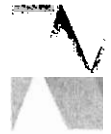


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**Australian  
Newsagents'**  
FEDERATION LTD

5 May 2009

Dr Richard Chadwick  
General Manager  
Adjudication Branch  
Australian Competition and Consumer Commission  
GPO Box 3131  
Canberra ACT 2601

**Collective Bargaining Notification on behalf of certain Western Australian distribution newsagents**

Dear Dr Chadwick

Please find enclosed a notification of collective bargaining form from the Australian Newsagents' Federation (ANF) made on behalf of certain Western Australian distribution newsagents, being members of the ANF, members of the Western Australian Distribution Association (WADA) or newsagents none of whom are members either the ANF or WADA (Independents).

Included is a completed Form GA, associated Annexures (A-G) which include lists of participating newsagents, an attachment (Attachment 1) in addition to this coverletter provided to help address the net public benefit claims, and a cheque for the required application fee of \$1000.

The ANF requests that the list of personal details of participating newsagents not be placed on the ACCC Public Register. The ANF and a number of participating newsagents hold concerns that the personal and business information contained within the attached annexures may be misused by third party entities for unsolicited marketing and other purposes.

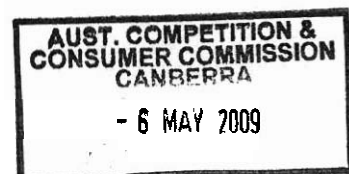
Yours sincerely

Anthony Matis CPA  
Chief Executive Officer



[www.anf.net.au](http://www.anf.net.au)

AUSTRALIAN NEWSAGENTS' FEDERATION LIMITED  
Level 3, 33 - 35 Atchison Street, St Leonards NSW 2065  
Telephone +61 2 8425 9600 • Facsimile +61 2 8425 9699  
ABN 14 008 295 038



## **Attachment 1**

### **PUBLIC BENEFIT & FACTORS LIMITING ANTI-COMPETITIVE DETRIMENT**

#### **Current low levels of bargaining between newsagents and the proposed counterparties**

The use of standard form contracts by major newspaper publishers, including WAN, is the norm in their commercial dealings with newsagents.

The applicants acknowledge that standard form contracts are an accepted method used to control transaction costs and that in limited instances these contracts are varied where the WAN deem it appropriate. However, these arrangements allow newsagents little opportunity to bargain or have effective input into the terms of these major commercial relationships.

Accordingly, the low level of individual bargaining and resultant low level of competition among newsagents would suggest that the current level of competition among newsagents with or without the bargaining arrangements in place may also be low.

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

As previously stated in this application the proposed collective negotiations on behalf of ANF, WADA and Independent newsagents is on an opt-in basis, demonstrated by the written consent forming part of Annexure A, B & C from newsagents authorising collective negotiation on their behalf.

The requirement to opt-in provides a reliable means of ensuring that no party is involved in the negotiation without having first given express and deliberate consent, thus assuring the voluntary nature of the proposed arrangement.

Collective negotiations are less likely to be anti-competitive where they are voluntary and allow businesses to negotiate individually thus providing a degree of ongoing competition, lessening the anti-competitive impact of the arrangement.

#### **The ability of the WAN to refuse to participate**

The proposed arrangements allow WAN to refuse to participate in collective negotiations. Should proposed collective negotiations appear anti-competitive, detrimental or unfavourable to the WAN there is no obligation to participate.

As a result, the proposed negotiations, in the absence of any coercive elements, must provide some benefits, perceived or actual, to both the WAN and participating newsagents in order for meaningful discussions and subsequently agreed amendments to occur.

#### **Lack of Collective Boycott Action**

The applicants again state that this application does **not** seek to apply in any way for authorisation under the TPA to conduct collective boycott activity.

No collective boycott provisions or collective boycott action is proposed and no issue of collective boycott is the subject of this application.



The applicants are acutely aware that the threat of collective boycott activity whether perceived or actual can irredeemably undermine confidence in the negotiation process or of any subsequent outcomes.

In the absence of collective boycott activity, the WAN cannot be compelled to negotiate and therefore has greater discretion over the extent of its participation in negotiations and the degree of the terms and conditions it would otherwise offer.

