



Australian  
Competition &  
Consumer  
Commission

# **Draft** Determination

## **Application for authorisation**

**lodged by**

**Queensland Newsagents Federation  
on behalf of the Newsagents Association of NSW and the ACT and  
the Victorian Association for Newsagents**

*to engage in collective negotiations on behalf of newsagents with the  
publishers and distributors of magazines*

**Date: 18 March 2009**

**Commissioners:** Samuel  
Kell  
Schaper  
Court  
Dimasi  
Martin  
Willett

**Authorisation no.: A91117**

**Public Register no.: C2008/2061**

## Summary

The ACCC proposes to grant authorisation to the Queensland Newsagents Federation, the Newsagents Association of NSW and ACT and the Victorian Association for Newsagents to engage in collective negotiations on behalf of member newsagents with major publishers and distributors of newspapers and magazines. The ACCC also proposes to grant authorisation to allow newsagents who are not members of the Associations to participate in the collective negotiations.

### 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

The Queensland Newsagents Federation (QNF) has applied for authorisation on behalf of itself, the Newsagents Association of NSW and the ACT (NANA) and the Victorian Association for Newsagents (VANA) to engage in collective negotiations, on behalf of newsagent members, with certain major publishers and distributors of newspapers and magazines.

The QNF is also seeking authorisation to negotiate on behalf of newsagents or groups of newsagents who are not members of the Associations but who ask to join in any collective bargaining.

### Background

On 28 April 2004, the ACCC granted authorisation to allow the Australian Newsagents Federation (ANF), the QNF and other state-based newsagent representative bodies to engage in collective negotiations, on behalf of newsagent members, with certain major publishers and distributors of newspapers and magazines.

This authorisation will expire on 20 May 2009.

### Public benefit

Overall, the ACCC is satisfied that the proposed arrangements are likely to generate public benefits to the extent that allowing newsagents to engage in collective negotiations with major publishers/distributors is likely to:

- assist in redressing an imbalance of bargaining power
- provide newsagents with greater input into their contracts.

### Public detriment

The ACCC considers that the anti-competitive detriment flowing from the proposed arrangements is likely to be limited due to:

- the voluntary nature of the arrangements

- the absence of any collective boycott activity
- the limited number of publishers who are targets of the proposed negotiations
- the limited level of individual negotiation currently occurring
- the ability of publishers/distributors to refuse to participate
- the constraints imposed on participating newsagents by the existence of other possible distribution chains for publishers/distributors.

### **Balance of public benefit and detriment**

The ACCC's role in applying the statutory test is to assess what benefits and detriments flow from the conduct if it were to take place. The ACCC does not discount the public benefits that accrue from collective negotiations because there is uncertainty about whether the conduct will actually be engaged in.

In the event that collective negotiations do occur between the participants and the targets, the ACCC is satisfied that the public benefits flowing from this conduct are likely to outweigh the public detriment.

### **Conditions**

The existing authorisation was granted subject to a number of conditions. In order to ensure that the public benefit of the proposed arrangements continues to outweigh the public detriments for the duration of the authorisation, the ACCC intends to impose the same conditions in the current authorisation.

Broadly, these conditions:

- limit collective negotiation to certain major publishers and distributors
- provide that newsagents wishing to participate must explicitly 'opt in' to the proposed arrangements
- limit negotiation groups to no broader than state-wide
- require that collective negotiation only occur in relation to certain core contract terms and conditions.

### **Length of authorisation**

The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

Consistent with the previous authorisation, the ACCC proposes to grant authorisation in respect of the proposed arrangements for a period of five years.

### **Interim authorisation**

In its application the QNF requested interim authorisation.

The ACCC has decided to grant interim authorisation to the proposed collective arrangements until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

### **The next steps**

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

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## List of abbreviations

ANF	Australian Newsagents' Federation
NANA	Newsagents Association of NSW & ACT
QNF	Queensland Newsagents Federation
VANA	Victorian Association for Newsagents
TNA	Tasmanian Newsagents' Association
WANA	West Australian Newsagents' Association

# 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 in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. 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 Once a draft determination is released, the applicant 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 applicant and interested parties to lodge written submissions commenting on the draft.
- 1.7 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.

## The application for authorisation

- 1.8 On 22 December 2008, the QNF lodged application for authorisation A91117 with the ACCC.
- 1.9 QNF is seeking authorisation on behalf of itself, VANA and NANA to engage in collective negotiations on behalf of newsagent members with certain major publishers and distributors of newspapers and magazines. The QNF proposes that these publishers/distributors should be:

### *Newspapers*

- News Ltd
- John Fairfax Holding Ltd/Rural Press Ltd
- APN News and Media Pty Ltd
- WA Newspapers-Holdings Ltd

### *Magazines*

- Gordon and Gotch Australia Pty Ltd
- NDD Distribution Pty Ltd
- ACP Publishing Pty Ltd
- Pacific Magazines Pty Ltd

1.10 In its original application, the QNF listed Universal Magazines Pty Ltd (Universal) as one of the potential targets. In response to a submission provided by Universal, QNF subsequently amended the application and removed Universal as a target.

