contains a list of the main office product manufacturers/suppliers in 2005.
- 2.28. Many suppliers are large overseas owned manufacturers importing to Australia and over one third of retailers use more than 40 different suppliers.

Chronology

2.29. The table below sets out the significant dates in the consideration of this application.

DATE	ACTION
12 July 2007	Application for authorisation lodged with the ACCC, including an application for interim authorisation.
1 August 2007	Closing date for submissions from interested parties in relation to the request for interim authorisation and the substantive application for authorisation.
8 August 2007	Draft determination issued and the ACCC granted interim authorisation to allow the Office Group to commence collective negotiations with office products suppliers.

3. Submissions received by the ACCC

- 3.1. The Office Group provided a supporting submission with its application for authorisation.
- 3.2. The ACCC also sought submissions from twenty-three interested parties potentially affected by the application, including competitors of the applicants and office products suppliers.
- 3.3. The ACCC received one confidential submission and one public submission in relation to the Office Group's substantive application for authorisation. The public submission was from Corporate Express.
- 3.4. No submissions were received in relation to the Office Group's application for interim authorisation.
- 3.5. A copy of the public submission is available from the ACCC website (www.accc.gov.au) by following the 'Public Registers' and 'Authorisations Public Registers' links.

4. The net public benefit test

- 4.1. The ACCC may only grant authorisation where the relevant test in section 90 of the Act is satisfied.

Application A91058

- 4.2. The Office Group lodged application for authorisation A91058 under section 88(1) of the Act to make and give effect to 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. The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.
- 4.3. In respect of the making of and giving effect to the arrangements, sections 90(6) and 90(7) of the Act state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
- the provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision concerned was given effect to.

Application of the tests

- 4.4. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition.³
- 4.5. However, the Tribunal has previously stated that regarding the test under section 90(6):
- [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.⁴
- 4.6. Consequently, given the similarity of wording between section 90(6) and (90(7), when applying these tests the ACCC can take most, if not all, detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

³ *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] AcompT9 at paragraph 67.

⁴ *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

Definition of public benefit and public detriment

- 4.7. Public benefit is not defined in the Act. However, the 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 principle elements ... the achievement of the economic goals of efficiency and progress.⁵

- 4.8. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁶

Future with-and-without test

- 4.9. The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.⁷ Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

Length of authorisation and conditions

- 4.10. The ACCC can grant authorisation for a limited period of time.⁸

- 4.11. The Act also allows the ACCC to grant authorisation subject to conditions.⁹

Future and other parties

- 4.12. Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to persons who become party to the contract, arrangement or understanding at some time in the future and persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.¹⁰

⁵ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677. See also Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242.

⁶ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

⁷ Australian Performing Rights Association (1999) ATPR 41-701 at 42,936. See also for example: Australian Association of Pathology Practices Incorporated (2004) ATPR 41-985 at 48,556; Re Media Council of Australia (No.2) (1987) ATPR 40-774 at 48,419.

⁸ Section 91(1).

⁹ Section 91(3).

¹⁰ Section 88.

5. ACCC evaluation

- 5.1. The ACCC's evaluation of the proposed collective bargaining arrangements is in accordance with the net public benefit test outlined in Chapter 4 of this draft determination. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments flowing from the proposed collective bargaining arrangements.

The market

- 5.2. The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.
- 5.3. Market definition is purposive, meaning the market may be defined differently depending on the conduct being assessed. In considering this application the ACCC does not consider it necessary to comprehensively define the market. In this respect it is the ACCC's view that its assessment will not be overly affected by the possible variation in precise definition.
- 5.4. For the purpose of assessing this application, the ACCC considers the potential areas of competition are:
- the wholesale acquisition and supply of office products, and
 - the retail supply of office products.

Wholesale suppliers

- 5.5. There are numerous suppliers of office products in Australia, many selling competing products. Many of those suppliers are large multinational corporations. Annexure B contains a list of the main office product manufacturers/suppliers in 2005.
- 5.6. On the information available, there would appear to be significant scope for substitution of supply across regions and the ability to import in many cases.

