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23 January 2009

Darrell Channing
Director, Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 2121
Canberra ACT 2601

Dear Mr Channing

Application for Authorisation A91117 by Queensland Newsagents' Federation (and others) - ACP Magazines' response

I refer to your letter dated 7 January 2009 advising that the Australian Competition and Consumer Commission (**ACCC**) has received an application for authorisation from the Queensland Newsagents' Federation (**QNF**) (Application A91117) (**Proposed Authorisation**).

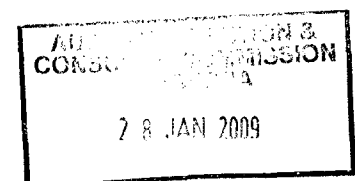
ACP Magazines understands that the QNF is seeking authorisation on behalf of itself, the Newsagents' Association of NSW and the ACT (**NANA**) and the Victorian Newsagents' Association (**VANA**) to collectively negotiate with certain newspaper and magazine publishers and distributors (including ACP Magazines). ACP Magazines understands that the scope of authorisation sought is broadly similar to the previous authorisation granted to the QNF and the Australian Newsagents' Federation by the ACCC on 24 April 2004 (Application A90804) (**Previous Authorisation**). However, unlike the Previous Authorisation, the Proposed Authorisation would allow the QNF, NANA and VANA to collectively negotiate on behalf of newsagents or groups of newsagents who are not members of their respective organisations who ask to join in any collective bargaining process.

ACP Magazines recognises and supports the role that state, regional and national newsagent associations and federations play in the publishing industry. Such bodies play an important role in representing the legitimate interests of newsagents on industry issues, are valuable sources of industry knowledge and information and are well positioned to provide useful insights and feedback on industry-wide issues.

More broadly, ACP Magazines recognises and continues to support the role of the newsagent channel. It does so through, among other things, investment in cost reduction, retailer development and consumer demand creation and through ongoing engagement with:

- state, regional and national newsagent groups;
- the growing segment of corporate and franchise newsagent groups;
- the growing segment of joint marketing, joint purchasing and business development groups servicing the newsagent channel; and
- individual newsagents, including partners within ACP Magazines' own trade development program, 'Connections with ACP'.

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With regard to cost reduction, ACP Magazines has invested substantial capital, effort and resources in supply chain and returns processing initiatives and in business to business information technology infrastructure. These initiatives and infrastructure have contributed to achieving efficiencies within the newsagent channel by removing costs from the newsagency business model. With regard to retailer development, ACP Magazines has implemented effective retail skill development programs, such as 'Connections with ACP'. Such programs have further contributed to achieving efficiencies within the newsagent channel by improving the retail skill base within that channel. Finally, with regard to consumer demand creation, a significant portion of ACP Magazines' consumer marketing budget is allocated to the newsagent channel with the purpose of driving foot traffic and consumer spend to newsagents. This marketing effort takes the form of, among other things, consumer promotions, brand building initiatives and in-magazine advertising campaigns promoting newsagents as local magazine specialists.

ACP Magazines does not however support the granting of the Proposed Authorisation and provides the following comments for the ACCC's consideration.

First, ACP Magazines 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. In order for ACP Magazines to maximise efficiencies in its business, it seeks to adopt nationally consistent distribution policies and procedures to the greatest extent possible, including through the use of nationally consistent terms and conditions as part of its standard arrangements with newsagents. Notwithstanding this general position, ACP Magazines is willing to, and does, engage in negotiation with individual newsagents to vary those arrangements. It does not, as the QNF claims in the Proposed Authorisation application, simply operate on a "take it or leave it" basis.

Individual negotiation and variation of arrangements with newsagents is driven by factors including maximisation of individual newsagent performance and efficiency. In this regard, ACP Magazines notes and welcomes the emergence of the growing segment of corporate and franchise newsagent groups and of joint marketing, joint purchasing and business development groups servicing the newsagent channel. Such groups have driven innovation in and the modernisation of that channel. Individual negotiation and variation of arrangements is not, and in ACP Magazines' view should not be, determined by geographic factors such as the location of the newsagent. This would be the result under the Proposed Authorisation. ACP Magazines has no current intention to alter its business operations in respect of individual negotiation and variation of arrangements with newsagents.

