



Australian
Competition &
Consumer
Commission

Assessment

Collective bargaining notification

lodged by

the Australian Newsagents' Federation

on behalf of certain Western Australian members

Date:

13 September 2007

Notification no. CB00003

Public Register no. C2007/1612

Summary

The Australian Competition and Consumer Commission does not object to the collective bargaining notification lodged by the Australian Newsagents' Federation on behalf of certain Western Australian members for those members to collectively negotiate contracts with West Australian Newspapers.

The small business collective bargaining notification process

Small business collective bargaining refers to two or more competitors collectively negotiating terms and conditions with a supplier or customer. Without protection, it can raise concerns under the competition provisions of the *Trade Practices Act 1974* (the Act).

Businesses can obtain protection from legal action under the Act for a small business collective bargaining arrangement by lodging a notification with the Australian Competition and Consumer Commission (ACCC). Provided the ACCC does not object to the notified arrangement, protection commences 28 days after lodgement.

The ACCC may object to a collective bargaining notification if it is satisfied that the proposed collective bargaining arrangement is not in the public interest (and in some cases, that the notified arrangement will substantially lessen competition).

The notification

Collective bargaining notification CB00003 was lodged by the Australian Newsagents' Federation (ANF). The notification was lodged on behalf certain Western Australian ANF members identified in the notification, being retail and distribution newsagents operating in Western Australia, for those member newsagents to collectively negotiate contract terms and conditions with West Australian Newspapers (WAN).

The collective bargaining notification process is transparent involving public registers and interested party consultation. The ACCC sought submissions from interested parties. Three submissions opposing the notification were received, from WAN, the Australasian Association of Convenience Stores (AACS) and the Queensland Newsagents Federation (QNF).

ACCC's assessment

The ACCC considers that the proposed arrangements may provide newsagents with greater input into their contracts.

The ACCC identified a number of features which mitigate against the potential for anti-competitive impact including the respective bargaining positions of Western Australian newsagents and WAN. Additionally, the arrangement is voluntary and does not involve potential boycotts.

On the information available, the ACCC is not satisfied that the detriments likely to arise from the notified arrangement would outweigh the identified benefits. Accordingly, it does not object to the notification.

1. Introduction

- 1.1. The ACCC is the independent Australian Government agency responsible for administering the Act. A key objective of the Act is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.2. In the context of the Act, collective bargaining involves two or more competitors agreeing to collectively negotiate terms and conditions (which can include price) with a supplier or a customer (known as the *target* or *counterparty*).
- 1.3. Arrangements will amount to collective boycott where the collective bargaining group agrees not to acquire goods or services from, or not to supply goods or services to, the counterparty unless it accepts the terms and conditions offered by the group.
- 1.4. Collective bargaining and collective boycott arrangements can have a detrimental effect on competition and consumers and are likely to raise concerns under the competition provisions of the Act.
- 1.5. The Act, however, allows businesses to obtain protection from legal action in relation to collective bargaining and collective boycott arrangements in certain circumstances. One way in which small business bargaining groups may obtain protection is to lodge a collective bargaining notification with the ACCC.
- 1.6. Provided the ACCC does not object to the notified arrangement, protection commences 28 days after lodgement. The immunity from a collective bargaining notification ceases three years from the date of lodgement.
- 1.7. The ACCC may object to a collective bargaining notification if it is satisfied that the proposed collective bargaining arrangement is not in the public interest (and in some cases where it believes the arrangement will substantially lessen competition).
- 1.8. The collective bargaining notification process is transparent involving public registers and interested party consultation. Where the ACCC proposes to object to a notification, it must first issue a draft objection notice setting out its reasons and providing an opportunity for interested parties to request a conference. If the ACCC issues a draft objection notice before the expiration of the 28 day statutory period, legal protection from the notification does not commence.
- 1.9. The collective bargaining notification process is intended for small businesses and a \$3 million limit (or higher amount as set by regulations) applies to the value of annual contracts expected to be entered into between each member of the collective bargaining group and the counterparty.

2. Background

The proposed arrangements

Notification CB00003

- 2.1. The ACCC considers that notification CB00003 was effectively lodged by the ANF on 10 September 2007. While a completed form was received by the ACCC on 15 August 2007 and the relevant payment received on 20 August 2007, on 10 September 2007 the ANF sought to replace the list of parties on whose behalf the notification was lodged. The replacement was sought to reflect oversights in the description of the relevant entities operating the member newsagencies. Accordingly, the ACCC does not consider the notification validly lodged until that date.
- 2.2. The notification was lodged by the ANF on behalf of certain of its Western Australian retail and distribution newsagent members. ANF members on whose behalf the notification was lodged are listed in an annexure to the notification and are discussed in greater detail at paragraph 2.18.
- 2.3. The ANF states the issues to be covered by the proposed negotiations will be:
 - late delivery of papers
 - home delivery fees
 - viability of delivery businesses
 - country businesses
 - OH&S issues
 - contracts
 - key performance indicators (KPI)
- 2.4. The ANF states that its preferred approach is towards performance based contracts which strive towards industry best practice while at the same time increasing productivity, sales and service.
- 2.5. The ANF states that it anticipates conducting extensive member forums and consultation with WAN with a view to formulating the essential elements of performance based contracts, including KPI's. The ANF proposes that KPI's be monitored on a monthly basis by representatives of WAN and newsagents.
- 2.6. The ANF notes that should KPI's not be met, there would need to be appropriate dispute resolution processes and ultimately, if the breach is considered serious, termination of agreements.
- 2.7. To this end, the ANF is currently developing a Newsagents Industry Code of Conduct, the primary objectives of which it submits are to encourage fair play

and open communication between industry participants as a means of avoiding disputes and to provide a simple, non legalistic dispute resolution mechanism for industry participants in the event of a dispute.