### **Group composition and constraints imposed on newsagents by the existence of other possible distribution networks for the WAN**

While the bargaining group consists of the majority of Western Australian distribution newsagents, Western Australian retail newsagents and other retailers such as supermarkets and convenience stores remain outside the bargaining group.

The applicants believe that the WAN in its capacity as sole supplier of the West Australian, provides the WAN with considerable bargaining power when negotiating with newspaper distributors.

The applicants submit that the existence of alternatives to newsagents for the provision of physical secondary distribution services for distribution of the West Australian newspaper, allows a degree of demand side substitution by the WAN.

The capacity of the WAN to substitute the services of an alternate distribution network, such as independent contractors, would likely limit the level of public detriment arising as a result of the proposed collective bargaining process.

Consequently, despite the significant number of Western Australian distribution newsagents involved in the proposed arrangement, the WAN's countervailing bargaining power constrains the extent to which distributors could negotiate, thus limiting the potential public detriment of the proposed arrangements.

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

The ACCC has previously stated its concern regarding the potential for unauthorised conduct to occur under the semblance of an authorised arrangement.

In respect of the WAN, collective bargaining conduct through a previous ANF authorisation and notification has shown there is no evidence to suggest that there has been or is likely to be conduct contrary to or beyond the authorisation granted.

The applicants are keen to avoid the accusation of anti-competitive misconduct and are sensitive and aware of the undermining influence the perception of collusion or anti-competitive conduct may have on the proposed negotiations.

The applicants do not concede that the proposed arrangements, has or is likely to have the effect, of substantially lessening competition. The application is made as a matter of caution and on the basis that regardless of the legal position, it is contended that what is proposed is in the public interest.

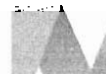
## **PUBLIC BENEFIT**

### **Increased input into contracts and redressing imbalances in bargaining power**

In its 2007 Notification assessment (CB00003), the Commission stated that while the bargaining position of newsagents in relation to the WAN may be improved by the proposed arrangements, it is not likely to reverse the relative bargaining powers.<sup>1</sup>

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<sup>1</sup> ACCC (2007) Assessment CB00003, 3.87. p. 20.



Further, the Commission noted that allowing newsagents to participate in collective bargaining is likely to enable those newsagents to have greater input into the terms and conditions of their contracts with the WAN and may produce more commercially efficient and streamlined outcomes which address common contractual issues and account for the needs of both sides.<sup>2</sup>

The applicants contend that the validity of increased contractual input as a public benefit argument is increasingly pertinent, due to the lack of any previous collective negotiation, a deterioration of the industry whether perceived or actual, and a collective desire to address commonly identified issues and problems.

### **Transaction Cost Savings**

Where a single negotiation process is utilised in preference to a multitude of negotiation processes, potential transaction costs savings can occur.

If as a result of negotiation an agreed contractual amendment is identified as proving mutually beneficial to newsagents and the WAN, the collective adoption of such an amendment can consolidate and share the associated costs in varying such agreements.

Such an arrangement would not limit the ability to tailor collectively negotiated contracts to individual circumstances where appropriate.

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<sup>2</sup> As above, 3.81-3.91 p,19-20.

# Form GA

Commonwealth of Australia

*Trade Practices Act 1974 — subsection 93AB (1)*

## NOTIFICATION OF COLLECTIVE BARGAINING

This form is to be completed by applicants proposing to engage in collective bargaining arrangements.

In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission take into account in assessing their notification.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

Protection provided by the notification extends only to the collective bargaining arrangements described in the form.

To the Australian Competition and Consumer Commission:

Notification is hereby given under subsection 93AB (1) of the *Trade Practices Act 1974*:

- to make, or propose to make, a contract containing a provision of the kind referred to in paragraph 45 (2)(a) of the *Trade Practices Act 1974*; or
- to give effect to a provision of a contract where the provision is of the kind referred to in paragraph 45 (2)(b) of the *Trade Practices Act 1974*.  
(Strike out if not applicable)

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

### Section A – general information

#### 1. Applicant

- (a) Name of the applicant:  
(refer to Direction 1)

A (name) and B (name) on behalf of the members of Australian Newsagents Federation (ANF) as listed in annexure "A" hereto. A (name) and B (name) themselves being members of ANF.