1.11 The QNF proposes to negotiate on behalf of its newsagent members with publishers/distributors in relation to the following terms and conditions:

### *Newspapers*

- newsagents' commissions
- home delivery fees
- insert fees
- settlement discounts
- late paper fees
- split papers
- terms of supply and rights of termination
- codes of conduct
- dispute resolution
- matters incidental to all the above.

### *Magazines*

- variable commissions for shelf life
- supply allocations

- carrying of non-core product
- subscription delivery
- returns policy
- terms of supply and rights of termination
- dispute resolution
- matters incidental to all the above.

1.12 The QNF advises that the proposed negotiation process is voluntary. Members may elect to opt-out and negotiate individual contracts with the publishers and distributors.

### **Interim authorisation**

1.13 The collective bargaining arrangements are currently covered by authorisation A90804, which will expire on 20 May 2009. At the time of lodging the application for authorisation, the QNF requested interim authorisation.

### **Chronology**

1.14 Table 1.1 provides a chronology of significant dates in the consideration of this application.

**Table 1.1: Chronology of application for authorisation A91117**

<b>DATE</b>	<b>ACTION</b>
22 December 2008	Application for authorisation lodged with the ACCC.
23 January 2009	Closing date for submissions from interested parties in relation to the request for interim authorisation.
23 January 2009	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
20 February 2009	Submission received from QNF in response to interested party submissions.
18 March 2009	The ACCC granted interim authorisation
18 March 2009	Draft determination issued.

## 2. Background to the application

### The applicant

- 2.1 The QNF is the Queensland state association representing specialist newsagents. There are 820 newsagents in Queensland, of which approximately 420 are QNF members.<sup>1</sup>

*NANA*

- 2.2 There are 1700 newsagents in NSW and the ACT, of which approximately 480 are NANA members.<sup>2</sup>

*VANA*

- 2.3 There are 800 newsagents in Victoria, of which approximately 465 are VANA members.<sup>3</sup>

### The newsagency industry

- 2.4 Newsagents are predominantly small businesses engaged in the retailing (and in the case of newspapers, delivery) of newspapers, magazines, stationery supplies, greeting cards, confectionary and soft gambling products such as lottery tickets.

- 2.5 According to the Australian Newsagents' Federation (the ANF), there are approximately 5000 newsagents in Australia.<sup>4</sup> These businesses turn over approximately \$6.5 billion per annum and employ approximately 20,000 people.

- 2.6 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.

#### *Distribution arrangements – newspapers and magazines*

- 2.7 Broadly, the publishers of major newspapers usually distribute them to newsagents. The publishers of magazines generally use the services of a specialist distributor to place their products in newsagencies.

- 2.8 Newsagents are paid a portion of the cover price for each newspaper they sell. Other fees are payable to newsagents in relation to additional services such as the provision of home delivery.

- 2.9 Magazines are usually distributed to newsagents on the basis that those that are not sold will be returned to the publisher. Newsagents are paid a commission on their sales of magazines.

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<sup>1</sup> QNF application for authorisation A91117, supporting submission, 22 December 2008.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Australian Newsagents' Federation website, [www.anf.net.au](http://www.anf.net.au)

## Past authorisations

- 2.10 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.
- 2.11 As this system involved an agreement between competitors, concerns arose that the system breached the Act. Newsagency councils therefore sought and obtained authorisations from the ACCC's predecessor, the Trade Practices Commission (the TPC).
- 2.12 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).
- 2.13 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 Act.
- 2.14 On 18 November 1998, the Tribunal made its decision in similar terms to the ACCC's decision.<sup>5</sup> However, it decided to grant a shorter transition period.
- 2.15 The newsagency council system therefore no longer operates to determine territories in which authorised newsagents have exclusive rights to distribute publishers' newspapers and magazines. Publishers now negotiate directly with newsagents for the distribution of newspapers and magazines.
- 2.16 The concerns raised by stakeholders during this consultation process gave rise to further applications for authorisation. These application differed from those previously considered by the ACCC and the Tribunal in that they related to proposals for newsagents to collectively negotiate directly with individual publishers and distributors of newspapers and magazines.

## Existing authorisation

### Authorisation A90804

- 2.17 On 28 April 2004, the ACCC granted authorisation for the ANF, the QNF, and other state newsagent associations to collectively negotiate, on behalf of their members, with certain major publishers and distributors of newspapers and magazines.
- 2.18 The ACCC considered that the arrangements gave rise to a 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

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<sup>5</sup> *Re: 7-Eleven Stores Pty Ltd & ors* [1998] ACompT 3 (18 November 1998).

turn may result in the negotiation of more commercially appropriate contract terms than were otherwise possible at the time.

2.19 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
- the constraints imposed on participating newsagents by the existence of other possible distribution chains for publishers/distributors.