- 2.8. The ANF submits that the timeline for the introduction of any contractual arrangements negotiated would be flexible. The ANF propose that initially contracts would be for two years, allowing sufficient time for adequate monitoring and evaluation. The ANF states that if both parties agree on satisfactory completion of initial two year contracts, it would look to extend the term of contracts agreed.
- 2.9. The ANF estimates the value of gross sales of the largest newsagent in Western Australia to be approximately \$1.4 million per annum and average annual sales approximately \$500,000 per annum.
- 2.10. The ANF originally submitted that WAN had verbally agreed to participate in the proposed collective bargaining process. However, WAN has advised that it has not agreed to participate in the arrangements and that it in fact does not support the notification.

The newsagency industry¹

Industry background

- 2.11. Newsagents are (predominantly small) businesses engaged in the retailing (and in the case of newspapers, delivery) of newspapers, magazines, stationary supplies, greeting cards, confectionary and soft gambling products such as lottery tickets.
- 2.12. According to the ANF there are approximately 5000 newsagents in Australia. These businesses turn over approximately \$6.5 billion per annum and employ approximately 20,000 people. The ANF estimates that newsagents home-deliver 3 million newspapers, distribute newspapers and magazines to 25,000 retail subagents and serve 2.5 million customers in their shops daily.
- 2.13. A major function of newsagents is the retail and distribution of newspapers and magazines. In the eastern states, newsagents traditionally perform both retail and delivery functions.
- 2.14. However, WAN advises that it enters into separate Distribution Agreements and Shop Distribution Agreements with Western Australian newsagents.
- 2.15. Distributors are appointed by WAN to distribute publications within a defined area. WAN states that under its distribution agreements, distributors act as agents for it for the purpose of delivering the West Australian newspaper. WAN states that there is no second sale from the distributor to the customer. Rather, the 'sale' takes place between WAN and the customer.

¹ Information in this section is sourced from the ANF's notification; interested party submissions; the ANF's website at www.australiannewsagents.com.au; WAN's website at www.thewest.com.au; previous ACCC determinations in the industry; and Australian Competition Tribunal decisions in relation to the industry.

- 2.16. WAN enters into separate Shop Distribution Agreements with persons who run newsagency businesses without a delivery round attached. As well as making home deliveries, distributors will deliver to these shop fronts. Some distributors have both a Distribution Agreement and a Shop Distribution Agreement.
- 2.17. Accordingly, in respect of their contractual relationships with WAN, there are three basic types of newsagents in Western Australia:
- those that engage in delivery services, to homes and/or shop fronts, only (distribution newsagents)
 - those that engage in delivery services and run a shopfront business and
 - those that have a shop front business only (retail newsagents).
- 2.18. The ANF advises that of the 149 newsagents on whose behalf the notification was lodged, 95 percent are distribution newsagents and that these newsagents represent over 90 percent of all distribution only newsagents in Western Australia.
- 2.19. Some retail newsagents offer additional services beyond those that have been available traditionally, such as facilities for dry-cleaning, banking and photograph processing.
- 2.20. In addition, newspapers, magazines and other items sold by newsagents are also carried by other retail outlets such as supermarkets and convenience stores.

The Australian Newsagents Federation

- 2.21. The ANF is the peak industry body representing newsagents in Australia. It is comprised of a representative from each state, elected by members in their state, who form the ANF Board of Directors.
- 2.22. Membership is open to any Australian newsagent who meets the ANF definition of a newsagent which is:
- "A newsagent is a person or entity conducting a retail business primarily offering a comprehensive range of newspapers and magazines from a clearly identified newsagency business and/or a distribution business offering home and territorial delivery of a comprehensive range of newspapers and magazines."
- 2.23. While a national organisation, the ANF states that it ensures that issues that are important to members at a local level are dealt with at that level. State/Territory branches are under the guidance of a Committee, which is also elected by members in that State/Territory.

- 2.24. WAN operates as a newspaper publisher only in Western Australia where it publishes the West Australian, a daily newspaper which is published Monday to Saturday.
- 2.25. The West Australian was first published in 1833 and it now sells an average of approximately 200,000 copies Monday to Friday and 375,000 copies on Saturday.
- 2.26. WAN also publishes 22 regional newspapers and magazines in towns such as Kalgoorlie, Broome and Albany.
- 2.27. The WAN group also operates a regional radio network covering the northern half of Western Australia including Broome, Karratha, Port Hedland and Geraldton. The group also has a 50% interest in the Hoyts Cinemas Group which operates 55 cinemas in Australia and New Zealand.