Retail suppliers (wholesale acquirers)

- 5.7. There are numerous retail suppliers of office products. Retail suppliers vary in the size and range of the products they sell. Some retailers focus on selling direct to business and government while others focus on selling direct to the public.
- 5.8. According to information provided by the Office Group, citing BIS Shrapnel, *The Australian Office Products Market*, 7th Edition, 2006-2008 (the Report), the largest retailer of office products in Australia in 2005 was Officeworks at 15.7 percent, Corporate Express at 11.7 percent and computer and electronic retailers at 11 percent. Other non-defined miscellaneous retailers held 15.6 percent.
- 5.9. Other retailers with significant share in 2005 included mass merchandisers such as Big W and K-Mart at 8.8 percent, Newsagents at 7.3 percent and OfficeMax at 5.3 percent.
- 5.10. Based on the same report, Office Choice's estimated share in 2005 was 2.2 percent, whilst Office National's share was 6.8 percent. Office Products Depot does not sell office

products in Australia, however, the Office Group estimates its purchases of wholesale products in Australia at 1 percent of wholesale supply.

- 5.11. Corporate Express states that it reserves its position with regard to the accuracy of the Report, particularly with regard to market definitions and market share.
- 5.12. Corporate Express submits that many Members of the Office Group operate in local areas with no significant competition such that they could be considered to be local monopolies.
- 5.13. The ACCC notes that some, particularly smaller retail customers, will be limited in their choice of office products suppliers to local retailers. Larger customers are likely to have a broader range of substitution opportunities. In any event, as discussed in greater detail at paragraph 5.76, the ACCC notes that the vast majority of Office Group Members operate in metropolitan areas or larger regional centres where at the very least they face competition from other specialist office products retailers and/or larger mass merchandise retailers.

The counterfactual

- 5.14. As noted in Chapter 4 of this draft determination, in order to identify and measure the public benefit and public detriment generated by conduct, the ACCC applies the 'future with-and-without test'.
- 5.15. The ACCC notes that Office Choice and Office Products have been members of the BPGI buying group for a number of years and that Office National has recently joined the buying group. Presumably, absent authorisation, they would be likely to remain members of the BPGI group.
- 5.16. However, the ACCC understands that the buying group has not generally been used to source products in Australia other than in respect of some large multinational suppliers where Office Group Members have been able to take advantage of arrangements negotiated by the buying group with suppliers' overseas parent companies.
- 5.17. In their current application Office Group Members have sought authorisation specifically to collectively bargain with their suppliers independently of the buying group, albeit with BPGI acting as their representative in negotiations.
- 5.18. Many buying group arrangements, as opposed to collective bargaining arrangements, are less likely to raise concerns under the competition provisions of the Act.
- 5.19. In this case, the applicants submit that its collective bargaining proposal may raise concerns under the Act. In these circumstances the ACCC considers that the proposed collective negotiations would be unlikely to occur absent authorisation.
- 5.20. On this basis, the counterfactual with respect to the proposed collective bargaining arrangements appears to be each of Office Choice, Office National and Office Products negotiating individually with suppliers and/or, acquiring some products through the existing buying group.

5.21. The ACCC also notes that regardless of the means by which their franchisors negotiate terms and conditions with suppliers, individual Members will remain free to either accept the terms agreed or negotiate individually with suppliers.

Public detriment

The applicants

5.22. The Office Group submits the proposed collective bargaining arrangements are unlikely to result in any detriments. They submit that granting authorisation will not protect or shield the operations of any particular business or the office products market from competition. Rather, they submit the arrangements are more likely to result in a more competitive office products market and lower prices for consumers.

5.23. The Office Group further submits that the collective market share of the group is less than 10 percent which is less than that of larger operators in the market such as Officeworks and Corporate Express.

5.24. The Office Group also notes that entering into negotiations and agreements will be voluntary for Office Choice, Office National and Office Products, their respective Members and suppliers. Members will be free to individually contract with a supplier if an agreement cannot be reached. Similarly Members will remain free to negotiate individually with the supplier even if a collective agreement is reached.

Submissions

5.25. One interested party submission, which was excluded from the public register at the request of the party, raised concerns that the Office Group, collectively, may be able to exert pressure on suppliers. Concerns were raised that if suppliers do not agree to rebates requested by the group, the group may exclude the supplier from supplying office products to Members.

5.26. The same interested party also raised concerns that goods supplied to the collective may have to be delivered to a number of points compared to, for example, Officeworks, where all goods are delivered to a central point. The interested party raised concerns that this may increase a suppliers delivery costs.

ACCC view

5.27. Collective bargaining refers to an arrangement under which two or more competitors in an industry come together to negotiate terms and conditions, which can include price, with a supplier or customer.