C (name) and D (name) on behalf of the members of West Australian Distributors Association (WADA) as listed in annexure "B" hereto. C (name) and D (name) themselves being members of WADA.

E (name) and F (name) on behalf of those persons (including E (name) and F (name)) listed in annexure "C" none of whom are members of ANF or WADA.

CB00072

The persons referred to in annexures A, B and C hereto are referred to as the "Applicants".

- (b) Description of business carried on by the applicant:  
(refer to Direction 2)

Each of the Applicants conducts the business of:

(i) Home/shop distribution of "the West Australian" published by West Australian Newspapers Ltd (WAN); or

(ii) a retail newsagency and home/shop distribution of "the West Australian"; as indicated on annexures A, B and C hereto.

- (c) Is the representative of the applicant lodging the notice a trade union, an officer of a trade union or a person acting on the direction of a trade union?  
(refer to Direction 3)

No.

- (d) Address in Australia for service of documents on the applicant:

(At one address of A, B, C, D or F)

**2. Lodged on behalf of**

- (a) Provide names and addresses of all persons on whose behalf the notification is lodged and who propose to participate in the collective bargaining arrangements:  
(refer to Direction 4)

See annexures A, B and C hereto.

- (b) Provide proof of the consent of each of the persons listed at 2 (a) above agreeing to the lodgement of the notification on their behalf:  
(refer to Direction 5)

See annexure D hereto.

- (c) Provide the following information relating to a notification:

- (i) Does this notification relate to a notification previously lodged with the Australian Competition and Consumer Commission and for which a concessional fee is claimed?

No.

- (ii) details of the first-mentioned notification, including but not limited to:  
(A) the name of the applicant; and  
(B) the date the notification was said to be lodged; and  
(C) if known or applicable — the registration number allocated to that collective bargaining notification.

.....  
.....  
.....

## Section B – collective bargaining arrangements

### 3. Proposed collective bargaining arrangements

- (a) Provide: the name and address of the target; the name, position and telephone contact details of an appropriate contact at the target; and a description of the business carried on by the target:

*(refer to direction 6)*

West Australian Newspapers Limited 50 Hasler Road, Osborne Park, WA 6017 contact: Mr Peter Bryant, Company Secretary, phone: 08 9482 3138.

- (b) Provide a description of the goods or services which the participants of the collective bargaining arrangements (listed at 2 (a) above) propose to supply to or acquire from the target:

The Applicants acquire from WAN “the West Australian” newspaper published daily from Monday to Saturday each week. The Applicants supply to WAN the services of:

(i) The home/shop distribution of “the West Australian”; or

(ii) A retail newsagency and home/shop distribution of “the West Australian”;

- (c) Do the participants of the proposed collective bargaining arrangements (see 2 (a) above) reasonably expect to make one or more contracts with the target about the supply to or acquisition from the target of one or more of the goods or services (listed at 3 (b) above)?

*(refer to direction 7)*

Yes.

- (d) In relation to (c) above, provide details of the basis upon which that expectation is held including details of past contracts with the target:

The dates of current contracts between the Applicants and WAN are listed in annexures A, B and C hereto. The Applicants reasonably expect to make amended contracts with WAN on the following basis:

(i) In 2008 proceedings were commenced by WAN in the Supreme Court of Western Australian (number CIV 1146 of 2008 – “the Proceedings”) against Applicants Nightview Nominees Pty Ltd, Kenneth Gordon Dreghorn, Jennifer Anne Dreghorn, Robert Wade Dreghorn and Pricilla Anne Dreghorn in which orders were sought as to the proper construction of the Distribution Agreements between WAN and its Distributors as to how and when the rates for delivery of newspapers could be reviewed and varied and for orders varying those Agreements under section 87 of the Trade Practices Act 1974 (“the Act”) as a consequence of alleged unconscionable conduct under section 51AC of the Act;

(ii) On 11 March 2009 the trial of the proceedings was adjourned (see annexure E – orders of the Honourable Justice Newnes dated 11 March 2009) on the terms agreed by the parties to the proceedings at mediation (see annexure F – Interim Terms Agreed at Mediation):.....