2.20 The application was granted subject to a number of conditions. Broadly, these conditions:

- limit collective negotiation to certain major publishers and distributors
- provide that newsagents wishing to participate must explicitly ‘opt in’ to the proposed arrangements
- limit negotiation groups to no broader than state-wide
- require that collective negotiation only occur in relation to certain core contract terms and conditions.

2.21 Authorisation was granted for a period of five years. This authorisation will expire on 20 May 2009.

### **Differences between the existing authorisation and the current application**

2.22 In some respects, the current application is broader in scope than the existing authorisation.

2.23 Table 1 sets out the arrangements that are currently authorised and the arrangements the current application seeks authorisation for.

**Table 1**

<i>Parties able to collectively bargain</i>	
<b>Existing authorisation</b>	<b>New application</b>
<ul style="list-style-type: none"> <li>▪ current and future members of the QNF, NANA and VANA</li> </ul>	<ul style="list-style-type: none"> <li>▪ current and future members of the QNF, NANA and VANA</li> <li>▪ any newsagent who is not a member of the relevant associations but asks to join in any</li> </ul>

	collective bargaining
<i>Categories of negotiation (newspaper publishers)</i>	
<b>Existing authorisation</b>	<b>New application</b>
<ul style="list-style-type: none"> <li>▪ newsagent commissions</li> <li>▪ home delivery fees</li> <li>▪ settlement discounts</li> <li>▪ insert fees</li> <li>▪ late paper fees</li> <li>▪ split papers</li> <li>▪ terms of supply and rights of termination</li> </ul>	<ul style="list-style-type: none"> <li>▪ newsagents commissions</li> <li>▪ home delivery fees</li> <li>▪ settlement discounts</li> <li>▪ insert fees</li> <li>▪ late paper fees</li> <li>▪ split papers</li> <li>▪ terms of supply and rights of termination</li> </ul>
<i>New categories of negotiation</i>	
	<ul style="list-style-type: none"> <li>▪ codes of conduct</li> <li>▪ dispute resolution</li> <li>▪ matters incidental to the above</li> </ul>

### **3. ACCC consultation**

3.1 The ACCC sought submissions from more than 20 interested parties potentially affected by the application, including newspaper and magazine publishers and distributors, industry bodies and small business organisations. The ACCC received submissions from:

- ACP Magazines
- Gordon and Gotch
- NDD Distribution Pty Ltd
- Fairfax Limited
- News Limited
- Tasmanian Newsagents' Association
- Universal Magazines
- West Australian Newsagents Association

3.2 The views of QNF and interested parties are outlined below. Copies of public submissions are available from the ACCC website ([www.accc.gov.au](http://www.accc.gov.au)) by following the 'Public Registers' and 'Authorisations Public Registers' links.

#### **QNF's supporting submission**

3.3 The QNF's submissions on the public benefits and detriments of the proposed arrangements are discussed in Chapter 5.

#### **Interested party submissions**

3.4 The interested party submissions can be broadly grouped into three categories in terms of the level of public benefit they consider will be generated from the arrangements:

- no objection to the application
  - Gordon and Gotch
- conditional support for the application
  - News Limited
- opposed to the application
  - Fairfax Media Limited
  - ACP Magazines Ltd
  - NDD Distribution Pty Ltd

- The West Australian Newsagents' Association
- Tasmanian Newsagents' Association

### **No objection to the application**

#### *Gordon and Gotch*

- 3.5 Gordon and Gotch note that the Applicants:
- have not sought authorisation for collective boycott activity
  - do not appear to be seeking to expand the matters currently authorised.
- 3.6 As the application appears to extend the operation of the 2004 authorisation on the same terms and conditions, Gordon and Gotch neither support nor oppose the application.
- 3.7 If the Applicants, the ACCC or another party seeks to vary the conditions of the 2004 authorisation, Gordon and Gotch requests that they be given sufficient notice in order to make a submission in relation to any such variation.

### **Conditional support for the application**

#### *News Limited*

- 3.8 News Limited submits that any interim authorisation granted to the QNF should reflect precisely the terms of the current authorisation.
- 3.9 News Limited considers that Condition 2 (which permitted the associations to represent only those members that opted-in to the collective negotiations) needs to be reflected in any interim or final authorisation granted.

### **Submissions opposed to the application**

#### *Fairfax Media Limited*

- 3.10 Fairfax is concerned that the QNF's application seeks to create rigidities and an inflexible distribution system. Fairfax submits that it needs to be able to distribute news and magazines to customers in an efficient and cost effective manner. If customers are dissatisfied with the service they are obtaining from an individual newsagent distributor, the system should be flexible enough to respond to this.
- 3.11 The QNF's application states that "supermarkets have greater bargaining power than newsagents and are able to extract more favourable terms from the publishers". Fairfax considers that the QNF's description of the position of distributors is somewhat misstated, as newsagents receive approximately 50% of a supermarket's commission when a Fairfax publication is sold in the territory secured by a newsagent distributor.
- 3.12 In addition, Fairfax notes that payment structures between Fairfax (and other publishers) and newsagents can vary to some extent based on performance.