5.28. Generally speaking, competition between individual businesses generates price signals which direct resources to their most efficient use. This is often referred to as allocative efficiency. Collective agreements to negotiate terms and conditions can interfere with these price signals and accordingly lead to allocative inefficiencies. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.

5.29. The ACCC has previously identified that the anti-competitive effect of collective bargaining arrangements constituted by lost allocative efficiencies is likely to be more limited where the following four features are present:

- the current level of negotiations between individual members of the group and the proposed counterparties on the matters that they seek to negotiate is low
- participation in the collective bargaining arrangements is voluntary
- there are restrictions on the coverage and composition of the bargaining group
- there is no boycott activity.

Current level of negotiations between the applicants and their respective Members and the counterparties

5.30. The ACCC notes that there are many buyers and sellers in the market for the wholesale supply of office products. The proposed arrangements will, in effect, aggregate the buying power of Office Group franchisors. Any bargaining power conferred by this aggregation of buying power is likely to be reflected in the terms and conditions of supply negotiated with wholesalers.

5.31. To the extent that the arrangements do distort market prices this may result in possible inefficiencies in resource allocation. That is, suppliers, faced with artificially low returns, may choose to direct their resources elsewhere to some extent. However, the ACCC considers that the proposed arrangements are unlikely to distort wholesale prices in the relevant market(s).

5.32. The proposed arrangements may reduce the level of direct negotiation between Office Group Members and office products suppliers compared to the situation where each franchisor negotiates individually with suppliers. However, the ACCC considers that the other features of the proposed arrangements discussed below, namely, the voluntary nature of the arrangements, the size of the bargaining group and the absence of boycott activity, mitigate against the arrangements generating any significant change in the bargaining power between the parties.

5.33. With respect to the level of negotiation between franchisees and suppliers, as noted, franchisees currently retain the discretion to either accept the terms and conditions negotiated by their individual franchisor or enter into individual negotiations with suppliers. Similarly, under the proposed arrangements franchisees will retain the discretion to either accept the terms and conditions negotiated by the franchisors collectively or enter into individual negotiations with suppliers.

Voluntary participation in the collective bargaining arrangements

5.34. Collective bargaining is voluntary where members of the collective bargaining group are free to choose not to participate in the collective negotiations if they prefer to negotiate individually. This provides an element of ongoing competition and as such lessens the anti-competitive impact of the arrangements. Where participation is voluntary, those businesses who consider that they will be able to negotiate a more commercially attractive

arrangement individually are free to do so. Consequently, incentives for businesses to compete on price, to innovate, or to improve their quality of service are not reduced to the extent that they otherwise might be.

- 5.35. Importantly in this respect, the granting of an authorisation does not compel any party to participate in the collective bargaining process, whether a potential member of the bargaining group, or a business with whom the group may seek to negotiate. Nor will it impact on existing arrangements between the parties unless the parties so choose.
- 5.36. The ACCC notes that participation in the proposed collective bargaining arrangement is voluntary.
- 5.37. Office Choice, Office National and Office Products and their respective Members will be free to individually contract with a supplier regardless of whether a collective agreement is reached.
- 5.38. Similarly, absent any boycott activity, as discussed below, suppliers remain free to choose whether to participate in the proposed collective negotiation or negotiate through existing channels.
- 5.39. The ACCC also notes that the application for authorisation is expressed so as to apply to any future members of the Office Group, providing those members with the opportunity to participate in the collective bargaining arrangements should they so choose.

Size/composition of bargaining groups

- 5.40. The ACCC considers that where the size of bargaining groups is restricted, any 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.
- 5.41. In this instance, the bargaining group includes, Office Choice, Office National, Office Products and, potentially, all of their respective franchisees. The Office Group submits that collectively this group makes up less than 10 percent of the office products market. While this figure appears to be low, concern has been raised in an interested party submission that has been excluded from the public register, that this would make the Office Group the fourth largest acquirer of office products.
- 5.42. The ACCC notes that in aggregate, the parties to the proposed arrangements would be one of the larger purchasers of wholesale office products. However, the size of the bargaining group is not large compared to the overall size of the market.
- 5.43. Given that Office National's share (based on the Report) is approximately 7 percent and that the Office Group's share will be approximately 10 percent, the ACCC does not consider that the proposed arrangements will significantly increase the composition and coverage of the bargaining group.
- 5.44. While some of the suppliers with whom the group propose to collectively negotiate are small, relative to the size of the proposed bargaining group, the ACCC does not consider that the proposed arrangements will significantly impact on the balance of bargaining

power between the group and suppliers compared to, for example, a situation where they negotiate with each franchisor individually.