Past authorisations

- 2.28. Traditionally, the distribution of newspapers and magazines in each state (except Tasmania) was controlled by a local newsagency council comprised of all significant newspaper and magazine publishers and the state newsagents' association. The newsagency councils' responsibilities included determining territories in which authorised newsagents had exclusive rights to distribute publishers' newspapers and magazines.
- 2.29. Because the system involved an agreement between competitors, concerns arose that the system breached the TPA. Newsagency councils therefore sought and obtained authorisations from the ACCC's predecessor, the Trade Practices Commission (the TPC).
- 2.30. Over the following years, the question of whether the authorised arrangements continued to be in the public interest was examined by both the TPC and the Australian Competition Tribunal (the Tribunal).
- 2.31. On 12 December 1997, the ACCC revoked several newsagency council authorisations, but granted substitute authorisations until 1 February 2001 to allow the parties time to formulate new arrangements consistent with the TPA.
- 2.32. On the 18 November 1998, the Tribunal made its decision in similar terms to the ACCC's decision.² However, it decided to grant a shorter transition period.
- 2.33. The newsagency council system therefore no longer operates to determine territories in which authorised newsagents have exclusive rights to distribute publishers' newspapers and magazines. Publishers now negotiate directly with newsagents for the distribution of newspapers and magazines.

² *Re: 7-Eleven Stores Pty Ltd & ors* [1998] ACompT 3 (18 November 1998).

- 2.34. Following the Tribunal's decision, the Federal Government asked the ACCC to consult with industry stakeholders and report to the Government as to the best way forward for the industry in regard to distribution arrangements.
- 2.35. The concerns raised by stakeholders during this consultation process gave rise to further applications for authorisation. The applications for authorisation differed from those previously considered by the ACCC and the Tribunal in that they related to proposals for newsagents to negotiate directly with publishers for the distribution of newspapers and magazines, albeit collectively.

Existing authorisation for newsagents to collectively bargain

- 2.36. Most recently, on 28 April 2004 the ACCC granted authorisation for the ANF, Queensland Newsagents Federation, and other state newsagents associations, including the Western Australian Accredited Newsagents Association, to negotiate with major publishers and distributors of newspapers and magazines, including WAN, on behalf of their members, subject to certain conditions.
- 2.37. The ACCC considered that the arrangements for which authorisation was ultimately sought gave rise to a small public benefit in that allowing newsagents to engage in collective negotiations with major publishers/distributors may redress an imbalance of bargaining power and provide newsagents with greater input into their contracts. The ACCC considered that this in turn may result in the negotiation of more commercially appropriate contract terms than were otherwise possible at the time.
- 2.38. The ACCC considered that the anti-competitive detriment generated by the proposed arrangements was limited by:
- the voluntary nature of the arrangements
 - the absence of any collective boycott activity
 - the limited number of distributors/publishers involved
 - the ability of distributors/publishers to refuse to participate and
 - the constraints imposed on participating newsagents by the existence of other possible distribution chains for publishers/distributors.
- 2.39. Relevant conditions of authorisation in accordance with which collective negotiations under the authorisation are required to take place include:
- Collective negotiations are to be conducted only with certain, identified, major publishers/distributors.
 - Newsagent are to form groups at no larger than state level (although a common negotiator, such as the ANF, across groups in separate states is permitted).

- Collective negotiations with the publishers of newspapers are to be in respect of the following terms and conditions only:
 - newsagents' commission and home delivery fees;
 - insert fees;
 - settlement discounts;
 - late paper fees;
 - split papers; and
 - terms of supply and rights of termination.
- 2.40. Authorisation did not extend to the 'messenger' system proposed by the ANF, which would allow the same bargaining agent to represent a number of individual newsagents in individual (rather than collective) negotiations with publishers/distributors.
- 2.41. Authorisation was granted for a period of five years, until 19 May 2009. The negotiation of any contracts after 19 May 2009, or the giving of effect to contracts negotiated prior to 19 May 2009 after that date was not authorised.
- 2.42. The ANF advised that its Western Australian members have not sought to collectively negotiate with WAN under the terms of the authorisation granted in 2004.

ACCC consultation

- 2.43. The ACCC sought submissions from interested parties potentially affected by the notified arrangement including WAN.
- 2.44. Submissions were received from WAN, the AACCS and the QNF. Each submission opposed the notification.
- 2.45. Copies of public submissions are available from the ACCC website (www.accc.gov.au) by following the 'Public registers' and 'Authorisations and notifications registers' links.
- 2.46. Issues raised in submissions are discussed in the ACCC's assessment of the notification at chapter 3 of this assessment.

Important dates

DATE	ACTION
20 August 2007	Notification and supporting submission first sought to be lodged.
20 August 2007	Public consultation process commenced.
31 August 2007	Closing date for submissions from interested parties.
7 September 2007	Closing date for response from the ANF to issues raised in public consultation process.
10 September 2007	Lodgement of collective bargaining notification completed.
13 September 2007	ACCC assessment of notified arrangement issued.
8 October 2007	Protection afforded by collective bargaining notification comes into effect.