- 3.13 Fairfax submits that the application is too imprecise and broad in scope, particularly as it may encourage newsagents to engage in collective conduct outside the boundaries of the authorisation, in breach of the TPA.

*ACP Magazines Ltd*

- 3.14 ACP does not, at present, consider it appropriate to engage in collective negotiations with newsagents on either a state or regional basis, as envisaged by the proposed authorisation. ACP submits that in order to maximise efficiencies in its business, it seeks to adopt nationally consistent distribution policies and procedures, including through consistent terms and conditions as part of its standard agreements with newsagents.
- 3.15 However, ACP is willing to, and does, engage in negotiation with individual newsagents to vary these conditions. ACP submits that, contrary to QNF's claims in the application, it does not simply operate on a "take it or leave it" basis.
- 3.16 ACP would be concerned if QNF, NANA or VANA were authorised to collectively negotiate on behalf of newsagents who are not members of the relevant bodies but who ask to join in any collective bargaining. ACP suggests that an implicit requirement of an authorisation is that there is certainty as to who enjoys the benefit of the immunity provided by authorisation. ACP submits that the application, in its current form, does not provide a means of identifying whether a newsagent is part of the collective negotiation that is covered by the authorisation.
- 3.17 ACP does not agree with the description of the magazine industry that is set out in the application. In particular, ACP does not consider that publishers and distributors such as ACP Magazines "have substantial market power and are able to dictate unfavourable terms and conditions ... with newsagents."
- 3.18 ACP submits that like all publishers and distributors, it is highly incentivised to operate in an environment that promotes a healthy and robust newsagent channel. In ACP's view, such a channel is best achieved through continued emphasis on cost reduction, retailer development and consumer demand. ACP submits that geographically-based collective negotiation will not make a meaningful contribution to the continued development of such a channel.

*NDD Distribution Pty Ltd*

- 3.19 NDD is involved in discussions with ACP, Gordon and Gotch and the ANF with a view to developing a Non-Prescribed Voluntary Code of Conduct. NDD submits that the purpose of the Code is to review newsagency channel problems and provide supply chain solutions – from publisher to retailer.
- 3.20 As a result, NDD considers it is impractical for magazine distributors to work with other state based newsagency representative bodies or agree to collective bargaining approaches.
- 3.21 NDD suggests that the Applicants consult with the ANF, as representatives for newsagents nationally, to ensure they are included as part of the process.

*The West Australian Newsagents' Association*

- 3.22 WANA is concerned that the application, as currently expressed, may potentially allow a number of newsagents to become included in the collective negotiations by default rather than by active choice.
- 3.23 WANA doubts the ability of each of the associations that are a party to the authorisation to effectively represent the interests of newsagents not domiciled in their respective states.
- 3.24 WANA considers it likely that the target entities will not support or participate in collective bargaining, requiring the QNF to pursue other remedies, such as an application for authorisation to collective boycott.
- 3.25 WANA contends that by offering newsagents who are not members of the relevant associations the opportunity to join in any collective bargaining, the application dilutes the value of association membership.

*Tasmanian Newsagents' Association*

- 3.26 The TNA submits that the application in its current form may result in newsagents other than those named being included in the collective bargaining negotiations by default. Further, the TNA is concerned that any default inclusion of a specific newsagent in the collective bargaining process
- 3.27 The TNA prefers the National Code of Conduct process that is being developed as this offers a voluntary opt-in approach while also generating efficiency gains through mutual self regulation.

*Applicant's response to interested party submissions*

- 3.28 The QNF submits that:
- As details of the voluntary Code of Conduct have not been made public, consideration of the Code is not possible at this time. If a Code is eventually agreed upon then it could provide valuable input as part of collective negotiations under the authorisation. It is not a replacement for the authorisation.
  - The QNF has sought to include newsagents who are not members of the relevant associations in the proposed collective bargaining because there are differences between newsagency associations in relation to stances on some issues. As a result, at times newsagents will choose to be part of different groups, which was highlighted in the Bill Express matter. In that instance QNF and NANA took a very different attitude to the ANF and many ANF members joined the NANA-convened class action.
  - ACP's approach of favouring national policies over collective bargaining on a regional basis is indicative of a one size fits all attitude that has led to inconsistent results.
  - The QNF rejects ACP's assertion that newsagents have countervailing market power to the magazine distributors, but would be happy to discuss this issue with

ACP on behalf of its members and anyone else who wishes to join a collective bargaining group.

- The QNF notes Fairfax's comments and submits that it cannot see how the application could lead to inflexibilities in distribution systems. The QNF submits that the inflexibility and rigidities are the hallmark of the publishers; Fairfax wants totally centralised policies that do not take account of regional or functional differences, especially in regional Australia.