5.45. In particular, the ACCC notes the strong competition between suppliers and acquirers of wholesale office products.

Boycott activity

5.46. In its recent decision of the VFF Chicken Meat Growers' Boycott Authorisation the Australian Competition Tribunal stated in part:

The seriousness of the potential consequences of authorising the use of collective boycotts is beyond doubt: they can result in substantial commercial damage not only to the direct target(s) of them but also to the other upstream and downstream businesses and their employees. Consumers might suffer disruption to market supplies and possibly at least temporary price increases.¹¹

5.47. The ACCC notes that the Office Group has not applied for authorisation to engage in collective boycott activity. Accordingly, any such conduct, should it occur, would not be protected from legal action under the TPA.

5.48. As noted, one interested party raised concerns that if suppliers do not agree to rebates requested by the group, the group may effectively exclude them from supplying office products to Members.

5.49. The ACCC would be concerned if competitors agreed to exclude a supplier from supplying individual Members and note that any such conduct, should it occur, would not be protected from legal action under the Act.

Increased costs to suppliers

5.50. One interested party raised concerns that the proposed arrangement may increase suppliers' delivery costs as goods supplied to the collective may have to be delivered to a number of points compared to, for example, Officeworks, where all goods are delivered to a central point.

5.51. While it may be the case that supplying Members of the collective may be more costly than supplying some other customers, it would be expected that this would be reflected in the terms and conditions of supply negotiated.

5.52. Further, to the extent that the supply requirements of Members of the Office Group differ from those of other customers, this would remain the case irrespective of the proposed arrangements. It does not appear that Office Choice, Office National and Office Depot negotiating collectively serves to increase the cost of delivering products to them or their franchisees.

¹¹ *Re VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT 2, at para 381

Public benefit

The applicants

- 5.53. The Office Group submits that the proposed collective bargaining arrangement will result in the following public benefits:
- reduced prices for office products
 - a reduction in the projected decline in the market share of the independent retailers to larger retailers
 - transaction cost savings (efficient and cost effective means to negotiate more favourable terms and conditions of the acquisition of office supplies)
 - increased choice for consumers in the long term
 - collective bargaining will assist the Office Group and their Members to compete more efficiently with retailers that have a greater buying power and enhance competition between the Office Groups Members and other retailers.
- 5.54. The Office Group submits that small independent operators are generally in a weaker bargaining position when negotiating terms and conditions for the acquisition of office supplies. They submit that large retailers are able to use their buying power and resources to negotiate more favourable pricing and terms.
- 5.55. The Office Group contends that authorisation, if granted, will allow them and their Members to collectively negotiate more favourable terms, prices and rebates than if they negotiated alone. They submit that this in turn would assist them to compete with other retailers.
- 5.56. The Office Group claims a lack of competitiveness by independent retailers may lead to their demise resulting in a concentration of the market in fewer, larger, competitors like Officeworks, Corporate Express and OfficeMax.

Submissions

- 5.57. In response to the Office Group's claims regarding the competitiveness of independent retailers Corporate Express notes the claims made by Office Choice on its website. The website states, among other things, that Office Choice enjoys the "most cost effective price" and "massive buying power".
- 5.58. Corporate Express, while noting that collective bargaining may result in increased competition between independent operators and larger retailers through reduced wholesale prices, suggests that these cost savings will not necessarily be passed through to consumers.
- 5.59. Moreover, Corporate Express submits that many Members of the Office Group operate in local areas where there is no significant competition and where there is unlikely to be so in the future. Corporate Express states that even in areas where Members face significant competition they compete effectively regardless of whether their buy or sell price is more than that of larger competitors.

5.60. Corporate Express states that Office Group Members have a number of advantages that larger retailers do not such as “local loyalty”, limited competition and the flexibility to respond to changed market conditions.

ACCC view

5.61. The Office Group submits that the proposed arrangements will improve the viability of its members businesses resulting in increased competition with larger retailers and reduced prices to consumers. Broadly, the Office Group submits that these benefits will flow from improving the bargaining power of Office Group Members and transaction cost savings.