Public benefit test

- 2.47. The ACCC may revoke a collective bargaining notification where the relevant test in section 93AC of the Act is satisfied.
- 2.48. For notifications that involve collective boycott, conduct within the meaning of s. 45(2)(a)(i) or (b)(i) of the Act (exclusionary provisions), or a collective arrangement under which competitors will negotiate prices, the ACCC may object to a collective bargaining notification if it is satisfied:
- that the benefit to the public that would result, or is likely to result, from the proposed arrangements does not outweigh the detriment to the public.
- 2.49. For notifications that do not involve collective boycotts (or other exclusionary provisions) or price fixing but involve conduct that may otherwise lessen competition within the meaning of s. 45(2)(a)(ii) or (b)(ii) of the Act, the ACCC may object to a collective bargaining notification if it is satisfied:
- that in all the circumstances the conduct would, or would likely result in a substantial lessening of competition, and
 - the conduct has not resulted or is not likely to result in a benefit to the public or the benefit to the public would not outweigh the detriment to the public constituted by any lessening of competition resulting from the conduct.

3. ACCC assessment

Affected markets

- 3.1. In considering the benefits and detriments associated with collective bargaining arrangements, it often assists to identify the markets affected. Where a market starts and finishes will be influenced by the degree of substitutability of different products and across different geographic areas.
- 3.2. Whilst it may not be necessary to precisely define all of the relevant markets, in this instance the ACCC has identified the following areas of competition that it considers to be relevant to this collective bargaining notification.
- 3.3. The ACCC's view is informed by 1994 and 1998 Tribunal decisions, and its own 2004 decision, in respect of applications for authorisation of previous arrangements for the distribution of newspapers and magazines.
- 3.4. In its 1994 decision, the Tribunal identified the market for the publication and distribution of metropolitan daily newspapers (which offer two products: news, information and entertainment; and advertising).³
- 3.5. In 1998, the Tribunal affirmed this view and further stated that it still considered that the relevant markets were State-wide in geographic terms (with regard to distribution). In 1994 the Tribunal had also stated that with regard to retailing, the markets were geographically characterised by a series of local markets.
- 3.6. The ACCC also adopted this view in its consideration of the ANF's 2004 application for authorisation and considers, for the purpose of the current notification, that the relevant areas of competition in relation to newspapers are likely to be those identified in these previous decisions.
- 3.7. For the purpose of considering the current notification it is also instructive to consider the areas in which the proposed parties to the collective bargaining arrangement – newsagents – compete and indeed with whom else they compete.
- 3.8. Relevant to the proposed arrangements, Western Australian newsagents supply distribution services to WAN for a fee. Each distribution newsagent has distribution rights for delivery of the West Australian newspaper to both homes/offices, retail newsagents and other retailers selling newspaper within a defined territory. Newsagents compete with each other for these distribution rights.
- 3.9. While the ACCC understands that newspapers in Western Australia are distributed primarily through distribution newsagents it is also relevant to note other potential distribution channels. For example, the ACCC understands that some publishers, such as in Canberra and Darwin, distribute their

³ *Re 7 Eleven Stores Pty Ltd* (1994) ATPR ¶41-357 at 42,672.

newspapers through parties other than newsagents (i.e. independent contractors).

- 3.10. Retail newsagents compete to supply many goods and service to the public. Relevant to the proposed arrangements, they compete to supply the West Australian to retail customers. Here newsagents compete with other newsagents as well as with other retailers such as supermarkets, petrol retailers and convenience stores.

The future with or without test

- 3.11. The ACCC uses the 'future-with-and-without-test' established by the Tribunal to identify and measure the public benefit and anti-competitive detriment generated by proposed arrangement.
- 3.12. Given that the proposed arrangements may raise concerns under the competition provisions of the Act, the ACCC considers that the proposed collective bargaining arrangement would be unlikely to occur in the absence of the legal protection afforded by the notification.
- 3.13. The ACCC notes the existing authorisation which provides for the collective negotiation by ANF Western Australian members with WAN. However, to date, collective negotiations have not been entered into under the terms of this authorisation. Further, the authorisation previously granted by the ACCC is limited in respect of the terms and conditions which can be collectively negotiated.
- 3.14. In addition, the existing authorisation is due to expire in May 2009. Accordingly, the continued giving of effect to contracts negotiated under the existing authorisation would not be afforded legal protection by the authorisation after May 2009. In particular, the giving of effect to the initial two year contracts contemplated by the ANF in the current application, would not be protected under the existing authorisation for their duration.
- 3.15. Accordingly, the ACCC has compared the benefits and detriments of the arrangements the subject of the ANF's notification with the existing circumstances, distribution and retail newsagents entering into individual agreements with WAN.

Effect on competition

Submissions

- 3.16. The ANF does not see the notified conduct as impacting negatively on existing markets. Rather, it submits, the proposed arrangements will enhance the market through better efficiencies and greater innovation.
- 3.17. The ANF submits that its members ability to negotiate with WAN individually is hindered by WAN's monopoly position. The ANF submits that WAN's monopoly means that it is not required to respond to market forces and can dictate terms to newsagents.

