



Australian
Competition &
Consumer
Commission

Assessment

in respect of a notification lodged by

the Australian Newsagents' Federation

on behalf of its Western Australian members, the members
of the West Australian Distribution Association and certain
independent newsagents

Date: 27 May 2009

Notification no. CB00072

Commissioners: Samuel

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Court

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Martin

Public Register no. C2009/890

Summary

The Australian Competition and Consumer Commission does not object to the collective bargaining notification lodged by the Australian Newsagents' Federation on behalf of its Western Australian members, the members of the West Australian Distribution Association and certain independent newsagents. The notification relates to a proposal by the newsagents to collectively negotiate the terms and conditions of their contracts with West Australian Newspapers.

On 6 May 2009, the Australian Newsagents' Federation (ANF) lodged collective bargaining notification CB00072 with the Australian Competition and Consumer Commission (ACCC) on behalf of its West Australian members, the members of the West Australian Distribution Association (WADA) and certain independent newsagents ('the collective bargaining group'). The collective bargaining group wishes to collectively negotiate the terms and conditions of their contracts with West Australian Newspapers (WAN).

Small businesses can obtain protection from legal action under the Act for collective bargaining arrangements by lodging a notification with the ACCC. Provided the ACCC does not object to the notified arrangement, protection commences 14 days after lodgement.

The ACCC will only object to and remove the immunity provided by a collective bargaining notification when it is satisfied that any public benefits from the proposed collective bargaining arrangement would not outweigh the public detriments (and substantially lessen competition for notifications that do not concern price fixing or exclusionary conduct).

The ACCC is satisfied that the proposed collective negotiations will result in a public benefit by enabling participating newsagents to have a greater opportunity to provide input into the terms and conditions of their contracts than would be the case if they were to each deal individually with publishers and distributors.

The ACCC considers that the likely public detriment is limited, particularly given the absence of collective boycott activity and the voluntary nature of the arrangements.

Accordingly, the ACCC does not intend to take any further action in respect of notification CB00072 at this time. Immunity from legal action provided by the notification commenced on 20 May 2009 and will last for three years.

1. Introduction

- 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 arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.2. In the context of the Act, collective bargaining involves two or more competitors agreeing to collectively negotiate terms and conditions (which can include price) with a supplier or a customer (the target or counterparty).
- 1.3. Arrangements will amount to a collective boycott where the collective bargaining group agrees not to acquire goods or services from, or not to supply goods or services to, the counterparty unless it accepts the terms and conditions offered by the group.
- 1.4. Collective bargaining and collective boycott arrangements can have a detrimental effect on competition and consumers and are likely to raise concerns under the competition provisions of the Act.
- 1.5. The Act, however, allows businesses to obtain protection from legal action in relation to collective bargaining and collective boycott arrangements in certain circumstances. One way in which small business bargaining groups may obtain protection is to lodge a collective bargaining notification with the ACCC.
- 1.6. Provided the ACCC does not object to the notified arrangement, protection commences 14 days after lodgement. The immunity from a collective bargaining notification expires three years from the date it was lodged.
- 1.7. The ACCC may object to a collective bargaining notification if it is satisfied that any public benefits from the proposed collective bargaining arrangement would not outweigh the public detriments (and substantially lessen competition for notifications that do not concern price fixing or exclusionary conduct).
- 1.8. The collective bargaining notification process is transparent involving public registers and interested party consultation. Where the ACCC proposes to object, it must first issue a draft objection notice setting out its reasons and providing an opportunity for interested parties to request a conference. If the ACCC issues a draft objection notice before the expiration of the 14 day statutory period, legal protection from the notification does not commence.

2. Background

The proposed arrangements

- 2.1. A group of Western Australian newsagents is seeking to collectively negotiate the terms and conditions of their distribution agreements with West Australian Newspapers. ('the collective bargaining group')
- 2.2. The collective bargaining group comprises the Australian Newsagents' Federation's WA members, members of the West Australian Distribution Association (WADA) and certain independent newsagents.
- 2.3. The ANF states that the issues to be covered by the proposed negotiations will be:
 - home delivery fees
 - handling fees
 - delivery fees
 - assignment of contracts
 - severability of provisions
 - incentive schemes to reward distributors for increasing
 - insert charges.