## 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 A91117

- 4.2 The QNF lodged application for authorisation A91117 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.<sup>6</sup>
- 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.<sup>7</sup>
- 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.

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<sup>6</sup> *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.

<sup>7</sup> *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.<sup>8</sup>

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.<sup>9</sup>

## **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.<sup>10</sup>

4.10 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**

4.11 The ACCC can grant authorisation for a limited period of time.<sup>11</sup>

## **Conditions**

4.12 The Act also allows the ACCC to grant authorisation subject to conditions.<sup>12</sup>

## **Future and other parties**

4.13 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<sup>13</sup>

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<sup>8</sup> 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.

<sup>9</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

<sup>10</sup> 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.

<sup>11</sup> Section 91(1).

<sup>12</sup> Section 91(3).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>14</sup>

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<sup>13</sup> Section 88(10).

<sup>14</sup> Section 88(6).

## 5. ACCC evaluation

5.1 The ACCC's evaluation of the QNF's proposed collective 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 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 In the past, the ACCC has identified two markets that are affected by the proposed collective bargaining arrangements:

- the supply by newsagents of distribution services to publishers of newspapers and magazines, where newsagents compete with each other and with other suppliers
- the retail supply of goods and services including newspapers and magazines to consumers, in which newsagents compete with one another and other retailers

5.4 The ACCC considers that these markets remain relevant to its assessment of the current proposed collective bargaining arrangements.

### The counterfactual

5.5 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'. This involves a counterfactual of identifying the conduct likely to occur if authorisation is not granted.

#### *Applicant's view*

5.6 The QNF submits that the relevant counterfactual is the status quo. The QNF considers that under the status quo, newsagents are faced with either:

- an oligopsony, i.e. a market characterised by a small number of buyers for its services, each of whom has substantial buying power; or
- a monopoly, as each supplier has a product that each newsagent must have.

#### *ACCC's view*

5.7 The ACCC notes that the existing authorisation provides for the collective negotiation by QNF, NANA and VANA with certain publishers and distributors. However, to date, 'not a lot of successful collective bargaining' has taken place under the terms of the authorisation.<sup>15</sup>

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<sup>15</sup>QNF application for authorisation A91117, supporting submission, 22 December 2008.

5.8 The ACCC considers that without authorisation of the proposed collective negotiations, the negotiations will not proceed. This would mean a continuation of the current situation, where there are standard form contracts between newsagents and publishers with some scope for input from individual newsagents and/or state representative bodies.

## **Public benefit**

5.9 The QNF notes that in its 2004 application, the Applicants submitted a long list of public benefits flowing from the proposed collective bargaining negotiations:

- ensuring the continued viability of small business operations, particularly in rural and regional areas, thus ensuring competition in those areas
- fostering business efficiency generally
- assistance to the efficiency and competitiveness of small business by:
  - facilitating the availability of information on operational and pricing issues
  - limiting transaction costs in negotiation of supply agreements
  - freeing up small business operators to focus on increasing the competitiveness of their businesses
- fostering industrial harmony
- promotion of equitable dealings in the market
- providing countervailing/bargaining power to small business in dealing with large and powerful suppliers
- promotion of industry cost savings, potentially resulting in contained or lower prices at all levels in the supply chain

5.10 In addition, the QNF submitted the following public benefits are relevant to its current application:

- “transaction cost savings
- protection from legal challenge – authorisation will often cover conduct that has been occurring from some time. However, this conduct was always at risk and targets can use this as a bargaining tactic.
- collective discussions – these must be better than hostility.”

5.11 The public benefits that the ACCC has considered for the purposes of this assessment are outlined below.

## **Increased input into contracts**

5.12 The QNF submits that newsagents have very little choice in relation to the newspapers that they stock. For example, each major city in Queensland is dominated by one major

metropolitan daily newspaper. It is the same situation with magazines as each distributor has covers that each newsagent much have.