- 3.18. The ANF submits that the consequence is that its newsagent members are currently subjected to 'take it or leave it' contracts. The ANF states that it has sponsored significant cost benchmarking studies of newspaper deliveries to ascertain the true costs associated with conducting delivery services and that the results of these surveys will be shared with WAN through the proposed collective bargaining process to find common ground on any potential price increases, if required.
- 3.19. Both WAN and the AACS oppose the proposed arrangements.
- 3.20. WAN states its preference to continue working with distributors on an individual basis to address any issues arising pertinent to the distributors particular circumstances. WAN states that in its experience this flexible approach is better suited to addressing the different concerns of individual distributors in individual circumstances.
- 3.21. WAN submits that the proposed arrangements appear primarily aimed at increasing fees payable to distributors. WAN submits that any such increase will adversely impact on consumers.
- 3.22. The AACS states that convenience stores cannot obtain direct supply from publishers, but rather, are forced to deal with (distribution) newsagents. The AACS submits that, consequently, they are forced to share their commission on sales with newsagents. The AACS states that convenience stores should be able to negotiate directly with publishers.
- 3.23. The QNF noted the existing authorisation for Western Australian Newsagent to collectively bargain and expressed concerns that the proposed arrangements will fragment the collective bargaining regime nationally and may move into areas other than contemplated by the authorisation.

ACCC assessment

- 3.24. Under collective bargaining arrangements, competitors come together to negotiate terms and conditions, which can include price, with a supplier or customer.
- 3.25. Generally speaking, competition between individual businesses generates price signals which direct resources to their most efficient use. Collective agreements to negotiate terms and conditions can interfere with these price signals and accordingly lead to inefficiencies. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.
- 3.26. The ACCC has previously identified that the anti-competitive effect of collective bargaining arrangements constituted by lost efficiencies is likely to be more limited where:
- the current level of negotiations between individual members of the group and the proposed counterparties is low

- participation in the collective bargaining arrangement is voluntary
- there are restrictions on the coverage or composition of the group and
- there is no boycott activity.

Current level of negotiations

- 3.27. Where the current level of individual bargaining between members of a proposed bargaining group and the counterparty is low, the difference between the level of competition with or without the collective arrangements may also be low.
- 3.28. There are many distribution and retail newsagents situation throughout Western Australia. The proposed collective bargaining arrangements will aggregate the bargaining power of a significant number of, in particular, distribution newsagents.
- 3.29. WAN submits that it considers a flexible approach to dealing with distributors issues preferable to a 'one size fits all' approach. WAN submits, for example, that its existing arrangements with individual distributors accommodate the payment of additional allowances to those distributors who have difficult territories to service.
- 3.30. However, the ANF submits that newsagents are currently subjected to "take it or leave it" contracts.
- 3.31. Information provided to the ACCC by WAN suggests that, with the exception of the payment of the above noted additional allowances to those distributors who have difficult territories to service, all newsagents receive a common fee for distributing and selling newspapers.
- 3.32. This tends to support the ANF's assertion that, at least with respect to price, newsagents are generally offered standard form contracts. Consequently, while each newsagent enters into an individual contract with WAN, traditionally the level of negotiation that occurs in respect of the terms and conditions of those contracts is not necessarily great.
- 3.33. It appears, at least in respect of their dealings with WAN, that newsagents are price takers with little influence over distribution and delivery fees. This is particularly the case given the importance of the West Australian newspaper to newsagents business and that WAN is the sole supplier of the West Australian.
- 3.34. While a large volume of a retail newsagents revenue may be derived from sources other than sales of the West Australian, this is less likely to be the case for distribution newsagents, who make up the vast majority of newsagents party to the proposed arrangements. Indeed, the ANF submitted that typically newsagents involved in distribution only generate most, and in many cases almost all, of their business turnover from distribution of the West Australian.

- 3.35. Further, it is difficult to envisage any Western Australian newsagent, be they a retailer, distributor or both maintaining a successful newsagency business without access to the West Australian.
- 3.36. In contrast, WAN is a large, well resourced business whose negotiations with any individual newsagent would be conducted in the context of the other distribution options available to it.
- 3.37. These other distribution options include other newsagents, both within and outside the bargaining group. Further, the ACCC notes that some publishers, such as those in Canberra and Darwin, distribute their newspapers through parties other than newsagents (i.e. independent contractors).
- 3.38. The consequence of such an imbalance in bargaining positions is likely to be, as the standard prices offered by WAN to newsagents appears to indicate, the offering of standard form contracts with little room for individual negotiation other than where issues such as difficult distribution territories dictate.
- 3.39. While there is likely to be competition between newsagents, within and outside the bargaining group, and others, to be granted rights to particular distribution networks, the proposed arrangements do not appear to inhibit such competition. This is particularly the case given the voluntary nature of the arrangements, as discussed below.