Improved bargaining power for the Office Group and their Members

5.62. Arguments based on improved bargaining power essentially relate to a change in the power relativities of the parties to a proposed agreement. An increase in bargaining power, raised in the authorisation context, typically involves a group of smaller businesses attempting to improve its bargaining position relative to another, generally larger business through a collective arrangement.

5.63. In assessing such arguments the ACCC does not generally focus on whether a mere change in the amount of bargaining power is, in itself, a public benefit. Rather, the ACCC focuses on the likely outcomes resulting from the change in bargaining position flowing from the proposed arrangement for which authorisation is sought.

5.64. In many cases, the ACCC has identified that individually, the businesses have a limited degree of input into their contracts being offered take it or leave it terms and conditions. These circumstances do not always lead to the most efficient contract. The ACCC has often accepted that collective bargaining arrangements can provide participants with an opportunity for greater input into contracts and accordingly deliver the opportunity for more efficient contracts. In this case, however, there is no information to suggest that the members of the group are currently limited in their ability to influence their contract terms and conditions.

5.65. This is not to suggest that collective bargaining, through allowing suppliers to service a greater range of customers through a single arrangement, will not produce other cost savings to the Office Group, which may be reflected in lower prices and/or improved levels of service.

5.66. It may be that the number of franchisees potentially included in the collective bargaining arrangement will enable suppliers to achieve economies of scale in the supply of office products that are not available in respect of dealing with each group of franchisees separately.

5.67. Further, irrespective of any cost savings to suppliers which may be achievable through servicing a large number of customers through a single agreement, suppliers may be willing to charge less under the proposed arrangements in order to guarantee access to the volume of franchisees that the proposed arrangements provide. The ACCC accepts that this may well be the case in this matter.

5.68. Competitive pressures in the office products retail market(s) are likely to force Members to pass on some of the reduction in costs in the form of lower prices to consumers.

Transaction cost savings

- 5.69. While the Office Group submits that it anticipates the collective bargaining process will result in an efficient and cost effective means to negotiate more favourable terms and conditions for the acquisition of office supplies for its Members, it does not indicate how these efficiencies will be achieved, or the extent of any efficiency gains.
- 5.70. Mere assertions that transaction cost savings will be realised by buying collectively are not generally accepted by the ACCC. Rather, the ACCC expects the applicants to substantiate their claim with factual material demonstrating how such savings will be achieved. For example, evidence of transaction costs which are, or would be, incurred absent the collective bargaining arrangement and how these costs will be avoided or reduced by the proposed arrangements.
- 5.71. Nevertheless, the ACCC considers that generally transaction costs can be lower where a single negotiating process is employed, such as in a collective bargaining arrangement, relative to a situation where multiple negotiation processes are necessary. To the extent that the transaction cost savings do arise they are likely to constitute a public benefit.
- 5.72. As discussed below, competitive pressures in the office products retail market(s) are likely to force Members to pass on some of the reduction in costs in the form of lower prices to consumers.

Promotion of competition for the supply office products

- 5.73. As noted, the Office Group submits that market trends indicate a decline in small retailers operating in the market and that without the ability to collectively negotiate better terms and conditions, including prices, Members will find it more difficult to compete with larger retailers.
- 5.74. Corporate Express submits that in areas where competition is strong Office Group Members are able to compete effectively. Moreover, Corporate Express submits that in areas where competition is not as strong any cost savings accruing to Office Group Members as a result of the proposed arrangements will not necessarily be passed through to consumers.
- 5.75. As noted, the ACCC considers that the proposed arrangements will result in cost savings to Office Group Members by allowing the relevant goods to be provided by suppliers at a lower cost than would otherwise be the case. Similarly, the proposed arrangements are also likely to result in transaction cost savings.
- 5.76. While Corporate Express submits that many Members of the Office Group operate in local areas with no significant competition it is not clear on what basis Corporate Express has made this assertion. The ACCC's enquiries indicate that that the vast majority of Office Group Members operate in metropolitan areas or larger regional centres where they compete with other specialist office products retailers and/or larger mass merchandise retailers. In this environment, it could be expected that any cost savings accruing to Office Group Members as a result of the proposed arrangements would be reflected in the price and quality of service offered to customers.

5.77. As noted, the ACCC does accept that the proposed arrangements may well be an efficient and cost effective means of negotiating terms and conditions of supply with wholesalers, improving the viability of members businesses. This in turn would further promote competition between Office Group Members and other retailers, which will be reflected in the price and quality of service offered to customers.