- 5.13 The QNF submits that there is a clear disparity of bargaining power between newsagents and publishers/distributors. This has resulted in the imposition of lower commission rate and unfavourable terms and conditions than would be the case if the targets lacked market power.
- 5.14 ACP Magazines does not agree with the QNF's submission that publishers and distributors "have substantial market power and are able to dictate unfavourable terms and conditions ...with newsagents." ACP magazines submits that:
- ... newsagents enjoy significant countervailing power to magazine publishers and distributors due to the importance of the newsagent channel for many high volume as well as specialty magazine titles that are not readily able to be sold through other volume, range and display space restricted distribution channels such as the supermarket and convenience channels.
- Further countervailing power arises from the fact that newsagents enjoy considerable discretion as to the placement and presentation of individual magazine titles, which can have significant impact on sales volumes of magazine titles.
- 5.15 The ACCC accepts that most newsagents are small businesses that are negotiating with large suppliers such as News Limited or Fairfax: companies that are well resourced and have significant experience negotiating in a commercial environment. These large companies could be expected to have significant bargaining power in negotiations with individual newsagents.
- 5.16 The level of bargaining power enjoyed by the larger publishers is slightly mitigated by the fact that newsagents provide the major distribution channel for newspapers. However, publishers who are dissatisfied with their dealings with newsagents have alternative distribution channels such as supermarkets, petrol retailers and other convenience stores. It is not clear what alternative sources of supply exist for the newspapers and magazines that underpin a newsagent's business.
- 5.17 The bargaining power of major newspaper publishers is further entrenched by the fact that most of the highest selling newspapers are metropolitan newspapers that are specific to a particular region. This suggests that many newspapers carry significant reader loyalty and therefore may be less directly substitutable; for example, a consumer in Brisbane is unlikely to accept substitution of News Ltd's *Courier Mail* with Fairfax's *The Age*. Newsagents unable to source the major metropolitan daily papers from News Ltd or Fairfax would therefore be likely to lose a significant number of customers.
- 5.18 Generally, one way in which small businesses can seek to redress an imbalance in bargaining power is to bargain collectively. This may allow small businesses to achieve competitive parity with larger businesses, enabling them to achieve more appropriate commercial outcomes through, for example, greater input into contract terms and conditions.
- 5.19 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. The ACCC accepts that providing small businesses with the ability to provide greater

input into the terms and conditions of their contracts with larger businesses may also reduce the likelihood of unfair contractual terms being imposed.

- 5.20 In this case, the ACCC considers that allowing newsagents to collectively bargain may assist them to achieve more appropriate commercial outcomes. In this regard, the ACCC notes the QNF's submission that, as a result of the current authorisation, the newsagent associations have had some input into the standard form contracts.
- 5.21 It would still be open to publishers/distributors to negotiate with newsagents on an individual basis if that is their preference. However, the proposed arrangements, by providing newsagents with a greater voice in negotiations, provide an opportunity for the issues identified by the QNF, such as oversupply, to be given greater consideration. If both sides consider it appropriate, contract terms and conditions can be negotiated that take greater account of these issues.
- 5.22 The proposed arrangements do not limit the ability of publishers to tailor collectively negotiated contracts to individual circumstances where appropriate or to deal directly with individual newsagents.

### **Transaction cost savings**

- 5.23 Generally, there are transaction costs associated with contracting. These 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. The ACCC considers that to the extent that these transaction cost savings do arise they are likely to constitute a public benefit.
- 5.24 The information available to the ACCC suggests that newsagents are generally offered standard form contracts with little scope to vary terms and conditions. However, there may still be costs associated with entering into such contract in the form of professional advice or obtaining the information necessary to make an informed choice. A collective may be able to consolidate and share such costs.
- 5.25 The ACCC considers that the proposed collective bargaining arrangements are likely to result in transaction cost savings.

### **Industrial harmony**

- 5.26 The QNF submitted that the collective bargaining arrangements are likely to foster industrial harmony. However, the QNF has not provided any evidence to support this claim.
- 5.27 The ACCC notes that, generally, publishers and distributors do not support the application. In this context, the ACCC does not accept that the proposed collective arrangements will lead to improved industrial harmony.

### **ACCC conclusion on public benefits**

- 5.28 The ACCC considers that the proposed arrangements will deliver public benefits by addressing the current bargaining imbalance between newsagent and major publishers/distributors. Collective bargaining arrangements is likely to provide

newsagents with greater bargaining power, thereby allowing them more effective input into contractual terms and conditions.

## **Public detriment**

- 5.29 Under collective bargaining arrangements, competitors come together to negotiate terms and conditions, which can include, price, with a supplier or customer.
- 5.30 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 lead to inefficiencies. The capacity of new entrants to compete for the rights to undertake the business of existing market participants subject to the collective bargaining agreement also has implications for how competition is affected. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.
- 5.31 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
  - there is no boycott activity.

## **Current level of negotiations**

- 5.32 Where the current level of individual bargaining between members of a proposed bargaining group and the target is low, the difference between the level of competition with or without the collective arrangements may also be low.
- 5.33 The QNF submits that the current level of negotiations between newsagents and the targets is low. The targets offer newsagents standard form contracts on a ‘take it or leave it’ basis with little, if any, scope to vary the commission rates and home delivery rates newsagents receive for supplying newspapers and magazines to customers.
- 5.34 There appears to be some opportunity for individual newsagents to vary the terms and conditions of supply where the publisher/distributor considers it appropriate. However, in general, the ACCC considers that the level of bargaining between individual newsagents and publishers/distributors is low.
- 5.35 Given this, the ACCC considers that the difference in the level of competition amongst newsagents with or without the collective bargaining arrangements is likely to be small.