The newsagency industry¹

Industry background

- 2.4. Newsagents are (predominantly small) businesses engaged in the retailing (and in the case of newspapers, delivery) of newspapers, magazines, stationary supplies, greeting cards, confectionary and soft gambling products such as lottery tickets.
- 2.5. In respect of their contractual relationships with WAN, there are three basic types of newsagents in Western Australia:
 - those that engage in delivery services, to homes and/or shop fronts, only (distribution newsagents)
 - those that engage in delivery services and run a shopfront business and
 - those that have a shop front business only (retail newsagents).

¹ Information in this section is sourced from the ANF's notification; interested party submissions; the ANF's website at www.australiannewsagents.com.au; WAN's website at www.thewest.com.au.

- 2.6. According to the ANF there are approximately 187 distribution newsagents in Western Australia.² These businesses turn over approximately \$91.5 million per annum collectively. The ANF estimates that these distributors home deliver approximately 82,800 newspapers Monday-Friday and 114,000 Saturday newspapers.
- 2.7. 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. However, WAN enters into separate Distribution Agreements and Shop Distribution Agreements with Western Australian newsagents.
- 2.8. Distributors are appointed by WAN to distribute publications within a defined area. WAN states that under its distribution agreements, distributors act as agents for it for the purpose of delivering the West Australian newspaper. WAN states that there is no second sale from the distributor to the customer. Rather, the 'sale' takes place between WAN and the customer.
- 2.9. 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.

The Australian Newsagents' Federation

- 2.10. 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.
- 2.11. While it is 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.

West Australian Newspapers Holdings Ltd

- 2.12. 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.
- 2.13. The West Australian was first published in 1833 and it now sells an average of approximately 200,000 copies Monday to Friday and 375,000 copies on Saturday.
- 2.14. WAN also publishes 22 regional newspapers and magazines in towns such as Kalgoorlie, Broome and Albany.

² ANF collective bargaining notification CB00072, supporting submission, 6 May 2009.

Existing notification for newsagents to collectively bargain

- 2.15. On 13 September 2007 the ACCC decided not to object to a collective bargaining notification (CB00003) lodged by the ANF on behalf of certain Western Australian members for those members to collectively negotiate their contracts with WAN.
- 2.16. The ACCC considered that the arrangements gave rise to public benefits in the form of providing newsagents with greater input into their contracts.
- 2.17. The ACCC considered that the anti-competitive detriment generated by the proposed arrangements was limited by the voluntary nature of the arrangements and the limited number of publishers involved.
- 2.18. The ANF and WAN advise that, to date, no collective negotiations have taken place under this notification (CB00003).

ACCC consultation

- 2.19. The ACCC sought submissions from interested parties potentially affected by the notified arrangement including WAN. WAN has provided a submission in support of the notification. In short, WAN agrees with the public benefits articulated by the ANF and submits that:

The process proposed by notification CB00072 gives rise to the real possibility, in WAN's view, of the resolution of issues between the parties:

- (a) in respect of WAN and all distributors who have consented to the process outlined in notification CB00072; and
- (b) the Supreme Court proceedings. If no resolution is reached those Supreme Court proceedings, the trial of which is currently adjourned pending the proposed process, are likely to be reinstated and continue to trial.
- 2.20. Copies of public submissions are available from the ACCC website (www.accc.gov.au) by following the 'Public registers' and 'Authorisations and notifications registers' links.

Important dates

DATE	ACTION
6 May 2009	Notification and supporting submission lodged.
7 May 2009	Public consultation process commenced.
18 May 2009	Closing date for submissions from interested parties.
20 May 2009	Protection afforded by collective bargaining notification comes into effect.

DATE	ACTION
27 May 2009	ACCC assessment of notified arrangement issued.