Balance of public benefit and detriment

5.78. The ACCC may only grant authorisation if it is satisfied in all the circumstances that the proposed collective bargaining arrangement is likely to result in a public benefit that will outweigh any public detriment.

5.79. The ACCC considers that the proposed arrangements generate a small level of public detriment. The proposed arrangements will reduce the level of direct negotiation between individual Office Group Members and office products suppliers compared to the situation where each franchisor negotiates separately with suppliers.

5.80. However, the ACCC considers that the voluntary nature of the arrangements, the size of the bargaining group and existing competition between office product wholesalers and their customers, mitigate against the arrangements resulting in any significant change in bargaining power between Office Group Members and suppliers.

5.81. The ACCC considers that the proposed arrangements are likely to result in some benefit to the public. The proposed arrangements, by allowing Office Group Members terms and conditions of supply to be negotiated through a single process, may enable suppliers to provide office products to them at a lower cost than would otherwise be the case. Similarly, the proposed arrangements are also likely to result in transaction cost savings to Office Group Members and suppliers.

5.82. Given existing competition in the retail market(s) for office products, these cost savings are likely to be reflected in lower prices and/or improved quality of service for consumers.

5.83. Following consideration of the Office Group's application for authorisation the ACCC concludes that the public benefits likely to result from the proposed collective bargaining arrangements are likely to outweigh the anti-competitive detriment.

Length of authorisation

5.84. The Office Group seeks authorisation for six years. The ACCC proposes to grant authorisation to the proposed collective bargaining arrangement for a period of six years.

6. Draft determination

The application

- 6.1. On 12 July 2007 Office Choice, Office National and Office Product (the Office Group) lodged application for authorisation A91058 with the Australian Competition and Consumer Commission (the ACCC).
- 6.2. Application A91058 was made using Form B Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88 (1) of the Act for Office Choice, Office National and Office Products to collectively negotiate and/or appoint a representative to collectively negotiate on their behalf, the terms and conditions that office supplies are sold by suppliers to them and to their present and future franchisees and members.

The net public benefit test

- 6.3. For the reasons outlined in Chapter 5 of this draft determination, the ACCC considers that in all the circumstances the arrangements for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.

Conduct for which the ACCC proposes to grant authorisation

- 6.4. The ACCC proposes to grant authorisation for a period of six years to the Office Group to collectively negotiate on behalf of themselves and their current and future members the terms and conditions on which office supplies are sold to them by suppliers.
- 6.5. This draft determination is made on 8 August 2007.

Conduct not authorised

- 6.6. This proposed authorisation does not extend to any collective decision by current or future Office Group Members to not deal with any office products supplier.

Interim authorisation

- 6.7. The Office Group requested interim authorisation to commence collective negotiations with suppliers for the 2008-09 supply year. The ACCC granted interim authorisation on 8 August 2007.
- 6.8. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Further submissions

- 6.9. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

APPENDIX A

The Office Group's major suppliers

Acco Australia

Avery Dennison

Bantex Pty Ltd

BIC Australia Pty Ltd

Dalton Packaging Pty Ltd

Proctor and Gamble

Esselte Australia Pty Ltd

Fellowes Manufacturing Pty Ltd

Imation

Mitsubishi Pencil Australia

Jasco Pty Ltd

Pelikan Artline

Pentel Australia

Sanford Australia

PaperlinX Office

Staedtler Pty Ltd

3M Australia Pty Ltd

APPENDIX B

Major office products manufacturers/suppliers 2005¹²

3M	Fuji Xerox
Acco	Fuji Xerox Printers
Australian Envelopes	Hewlett Packard
Australian Paper	Hunter Leisure
Avery Dennison	Imation
Bantex	Jasco
BIC	Kyocera Mita
Brother	Lexmark
Camerons	Moore Business Systems
Canon	Notepad Manufacturers
Colby	Pelikan Quartet
Collins Debden	Penline Mon Ami
Cumberland Stationary	Pentel
Dalton Packaging	Quill Stationary Manufacturers
DATS	RTS Imaging
Epson	Sanford
Esselte	Tudor/Spicers Stationary
Faber Castell	Staedtler
Fellowes	Statman

¹² BIS Shrapnel, *The Australian Office Products Market*, 7th Edition, 2006-2008, at p.xii