Voluntary participation

- 3.40. 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.
- 3.41. Importantly in this respect, the lodging of a notification does not compel any party to participate in the collective bargaining process. Nor will it impact on existing arrangements between the parties unless the parties so choose.
- 3.42. The ACCC notes that participation in the proposed collective bargaining arrangement is voluntary. Individual newsagents will be free to individually contract with WAN if they, and WAN wish to do so.
- 3.43. The ACCC notes WAN's stated preference to continue to work with newsagents on an individual basis. WAN states that in its experience this approach gives it the flexibility to better address the concerns of individual distributors in individual circumstances.

- 3.44. Presumably, any newsagent that considers that any concerns it may have can be best addressed through individual negotiations will also remain of this view.
- 3.45. The proposed arrangements do not impact on WAN's ability to negotiate individually with newsagents either in addition to, or instead of, collective negotiations. Rather, the arrangements give WAN another option in respect of dealing with newsagents, should it chose to exercise this option.
- 3.46. Absent any boycott activity, as discussed below, WAN remains free to choose whether to participate in the proposed collective negotiation or negotiate through existing channels, irrespective of any wish by newsagents to collectively negotiate. Indeed, newsagents will have no choice but to negotiate individually with WAN if that is WAN's preference.
- 3.47. The ACCC is aware of recent communications ANF has had with Western Australian newsagents where it appears the ANF may have encouraged members not to provide WAN with information requested by it for the purposes of undertaking a study into distribution arrangements. Rather, it has been suggested, the ANF has encouraged its members to provide such information as is requested in this respect directly to it, presumably with the intention of making a common representation to WAN regarding newsagents concerns.
- 3.48. The information individual newsagents choose to provide to WAN and/or any other party is, subject to any relevant contractual obligations, a matter for each individual newsagent to consider. The ACCC would be concerned if a co-ordinated approach to refusing to supply such information directly to WAN was entered into. Such an approach may be inconsistent with the benefits later identified by the ACCC. Should any such conduct occur the ACCC has the power to review the notification. This issue is discussed further at paragraphs 3.90 to 3.91.

Coverage or composition of the group

- 3.49. 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 outside the group.
- 3.50. The collective bargaining arrangement described in the notification does not extend to a large number of retail newsagents in Western Australia. The vast majority of retail newsagents in Western Australia remain outside the group.
- 3.51. In addition, many businesses involved in the over the counter retail sale of newspapers are not newsagents. Such businesses include for example, convenience stores and supermarkets. These retailers also remain outside the bargaining group.
- 3.52. The proposed bargaining group does include a majority of Western Australian distribution newsagents. However, as noted at paragraphs 3.31 – 3.35, the

counterparty to negotiations WAN, has considerable bargaining power when negotiating with newsagents be it individually or collectively.

- 3.53. In particular, WAN is the sole supplier of the West Australian, the supply of which is all but essential to any distribution newsagents business. In contrast, WAN has other distribution options available to it.
- 3.54. Consequently, notwithstanding that the proposed bargaining group includes a significant number of Western Australian distribution newsagents, WAN's countervailing bargaining power constraints the extent to which newsagents could negotiate, for example, on prices and other terms and conditions, limiting the potential anti-competitive effects of the proposed arrangements

Boycott activity

- 3.55. 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.⁴

- 3.56. WAN notes the ANF's submission that it reserves its right to use the provisions of the Act which allow notification of proposed collective boycotts should collective negotiations fail. WAN strongly objects to any suggestion that collective negotiation could be supported by a collective boycott and considers that a collective boycott could generate significant public detriments.
- 3.57. The ACCC sought clarification from the ANF in relation to its comments regarding collective boycotts. The ANF confirmed that it is not seeking to obtain protection from legal action in relation to any collective boycott through the current notification. However, the ANF states that it reserves its right to lodge a further notification in respect of a collective boycott in the future should collective negotiations fail.
- 3.58. The notified arrangement does not provide for the ANF or its members to engage in collective boycott activity. Nor can it be assumed that the ACCC would not object to any future notification that may be lodged in respect of a collective boycott. As noted by the Tribunal, collective boycotts can result in substantial damage not only to the direct targets of them but also to the other upstream and downstream businesses, their employees and consumers.

Direct dealing between AACS members and WAN

- 3.59. The AACS states that convenience stores cannot obtain direct supply from publishers, but rather, are forced to deal with newsagents. The AACS submits that, consequently, they are forced to share their commission on sales with

⁴ *Re VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT 2, at paragraph 381

newsagents. The AACS states that convenience stores should be able to negotiate directly with publishers.

- 3.60. The ACCC notes that the AACS concerns primarily relate to WAN's distribution arrangements. Subject to legal requirements, the manner in which WAN chooses to distribute the West Australian is a matter for it to consider.
- 3.61. The current notification does not relate to the means by which WAN chooses to distribute the West Australian but rather, to the extent that it wishes to distribute through ANF distribution newsagent members, to the negotiation of terms and conditions under which such distribution will occur.
- 3.62. It is open to WAN to negotiate directly with AACS members, and to distribute publications to them by whatever means the parties agree if it so wishes, irrespective of the proposed arrangements.