Second, ACP Magazines would be concerned if any of the QNF, NANA or VANA were authorised to collectively negotiate on behalf of newsagents or groups of newsagents who are not members of those bodies who ask to join in any collective bargaining. In this regard, ACP Magazines notes that the purpose of authorisation is to provide immunity for conduct that would ordinarily be a contravention of the Trade Practices Act. An implicit requirement of an authorisation is therefore surely that there is certainty as to who enjoys the benefit of that immunity. As noted by the QNF on page 3 of Attachment A of the Proposed Authorisation application, the ACCC has in the past indicated that the placing of restrictions on the composition of the bargaining groups is an important element in limiting the anti-competitive effect of collective negotiation arrangements.

As it currently stands, to enjoy the benefit of the immunity under the Previous Authorisation, a newsagent must be a member of the respective newsagents' federation undertaking the collective negotiation. The Proposed Authorisation, which allows people to "ask to join in any collective bargaining", does not provide a similarly objective method of identification as to whether a newsagent is part of the collective negotiation that is covered by the authorisation. As such, there is potential for real uncertainty as to which newsagents would be represented in any collective negotiation and relevantly enjoying the immunity afforded by the Proposed Authorisation.

From a more practical perspective, how would it be made clear and evidenced to ACP Magazines (or any other publisher and/or distributor) that a newsagent is, or is not, party to any collective agreement being negotiated? This is particularly the case where the Proposed Authorisation application seems to suggest that a newsagent who is part of one federation or association may seek or "ask" to be included in a

collective negotiation being undertaken by another federation or association. The Proposed Authorisation application explains the rationale for this approach as follows:

a substantial number of newsagents are not members of any newsagency association or it [sic] they are they are not satisfied with what their association is doing in any negotiations or lack of negotiations with publishers and distributors.

However, the consequence of such an arrangement is that newsagents may be part of multiple collective negotiations at any one time and that those negotiations may be undertaken by one or more state-based federations or associations with which the newsagent has no other connection.

Third, ACP Magazines does not agree with the description of the magazine industry set out in the Proposed Authorisation application. In particular, ACP Magazines does not consider publishers and distributors such as ACP Magazines "have substantial market power and are able to dictate unfavourable terms and conditions with...newsagents". As stated in ACP Magazines' previous submissions to the ACCC regarding the Previous Authorisation (dated 3 July 2002 and 20 November 2003), ACP Magazines considers 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.

Moreover, ACP Magazines, like all publishers and distributors, is highly incentivised to operate in an environment that promotes a healthy and robust newsagent channel. In ACP Magazines' view, such a channel is best achieved through continued emphasis on cost reduction, retailer development and consumer demand and that geographically-based collective negotiation will not make a meaningful contribution to the continued development of such a channel.

Finally, when the QNF (with the Australian Newsagents' Federation) originally lodged the Previous Authorisation with the ACCC it sought authorisation for collective boycott activities that would form part of its collective bargaining activities with publishers. Following indications from the ACCC that it intended to deny authorisation for that conduct, the applicants withdrew the collective boycott element of the authorisation.

Whilst the QNF has not sought authorisation for collective boycott conduct in the Proposed Authorisation, ACP Magazines is concerned by the following statement in its application (my emphasis):

*QNF is not seeking authorisation for collective boycott activities **at this stage** ...QNF is keeping open its options on any application or notification in relation to collective boycotts of all or some of the targets.*

ACP Magazines would have significant concerns if the QNF (or NANA or VANA) did seek authorisation in relation to collective boycott activity and would vigorously oppose the granting of any such authorisation.

Please do not hesitate to contact me if you wish to discuss the contents of this letter further.

Yours faithfully



Eugene Varricchio
General Manager, Retail Sales & Distribution