(iii) As set out in annexure F: “2. The intention is for representatives of each of WAN on the one hand and all of the Distributors of WAN’s publications on the other, to meet at the times and generally in accordance with the procedure set out in the document attached for the purposes of:.....

(a) discussing and negotiating the terms of all of the distribution agreements; and.....

(b) discussing and negotiating WAN’s proposals for the review of fees paid to the Distributors”.....

(e) Do the participants of the collective bargaining arrangements (listed at 2 (a) above) reasonably expect that contractual payments between the target and each participant will not exceed \$3 million (or any other amount prescribed by regulation) in any 12 month period, and on what basis?  
*(refer to direction 8)*

No.....

(f) In relation to (e) above provide an estimation of the contractual payments expected between the target and each participant in relation to the goods and services (listed at 2 (a) above):

See annexure G.....

(g) Provide a description of the collective bargaining arrangements proposed including, but not limited to:

- (i) the process by which participants propose to undertake collective bargaining with the target; and
- (ii) the type of terms and conditions expected to be negotiated in collective bargaining arrangements (for example: price; non-price conditions of supply such as contract periods etc); and
- (iii) details of any dispute resolution procedure (if any) proposed between participants throughout the collective bargaining process; and
- (iv) details of any dispute resolution procedure (if any) proposed between participants and the target throughout the collective bargaining process; and
- (v) details of any dispute resolution procedure (if any) proposed to deal with disputes throughout the term of contracts entered into with the target; and
- (vi) details of proposed commencement and duration of contracts to be negotiated with the target:  
*(refer to direction 9)*

Please see annexure F hereto. The types of terms and conditions expected to be negotiated are: (i) Home delivery fees; (ii) Handling fees; (iii) Delivery



fees; (iv) Assignment of contracts; (v) Severability of provisions; (vi) Incentive schemes to reward Distributors for increasing circulation; and (vii) Insert charges.

The contracts will be subject to standard expert determination dispute resolutions procedures.

- (h) Identify any parts of the proposed collective arrangements described in 3 (g) which relate to possible price agreements:

Please see paragraphs 3 (g) (i), (ii), (iii), (vi) and (vii) above.

- (i) Identify any parts of the proposed collective arrangements described in 3 (g) which relate to a possible or proposed exclusionary provision(s), including but not limited to:

- (i) the nature of the proposed or possible exclusionary provision(s) (for example an agreement to withhold supply of the relevant goods or services to the target); and

- (ii) the circumstances in which the collective bargaining participants would engage in the exclusionary provision(s), including but not limited to:

- (A) details of the events that would trigger any such activity; and  
(B) details of the process that would be followed in undertaking any such activity; and  
(C) details of any proposed period of notice to be given to the target prior to the commencement of such activity; and  
(D) details of any dispute resolution procedure to be applied or offered to the target prior to the commencement of such activity:

*(refer to direction 10)*

There are no proposed exclusionary provisions

## Section C – public detriments

### 4. Market definition

Provide a description of the market(s) in which the goods or services described at 3 (b) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):  
*(refer to direction 11)*

The Applicants adopt the information set out at paragraphs 2.11 – 2.18, 2.21 – 2.41 and 3.1 – 3.10 (subject to the necessary changes arising from the information in the annexures hereto and historical changes which have been corrected) of the assessment by the ACCC of notification CB00003 as follows:

“2.11 Distributors are predominantly small businesses engaged in the delivery of newspapers. Retail newsagents also retail magazines, stationary

supplies, greeting cards, confectionary and soft gambling products such as lottery tickets.

2.12 According to the ANF there are approximately 187 distributors in Western Australia. These businesses turn over approximately \$91.5 million per annum collectively. The ANF estimates that distributors home-deliver approximately 82,800 newspapers Monday – Friday and 114,000 Saturday newspapers, distribute newspapers to approximately 1980 retail subagents and that retail newsagents serve on average 85% of Western Australians aged +14 years 1-2 a week.

2.13 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.

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 businesses 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, WADA and the Independents advise that of the distributors on whose behalf the notification is lodged, these represent over 76% percent of all distributors in Western Australia.

*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 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 on average of approximately 200,000 copies Monday to Friday and 350,000 copies on Saturday.