Public benefit test

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

3. ACCC assessment

Market

- 3.1. In previous matters involving the newsagency industry, 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, where newsagents compete with each other and with other suppliers
 - the retail supply of goods and services including newspapers to consumers, in which newsagents compete with one another and other retailers.
- 3.2. The ACCC considers that these markets remain relevant to its assessment of the current proposed collective bargaining arrangements.

The future with or without test

- 3.3. The ACCC uses the ‘future-with-and-without-test’ established by the Tribunal to identify and measure the public benefit and anti-competitive detriment generated by proposed arrangement.
- 3.4. Given that the proposed arrangements may raise concerns under the competition provisions of the Act, the ACCC considers that the proposed collective bargaining arrangements would be unlikely to occur in the absence of the legal protection afforded by the notification.
- 3.5. In the absence of the collective bargaining arrangements, the ACCC considers that the current arrangements will continue. That is, standard form contracts between WAN and the newsagents with some scope for variation to suit individual circumstances.

Public benefits

- 3.6. The ANF submits that the arrangements will deliver public benefits in the form of increased input into contracts and transaction cost savings.

Increased input into contracts

- 3.7. There appears to be an imbalance in bargaining positions between WAN and individual newsagents. This is likely to be reflected in the terms and conditions of supply negotiated.
- 3.8. In its assessment of the collective bargaining notification CB00003 lodged by the ANF in 2007, the ACCC considered that improving newsagents bargaining

position may increase the degree to which they have input into the terms and conditions of their contracts with WAN.

- 3.9. The ACCC remains of the view that this improved input can provide a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their business, for example, addressing common contractual problems in a more streamlined and effective manner.
- 3.10. It remains open to WAN to negotiate with newsagents on an individual basis if that is its preference. However, the proposed arrangements, by providing newsagents with a greater voice in negotiations, provide an opportunity for the issues highlighted by the ANF, such as delivery fees, to be given greater consideration. If both sides consider it appropriate, contract terms and conditions that take greater account of these issues can be negotiated.
- 3.11. In this case, the ACCC considers that allowing newsagents to collectively bargain is likely to result in a public benefit by assisting them and WAN to achieve more mutually beneficial commercial outcomes.
- 3.12. The proposed arrangements do not limit the ability of WAN to tailor collectively negotiated contracts to individual circumstances where appropriate or to deal directly with individual newsagents.

Transaction cost savings

- 3.13. 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 these transaction cost savings do arise they are likely to constitute a public benefit.
- 3.14. 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.
- 3.15. The ACCC considers that the proposed collective bargaining arrangements are likely to result in transaction cost savings.

Facilitating resolution of court proceedings

- 3.16. The ACCC notes that the main impetus for the ANF lodging the collective bargaining notification was the court proceedings that WAN commenced in the Supreme Court of Western Australia against some of its distributors. The ANF advises that WAN sought orders as to the proper construction of its distribution agreements between WAN and its distributors and how and when the rates for delivery of newspapers could be reviewed and varied.

- 3.17. WAN submits that the proposed collective bargaining arrangements ‘give rise to a real possibility’ that the existing issues between the parties will be resolved without the proceedings being reinstated.
- 3.18. The ACCC accepts that, in this case, the arrangements are likely to deliver a public benefit by facilitating a resolution of ongoing court proceedings.

Public detriments

- 3.19. Under collective bargaining arrangements, competitors come together to negotiate terms and conditions, which can include price, with a supplier or customer.
- 3.20. Generally speaking, competition between individual businesses generates price signals which direct resources to their most efficient use. Collective agreements to negotiate terms and conditions can interfere with these price signals and accordingly lead to inefficiencies. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.
- 3.21. 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 following features are present:
- the current level of negotiations between individual members of the group and the proposed counterparties on the matters that they seek to negotiate is low
 - there are restrictions on the coverage and composition of the bargaining group
 - participation in the collective bargaining arrangements is voluntary and
 - there is no boycott activity.