Existing authorisation to collectively bargain

- 3.63. The QNF states the proposed arrangements will fragment the collective bargaining regime established under the existing authorisation and may move into areas other than contemplated by the authorisation.
- 3.64. The ACCC notes the ANF's advice that no Western Australian newsagents have sought to collectively bargain with WAN under the existing authorisation. Nor is the ACCC aware of any indication that any Western Australian newsagents will seek to engage in negotiations under the authorised arrangements in the future.
- 3.65. In any event, as noted at paragraph 3.14, the giving of effect to contracts of the type contemplated by the ANF in the current application, would not be protected under the existing authorisation for their duration.

Public benefits

Submissions

- 3.66. The ANF states that collective bargaining will alleviate some of the pressure exerted over newsagents as a result of existing contracts. The ANF contends that these contracts do not include market incentives which are crucial to health competition and efficient customer service. They submit that currently, contracts are driven by WAN rules and regulations and newsagents have continually found themselves economically disadvantaged and concerned about the viability of their businesses. Specifically, the ANF submits that WAN holds a monopoly in the market which means that it is not required to respond to market forces and can dictate terms to newsagents.
- 3.67. The ANF states that the recent introduction of new printing presses by WAN has resulted in persistent and chronic late deliveries to agents, resulting in business inefficiencies, lost subscriptions and newsagents having to work longer hours. The ANF contends that collective negotiation will broaden communication channels between the parties and help alleviate these concerns.

- 3.68. The ANF states that it proposes performance based agreements to drive overall efficiency across the industry. The ANF submits that the overall aim of negotiating performance based agreements is to reduce costs and streamline businesses.
- 3.69. The ANF submits that a fundamental element of performance based contracts will be KPI's, typically aimed at areas such as cost reductions, delivery and organisational processes, safety and quality.
- 3.70. The ANF contends that the inclusion of KPI's in agreements will create greater accountability on both distribution newsagents and WAN and improve overall services. The ANF states that this benefit will flow on to other newspaper retailers such as retail newsagents.
- 3.71. The ANF submits that it has undertaken benchmarking studies to ascertain the true costs of home delivery which could be used to formulate future distribution agreements. The ANF states that it proposes a commission increase from the current level of 18%–19% of the cover price of the West Australian to 25% per paper, which, it submits, is the standard rate received by newsagents nationally.
- 3.72. The ANF submits that reductions in commission prices paid to newsagents have had a significant effect on delivery newsagents with an attrition rate among distribution newsagents of 23%.
- 3.73. The ANF also wishes to address common concerns regarding the delivery of split edition newspapers.
- 3.74. WAN submits that has already instigated a review of its distribution arrangements with the objective of achieving the most effective and efficient distribution system and has indicated to distributors that it would welcome their, or the ANF's input into the review.
- 3.75. WAN submits that collective bargaining, rather than generating public benefits, will lack the flexibility inherent in the current distribution arrangements which have resulted in low cost, efficient and timely home delivery. Consequently, WAN states its preference to continue working with distributors on an individual basis to address any issues arising pertinent to the distributors particular circumstances. WAN states that in its experience this flexible approach is better suited to addressing the different concerns of individual distributors in individual circumstances.
- 3.76. Further, WAN submits that as the publisher of the West Australian it has every economic incentive to ensure its efficient and timely delivery to customers.
- 3.77. WAN states that the assertion that returns from it are threatening newsagents viability is also incorrect as, irrespective of these returns, Western Australian newsagents sell and distribute other newspapers and magazines and in many cases, soft gambling products, stationary, convenience foods and soft drinks.
- 3.78. WAN questions the ANF's assertion regarding reductions in home delivery fees. WAN states that while its split delivery fees, paid to account for situations where a publication is required to be split into two sections, have

remained constant there have been appropriate increases in handling fees paid to distributors. WAN submits that these increases have been well in excess of CPI. WAN contends that the return which it offers its distributors is fair and commensurate with the job that they do. WAN also questions the ANF's assertion that nationally, newsagents receive a standard commission of 25% of the cover price of the publication.

- 3.79. WAN submits that while the introduction of new printing presses has resulted in some late deliveries it is at an early stage of commissioning the presses. WAN states that while it is confident that efficiencies will improve it may be that the requirements placed upon distributors will change as a consequence of its changing production methods. WAN states that it expects the work flexibly with its distributors to resolve any issues and has invited them to suggest ways in which the current distribution arrangements could be improved.

ACCC assessment

- 3.80. Broadly, the ANF's public benefit arguments can be summarised as resulting from providing newsagents with an opportunity for increased input into contracts and improved fairness of contracts.