2.26 WAN also publishes 21 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 Headland and Geraldton.

*Past Authorisations.*

2.28 Traditionally, the distribution of newspapers and magazines in each state (except Tasmania) was controlled by local newsagency council comprised of all significant newspaper and magazine publishers and the state newsagents' association. The newsagency council' 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.<sup>2</sup> 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.

2.34 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.
- Newsagents 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.

*[The ANF has lodged a new authorisation application to extend the previous authorisation granted in 2004. The new application is currently*

*with the ACCC for their consideration.]*

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).<sup>3</sup>

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 arrangements – distributors – compete and indeed with whom else they compete.

3.8 Relevant to the proposed arrangements, Western Australian distributors supply distribution services to WAN for a fee. Each distributor 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. Distributors 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 Canberra and Darwin, distribute their newspapers through parties other than newsagents (i.e. independent contractors).

3.10 Retail newsagents compete to supply many goods and services 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 WADA is an unincorporated and informal group of distributors.

## 5. Public detriments

- (a) What will be the likely effect of the notified conduct on the prices of the goods or services described at 3 (b) above and the prices of goods or services in other affected markets? In answering this question please provide facts and information to support the claims made:

No collective boycott provisions or collective boycott action is proposed and no issue of collective boycott is the subject of this notification.

The Applicants adopt what was said in paragraphs 3.25 of notification CB00003 as follows:

“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.”

- (b) What other detriments may result from the notified conduct? In answering this question please provide facts and information to support the claims made:

See Attachment 1.

## Section D – public benefits

### 6. Public benefit claims

- (a) Provide details of the public benefits resulting or likely to result from the proposed arrangement. In answering this question please provide facts and information to support the claims made:

The Applicants adopted the substance of what was said at paragraph 3.26 of notification CB00003 as follows:

“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*

Until the Mediation referred to in paragraph 3(d) above the level of negotiation between the parties has been low and on an individual basis. As set out in annexure F hereto it is proposed that collective bargaining will address any perceived imbalance of bargaining position (referred to in paragraphs 3.27 – 3.39 of notification CB00003) and facilitate a resolution of all issues between the parties without inhibiting competition between newsagents.

#### **Voluntary participation**

The Applicants adopt the substance of what was said in paragraphs 3.40 – 3.42 and 3.45 and 3.46 of the notification CB00003 (subject to the information in Annexures A, B and C hereto, in this regard as follows:

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 business 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 distributors will be free to individually contact with WAN if they, and WAN wish to do so.



3.45 The proposed arrangements do not impact on WAN's ability to negotiate individually with distributors either in addition to, or instead of, collective negotiations. Rather, the arrangements give WAN another option in respect of dealing with distributors, should it choose 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 distributors to collectively negotiate. Indeed, distributors will have no choice but to negotiate individually with WAN if that is WAN's preference."

*Coverage or composition of the group*

The Applicants adopt the substance of what was said in paragraphs 3.49 to 3.54 of the notification CB00003 (subject to the information in Annexures A, B and C hereto) in this regard as follows:

"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 any retail newsagents in Western Australia. The 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 distributors. Such businesses include, for example, convenience stores and supermarkets. These retailers also remain outside the bargaining group.

3.52 The proposed bargaining group includes a majority of Western Australian distributors. However, as noted at paragraphs 3.31 – 3.53, the counterparty to negotiations WAN, has considerable bargaining power when negotiating with newspaper distributors 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 distributor's 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 distributors, WAN's countervailing bargaining power constrains the extent to which distributors could negotiate, for example, on prices and other terms and conditions, limiting the potential anti-competitive effectiveness of the proposed arrangements."

The Applicants also adopt the substance of what was said in paragraphs 3.80 – 3.91 and paragraphs 4.1 to 4.5 of the notifications CB00003 (subject to the information in Annexures A, B and C hereto) in this regard as follows:

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 views of ANF, other representatives and WAN as to the suitability of collective bargaining as a means of negotiating contracts between distributors and WAN. The ANF, the other representatives and WAN submit that collective negotiations should result in contracts which more effectively take account of the needs of both sides and allow issues of common concern to effectively take account of the needs of both sides and allow issues of common concerns to distributors to be effectively addressed. WAN is also prepared to negotiate 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 distributors. This is likely to be reflected in the terms and conditions of supply negotiated.