## **Voluntary participation in the collective bargaining arrangements**

- 5.36 The QNF advises that participation in the proposed collective bargaining arrangements is voluntary. Individual newsagents remain free to negotiate directly with the targets or other suppliers of newspapers and magazines at any time.
- 5.37 In this case, the proposed collective bargaining group has two components:
- current and future members of the QNF, NANA and VANA. The QNF is proposing an opt-out mechanism for members, i.e. these newsagents will be automatically represented in any collective bargaining that takes place unless they notify the relevant association that they do not wish to be included.
  - any newsagents who are not members of the relevant associations but ask to join in any collective bargaining. These newsagents must opt-in by notifying the relevant association that they wish to be part of the collective negotiations.
- 5.38 The existing authorisation requires newsagent members of the relevant associations to elect to participate in any collective bargaining. The current application proposes to transition from an opt-in to an opt-out process for members of the associations. In this particular case, the ACCC can see administrative efficiencies in an opt-out process for members. It is important that such a process does not adversely affect newsagent members.
- 5.39 The ACCC is prepared to allow an opt-out process where current and any future members are advised in writing that by joining the QNF, NANA or VANA they are agreeing to participate in collective bargaining unless they explicitly opt-out.
- 5.40 The ACCC considers that it is the responsibility of the newsagency associations to ensure their members are fully informed of this change in process. This issue is addressed by Condition C5, which is outlined in Chapter 6. The ACCC would welcome further submissions from interested parties on this issue.
- 5.41 In addition, it is unclear whether the QNF, NANA and VANA are proposing to charge non-members a fee for the services they provide as part of any collective bargaining process. The ACCC expects that if fees were to be charged, this would be clearly disclosed to non-members prior to the commencement of any collective negotiations. The ACCC seeks further information from the QNF in relation to this issue.

## **Coverage or composition of the group**

- 5.42 The ACCC considers that where the size of the bargaining group is restricted, any anti-competitive effect is likely to be smaller having regard to the smaller area of trade affected and the competition provided by those suppliers outside the group.
- 5.43 While the organisations seeking authorisation are state-based and do not have a national presence, the QNF's proposal that any newsagent may join in the collective bargaining means that the group has the potential to significantly increase in size.
- 5.44 In order to mitigate this potential detriment, the ACCC considers it appropriate to impose conditions that set clear limits on the coverage, composition and representation

of the bargaining groups and also the scope of negotiations. Conditions C1 to C4 are set out in Chapter 6.

### **Boycott activity**

- 5.45 Collective boycotts can remove the discretion of the target to participate in collective bargaining and to accept the terms and conditions (including price) offered by the collective bargaining group. This is because the target, faced with the threat of withdrawal of supply, will be under increased pressure to accept the terms and conditions offered by the collective bargaining group.
- 5.46 Collective boycotts can also significantly disrupt downstream and upstream businesses. The Tribunal has found that collective boycotts have the potential to inflict significant damage upon the target of the boycott, its employees, consumers, and also, the boycotters themselves.<sup>16</sup> The Tribunal considered that the threat of a boycott – even without it ultimately being engaged in – is likely to come at a high cost to society.
- 5.47 The ACCC considers that collective boycotts can significantly increase the potential anti-competitive effects of collective bargaining arrangements and it is unlikely to allow protection from legal action to such conduct in most cases.
- 5.48 The QNF 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 Act. Additionally, if such conduct did occur, the ACCC would investigate.

### **Potential for collusive anti-competitive conduct beyond that authorised**

- 5.49 Generally, the ACCC would be concerned if, under the guise of the authorised arrangement, other issues were collectively determined between the authorised parties. For example, the ACCC would be concerned if newsagents raised issues of market sharing during any discussion with the targets.
- 5.50 However, in this regard the ACCC notes that the collective bargaining arrangements have been authorised for five years and there is no evidence to suggest that they have been or are likely to be utilised in any way contrary to the authorisation.

### **ACCC conclusion on public detriments**

- 5.51 The ACCC considers that there are several features of the proposed arrangements which limit the potential detriment. In particular, the level of competition amongst newsagents with or without collective bargaining is likely to be small. In addition, the proposed arrangements do not involve collective boycott activity.
- 5.52 The ACCC considers that the current coverage of the bargaining group is limited to newsagents in NSW, Queensland and Victoria that are represented by the relevant associations, but notes the potential for the group to increase in size.

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<sup>16</sup> *VFF Chicken Meat Growers' Boycott Authorisation* [2006] AcompT9 at paragraph 442.

## **Balance of public benefit and detriment**

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

5.54 In the context of applying the net public benefit test at section 90(8)<sup>17</sup> of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>18</sup>

5.55 The ACCC is satisfied that that the proposed arrangement is likely to generate public benefits by giving newsagents greater bargaining power, allowing them more effective input into contractual terms and conditions.

5.56 The ACCC considers that the proposed conduct is likely to result in limited public detriments.

5.57 On balance, the ACCC considers the public benefit is likely to outweigh the public detriment.

## **Likelihood of collective bargaining occurring**

5.58 A number of the submissions received by publishers and distributors suggested that it was unlikely that they would engage in collective negotiations with the proposed bargaining groups. In this context, the ACCC recognises that collective bargaining may not occur with all or any of the targets.