Increased input into contracts

- 3.81. Arguments based on improving bargaining positions relate to a change in the power relativities of the parties to a proposed collective agreement. A mere change in the amount of bargaining power is not in itself a public benefit. Rather, the ACCC will consider the likely outcomes resulting from the change in bargaining position arising from the proposed collective bargaining agreement.
- 3.82. Competition between buyers and sellers on terms and conditions of supply, through the process of negotiation, is likely to lead to an efficient outcome. In the past the ACCC has recognised that if buyer or sellers are constrained in their ability to provide input into those terms and conditions, the most efficient outcome may not be achieved.
- 3.83. Where this is the case, collective bargaining may help businesses by providing a mechanism through which they can provide greater input into contracts and be more commercially efficient.
- 3.84. The ACCC notes the conflicting views of ANF and WAN as to the suitability of collective bargaining as a means negotiating contracts between newsagents and WAN. On the one hand, the ANF submits that collective negotiations will result in contracts which more effectively take account of the needs of both sides and allow issues of common concerns to newsagents to be effectively addresses. Against this, WAN favours negotiation on an individual level to provide flexibility in negotiations to take account of particular circumstances.
- 3.85. As noted in the ACCC's consideration of the effects on competition of the proposed arrangements, there currently appears to be an imbalance in bargaining positions between WAN and individual newsagents. This is likely

to be reflected in the terms and conditions of supply negotiated.

- 3.86. Accordingly, it may be that improving newsagents bargaining position may increase the degree to which they have input into those terms and conditions. This improved input can provide a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their businesses, for example, addressing common contractual problems in a more streamlined and effective manner.
- 3.87. While the proposed arrangement may improve newsagents bargaining position, it is not likely to change the bargaining power relativities between the parties to such an extent that any existing imbalance in bargaining power would be reversed.
- 3.88. It would still be open to WAN to negotiate with newsagents on an individual basis if that is its preference. However, the proposed arrangements, by providing newsagents with a greater voice in negotiations, provide an opportunity for the issues highlighted by the ANF to be given greater consideration in negotiations and, if both sides consider it appropriate, for contract terms and conditions to be negotiated that take greater account of these issues.
- 3.89. Similarly, the proposed arrangements do not limit the ability to tailor collectively negotiated contracts to individual circumstances where appropriate.
- 3.90. The ACCC is aware of recent concerns expressed by both WAN and the ANF regarding the need for a co-operative and non-obstructive approach to negotiations, be they individual or the proposed collective bargaining arrangement.
- 3.91. The scope for a collective bargaining process to achieve positive outcomes for the bargaining group and the counterparty is maximised where both sides adopt a co-operative approach to the negotiating process. A less co-operative approach between the ANF and WAN is less likely to result in the negotiation of a collective agreement addressing the issues highlighted by the ANF. This in turn would mitigate against the public benefits of the proposed arrangements identified being realised.

Contractual fairness

- 3.92. The ANF submits that relative commission prices paid to newsagents have been declining in recent years and this has significantly affected some newsagents ongoing viability. The ANF states that it wishes to negotiate contract prices which, in its view, more fairly reflects the costs and value of the work performed by newsagents.
- 3.93. WAN submits that commission fees have increased steadily in recent years, outstripping inflation, and that the return it offers distributors is fair and commensurate with the job that they do.

- 3.94. The ACCC notes that the conflicting submissions from the ANF and WAN regarding whether commission rates have increased or decreased appear to stem from the ANF expressing these rates as a percentage of the cover price of the West Australian whereas WAN has expressed these rates as dollar values.
- 3.95. While many parties seeking to engage in collective negotiations claim that the proposed arrangements will lead to increased fairness, it is difficult for the ACCC to accept these claims in the absence of examples of extreme or unconscionable conduct in past negotiations.
- 3.96. While the ACCC has in the past taken the view that improved contract terms which would assist in maintaining the viability of efficient small business would be a public benefit, the ACCC requires clear evidence that the viability of efficient small businesses is being jeopardised and that allowing those small businesses to negotiate collectively will go some way towards ensuring their continued viability.
- 3.97. It is in WAN's best interest to maintain a viable home delivery network, and the ACCC would expect it to act in accordance with this interest, whether negotiating with newsagents collectively or individually.
- 3.98. While, the ACCC does not accept increased fairness of contracts of a public benefit of the proposed arrangements, to some extent arguments concerning increased input into contracts discussed above may well address the same issue.

4. Conclusion

- 4.1. The proposed collective bargaining arrangement involves an agreement on price and is therefore subject to the test described in paragraph 2.48.
- 4.2. Consistent with that test the ACCC will object where it is satisfied:
- that the benefit to the public that would result, or is likely to result, from the proposed arrangements does not outweigh the detriment to the public.
- 4.3. Having regard to the claims by the applicant and the issues raised by interested parties, the ACCC is not satisfied that the detriments likely to arise from the notified arrangement would outweigh the identified benefits.
- 4.4. The ACCC identified a number of features which mitigate against the potential for anti-competitive impact including the respective bargaining positions of Western Australian newsagents and WAN. Additionally, the arrangement is voluntary and does not involve potential boycotts.
- 4.5. Importantly, the ACCC considers that the proposed collective bargaining arrangement may provide newsagents with greater input into their contracts.

- 4.6. Accordingly, the ACCC does not object to notification CB00003. Immunity from legal action provided by notification CB00003 commences on 8 October 2007 and will expire three years after the date of lodgement (10 September 2010).
- 4.7. As with any notification, the ACCC may review this notification at a later stage should concerns arise.