3.86 Accordingly, It may be that improved distributors 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 distributors 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 revised.

3.88 It would still be open to WAN to negotiate with distributors on an individual basis if that is its preference. However, the proposed arrangements, by providing distributors with a greater voice in negotiations, provide an opportunity for the issues highlighted by the ANF and other representatives 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 arrangements.

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 other representatives and WAN is less likely to result in the negotiation of a collective agreement addressing the issues highlighted by the ANF and other representatives. This in turn would mitigate against the public benefits of the proposed arrangements identified being realised.

**Section E - authority**

**7. Contact details**

- (a) Name, contact telephone number and address of person authorised by the notifying parties to provide additional information in relation to this application:

(To include persons A, B, C, D, E and F)

(refer to direction 12)

Dated..... 22 April 2009 .....

Signed by/on behalf of the applicant

(Signature)

(Full Name)

(Organisation)

(Position in Organisation)

Dated..... 28<sup>th</sup> April 2009 .....

Signed by/on behalf of the applicant

(Signature)

(Full Name)

(Organisation)

(Position in Organisation)

Dated 22 April 2009

Signed by/on behalf of the applicant

Teresa Borwick  
(Signature)

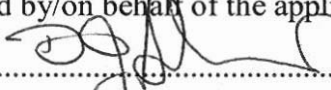
TERESA WINIFRED BORWICK  
(Full Name)

WADA  
(Organisation)

CHAIRPERSON  
(Position in Organisation)

Dated 24<sup>th</sup> April 2009

Signed by/on behalf of the applicant

  
(Signature)

~~HADA~~ DOUGLAS JOSEPH SHAW  
(Full Name)

WADA  
(Organisation)

COMMITTEE MEMBER  
(Position in Organisation)

Dated 23 April 2009

Signed by/on behalf of the applicant

PL Martin  
(Signature)

PHILIP LEONARD MARTIN  
(Full Name)

INDEPENDENT AGENT  
(Organisation)

(Position in Organisation)

Dated..... 21/4/2009.....

Signed by/on behalf of the applicant

.....  
(Signature)

ANDREW GANNON  
.....  
(Full Name)

INDEPENDENT AGENT.....  
(Organisation)

.....  
(Position in Organisation)

## **DIRECTIONS**

1. Where the notice is given by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
2. Describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which notification is given.
3. A collective bargaining notification can not be lodged by a trade union or a trade union representative.
4. Where the applicant will be a participant in the collective bargaining arrangements (rather than a representative of participants) the name of the applicant must also be included. Where those persons are corporations, list the corporation's name and address.
5. The applicant, in lodging a notification on behalf of others, must obtain their consent to do so and provide proof of that consent.
6. Where the target is a corporation, provide the corporate name.
7. The collective bargaining notification process is only available to parties that reasonably expect to make one or more contracts with the target about the supply or acquisition of goods or services the subject of the notification.
8. The value of the contract to be collectively negotiated between the target and each participant is not to exceed \$3 million (or such other amount as is prescribed by the regulations) per participant in any twelve month period.
9. To the extent that the collective bargaining arrangements have been reduced to writing, provide a true copy of the arrangement. To the extent that the collective bargaining arrangements have not been reduced to writing, provide a full and correct description of the key terms that have not been reduced to writing.
10. In simple terms an exclusionary provision exists where the proposed contract, arrangement or understanding is made by businesses (at least two of whom are competitors) for the purpose of preventing, restricting or limiting the supply of services to particular persons or classes of persons by all or any of the parties to the contract, arrangement or understanding.

In the context of collective bargaining, an exclusionary provision(s) may include contracts, arrangements or understandings (whether currently in existence or to be made or arrived at during the term of the notification) between collective bargaining participants to limit or restrict their dealings with the target including contracts arrangements or understandings to:

- (a) withhold the supply of goods or services from the target; or
- (b) refuse or decline to acquire the goods or services of the target;

whether such conduct was absolute, limited or subject to certain terms or conditions. This is sometimes referred to as a collective boycott.

11. Provide details of the market(s) likely to be affected by the notified conduct, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the notification.
12. The notification must be signed by a person authorised by the applicant to do so.