5.59 The ACCC's role in applying the statutory test is to assess what benefits and detriments flow from the conduct if it were to take place. The ACCC does not discount the public benefits that accrue from collective negotiations because there is uncertainty about whether the conduct will actually be engaged in.

5.60 In the event that collective negotiations do occur between the participants and the targets, the ACCC is satisfied that the public benefits flowing from this conduct are likely to outweigh the public detriment.

## **Length of authorisation**

5.61 The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

5.62 In this instance, the QNF seeks authorisation for five years.

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<sup>17</sup> The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

<sup>18</sup> Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.

5.63 Consistent with the previous authorisation, the ACCC proposes to grant authorisation in respect of the proposed arrangements for a period of five years.

## 6. Draft determination

### The application

- 6.1 On 22 December 2008, the QNF lodged application for authorisation A91117 with the Australian Competition and Consumer Commission (the ACCC).
- 6.2 Application A91117 was made using Form B of the Trade Practices Regulations 1974. The application was made under subsection 88(1) of the Act to:
- make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
  - 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
- 6.3 In particular, the QNF seeks authorisation on behalf of itself, NANA and VANA to represent newsagent members in collective negotiations with certain major publishers and distributors.

### The net public benefit test

- 6.4 For the reasons outlined in Chapter 6 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.
- 6.5 The ACCC is satisfied that the arrangements for which authorisation is sought are likely to result in such a benefit to the public that the arrangements should be allowed to take place.
- The ACCC therefore **proposes to grant** authorisation to application A91117.

### Conduct for which the ACCC proposes to grant authorisation

- 6.6 The ACCC proposes to grant authorisation to the Queensland Newsagents Federation, the Newsagents Association of NSW and the Victorian Association for Newsagents to engage in collective negotiate on behalf of member newsagents with major publishers and distributors of newspapers and magazines. The ACCC also proposes to grant authorisation to allow newsagents who are not members of the Associations but ask to participate in any collective bargaining.

- 6.7 The ACCC proposes to grant authorisation to the arrangements for a period of five years.
- 6.8 This proposed authorisation is subject to the conditions outlined below.
- 6.9 Further, the proposed authorisation is in respect of the arrangement as it stands at the time authorisation is granted. Any changes to the arrangement during the term of the proposed authorisation would not be covered.
- 6.10 This draft determination is made on 18 March 2009.

## **Conditions**

### **Condition C1**

**Collective negotiations on behalf of newsagents are to be conducted only with the following publishers/distributors and their subsidiaries (if any):**

- **News Ltd**
- **John Fairfax Holdings Ltd**
- **APN News and Media Pty Ltd Publishing Pty Ltd**
- **WA Newspapers-Holdings Ltd**
- **Gordon and Gotch Australia Pty Ltd**
- **NDD Distribution Pty Ltd**
- **ACP Publishing Pty Ltd**
- **Pacific Magazines Pty Ltd**

### **Condition C2**

**Collective negotiations are to be conducted on behalf of members of the associations named above. Publishers/distributors who decide to participate in any collective negotiations are to be provided with a list of participating newsagents before negotiations commence.**

### **Condition C3**

**Newsagent members are to form groups at no larger than state level. Where appropriate, regional groups can be formed.**

### **Condition C4**

**Collective negotiations with the publishers and distributors of magazines are to be in respect of the following terms and conditions only:**

- **variable commissions for shelf life**

- **supply allocations**
- **carrying of non-core product**
- **subscription delivery**
- **returns policy**
- **terms of supply and rights of termination.**

**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**
- **terms of supply and rights of termination.**

**To the extent that collective negotiations take place with a view to establishing a Code of Conduct, these negotiations should 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**
- **terms of supply and rights of termination.**

#### **Condition C5**

**The QNF, NANA and VANA must notify their newsagent members in writing of the new opt-out process for collective negotiations. They must notify members of the following:**

- **That as members of the association, they will automatically be included in any collective bargaining that occurs.**
- **That they have the option of removing themselves from the bargaining group if they explicitly notify the relevant association of their wish to opt-out.**

**New members must be advised of these matters in writing at the time of joining the association. In addition, existing members of the associations must be advised in writing every time they renew their membership.**

### **Interim authorisation**

- 6.11 At the time of lodging the application, the QNF requested interim authorisation.
- 6.12 On 18 March 2009, the ACCC granted interim authorisation to allow the QNF, NANA and VANA to collectively negotiate on behalf of member newsagents with major publishers and distributors of newspapers and magazines. The ACCC also granted interim authorisation to these associations to represent newsagents who are not members of the Associations but ask to participate in any collective bargaining.
- 6.13 Interim authorisation was granted subject to the conditions outlined above.
- 6.14 Should the QNF, VANA or NANA wish to engage in collective negotiations in accordance with the terms of this interim authorisation, they must comply with all conditions set out above, including the requirement to notify their members of the new opt-out process, as set out in Condition C5.
- 6.15 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**

- 6.16 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.