Current level of negotiations

- 3.22. The ANF submits that newsagents are generally offered standard form contracts that are only varied in limited circumstances when WAN considers it appropriate.
- 3.23. It appears, at least in respect of their dealings with WAN, that newsagents are price takers with little influence over distribution and delivery fees. This is particularly the case given the importance of the West Australian newspaper to newsagents business and that WAN is the sole supplier of the West Australian.
- 3.24. While a large volume of a retail newsagents revenue may be derived from sources other than sales of the West Australian, this is less likely to be the case for distribution newsagents. It is difficult to envisage any Western Australian newsagent, be they a retailer, distributor or both maintaining a successful newsagency business without access to the West Australian.

- 3.25. In contrast, WAN is a large, well resourced business whose negotiations with any individual newsagent would be conducted in the context of the other distribution options available to it.
- 3.26. These other distribution options include other newsagents, both within and outside the bargaining group. Further, the ACCC notes that some publishers, such as those in Canberra and Darwin, distribute their newspapers through parties other than newsagents (i.e. independent contractors).
- 3.27. While there is likely to be competition between newsagents, within and outside the bargaining group, and others, to be granted rights to particular distribution networks, the proposed arrangements do not appear to inhibit such competition. This is particularly the case given the voluntary nature of the arrangements, as discussed below.

Voluntary participation

- 3.28. The ACCC notes that participation in the proposed collective bargaining arrangement is voluntary. Individual newsagents will be free to individually contract with WAN if they, and WAN, wish to do so.
- 3.29. Presumably, any newsagent that considers that any concerns it may have can be best addressed through individual negotiations will also remain of this view.
- 3.30. WAN remains free to choose whether to participate in the proposed collective negotiation or negotiate through existing channels, irrespective of any wish by newsagents to collectively negotiate. Indeed, newsagents will have no choice but to negotiate individually with WAN if that is WAN's preference.

Coverage or composition of the group

- 3.31. 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.
- 3.32. The proposed collective bargaining arrangements will aggregate the bargaining power of a significant number of distribution newsagents in Western Australia. The ANF estimates that the collective bargaining group represents approximately 76% of distribution newsagents in Western Australia.³
- 3.33. However, as noted at paragraphs 3.23 – 3.26, WAN has considerable bargaining power when negotiating with newsagents, be it individually or collectively.

³ ANF collective bargaining notification CB00072, supporting submission, 6 May 2009.

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

Boycott activity

- 3.36. The notified conduct does not allow for the collective bargaining group to engage in collective boycott activity. This significantly reduces the potential anti-competitive effect of the arrangements.

Conclusion on public detriments

- 3.37. The ACCC considers that the proposed collective bargaining arrangements are unlikely to lead to public detriment due to low levels of current negotiation, the arrangements remaining voluntary for all participants and the absence of boycott activity.

4. Conclusion

- 4.1. The proposed collective bargaining arrangement involves an agreement on price and is therefore subject to the test described in paragraph 2.22.
- 4.2. Consistent with that test the ACCC will object to a notified arrangement where it is satisfied that the benefit to the public that would result, or is likely to result, from the proposed arrangements does not outweigh the detriment to the public.
- 4.3. The ACCC considers that the proposed collective bargaining arrangement is likely to result in some public benefit in the form of:
 - providing newsagents with increased input into their contracts with WAN
 - transaction cost savings
- 4.4. The ACCC considers that the proposed collective bargaining arrangements are unlikely to lead to public detriment due to the low levels of current negotiation, the arrangements remaining voluntary for all participants and the absence of boycott activity.
- 4.5. Accordingly, the ACCC does not intend to take any further action in respect of notification CB00072 at this time.
- 4.6. Immunity from legal action provided by notification CB00072 commenced on 20 May 2009 and will last for three years from the time of lodgement, ceasing on 6 May 2012.
- 4.7. The Act does not provide any appeal provisions for the ACCC's decision not to take action on a collective bargaining notification. However, the ACCC may review a collective bargaining notification at any time.