



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

Newsagents Association of NSW and ACT

in respect of

**collective negotiations by the Newsagents Association of NSW and ACT
on behalf of its members, in relation to the terms and conditions of
agency agreements with NSW Lotteries**

Date: 26 August 2011

Authorisation no.: A91269

Public Register no.: C2011/661

Commissioners: Sims
Kell
Schaper
Court
Dimasi
Walker
Willett

Summary

The ACCC proposes to grant authorisation to the Newsagents Association of NSW and ACT Ltd (NANA) to collectively bargain on behalf of its members, in relation to the terms and conditions of agency agreements with NSW Lotteries.

The ACCC has considered NANA's request for interim authorisation and has granted interim authorisation until the final determination comes into effect or until the ACCC decides to revoke interim authorisation.

On 1 August 2011, NANA lodged an application for authorisation A91269 with the ACCC to collectively bargain on behalf of its members, in relation to the terms and conditions of agency distribution agreements with NSW Lotteries.

The ACCC considers that the collective bargaining arrangements are likely to result in public benefits by reducing transaction costs associated with negotiating agency distribution agreements. The arrangements are also likely to provide NANA members with a greater opportunity to have effective input into the terms and conditions of their distribution contracts. This improved input provides a mechanism through which NANA members may be able to negotiate more efficient outcomes compared to a situation where they negotiate individually and/or sign standard form contracts.

As a result, NANA members and NSW Lotteries may achieve greater efficiencies in their business, for example, by addressing common contractual problems in a more streamlined and effective manner. Further, collective negotiations have the potential to reduce information asymmetries that exist between NANA members and NSW Lotteries, which also enhances the potential for efficient outcomes to be achieved.

The ACCC considers that there is likely to be minimal public detriment as a result of the collective bargaining arrangements as the current level of negotiation between individual NANA members who are lottery agents and NSW Lotteries is low, participation in the collective bargaining arrangements is voluntary for both NANA members and NSW Lotteries, and the arrangements do not include collective boycott activity.

On balance, the ACCC considers the public benefits that are likely to result from the conduct will outweigh any public detriments. Accordingly, the ACCC proposes to grant authorisation for five years.

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 or interested parties may also request a conference to be held to make oral submissions on the draft determination.

The ACCC has granted interim authorisation to NANA to collectively bargain on behalf of its members in relation to the terms and conditions of agency agreements with NSW Lotteries. Interim authorisation will remain in place until the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

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List of abbreviations

ACCC	Australian Competition and Consumer Commission
ANF	Australian Newsagents' Federation
LAAV	Lottery Agents Association of Victoria
LAQ	Lottery Agents Queensland
NANA	Newsagents Association of NSW and ACT
NSW Lotteries	New South Wales Lotteries Corporation Pty Ltd
Tatts Group	Includes Tattersall's Holdings Pty Ltd and NSW Lotteries
Tribunal	The Australian Competition Tribunal
the Act	Competition and Consumer Act 2010

1. The application for authorisation

- 1.1. On 1 August 2011, the Newsagents Association of NSW and ACT Ltd (NANA) lodged an application for authorisation A91269 with the ACCC.
- 1.2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (the Act). 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.
- 1.3. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Further information about the authorisation process is contained in Attachment A. A chronology of the significant dates in the ACCC's consideration of this application is contained in Attachment B.
- 1.4. Application A91269 was made 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.
 - Section 88(1A) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- 1.5. In particular, NANA applied for authorisation to collectively bargain on behalf of its members regarding the terms and conditions of agency distribution agreements with NSW Lotteries over five years.
- 1.6. NANA submits that the terms and conditions of agency agreements include: commission fees; handling fees; agency application fees; support services levies; freight charges; product ordering fees; equipment hire costs; retail image design and agency subsidy and insurances; and any conduct protocols issued by NSW Lotteries.
- 1.7. NANA also submits that it proposes to develop a dispute resolution regime overtime using an arms length mediator that would apply to NANA and individual NANA members in the event of a dispute with NSW Lotteries.
- 1.8. The ACCC considers that the terms and conditions outlined in paragraphs 1.6 and 1.7 above form part of the authorised conduct.
- 1.9. NANA submits that members' participation in the proposed agreement with NSW Lotteries is voluntary. NANA has also noted that while all NANA members are newsagents, not all newsagents are agents for NSW Lotteries.

- 1.10. NANA has also sought interim authorisation for this matter. Interim authorisation allows an applicant to engage in the conduct as if authorisation has been granted, before the ACCC issues a final determination.
- 1.11. This application is being considered by the ACCC under the ACCC's streamlined collective bargaining assessment process for small business. Under the streamlined process, the ACCC undertakes to respond to requests for interim authorisation and issue a draft determination within 28 days of receiving an application and will endeavour to finalise its consideration of the application within three months.

Other parties

- 1.12. Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party or proposed party to the conduct.
- 1.13. NANA has sought authorisation to extend the agreement to future members of NANA.

Similar arrangements

- 1.14. The ACCC has previously considered applications for authorisation, including interim authorisation for associations to represent members in collective negotiations involving the distribution of lottery products.
- In March 2009 the Lottery Agents Association of Victoria (LAAV) lodged an application for authorisation A91126 to collectively negotiate on behalf of its members the terms and conditions of franchise and licence agreements with Tattersalls and Intralot Australia. The LAAV represented approximately 600 of the 1100 lottery agents in Victoria. The ACCC granted authorisation on 3 June 2009 for five years.
 - In September 2008, Lottery Agents Queensland (LAQ) lodged an application for revocation of authorisation A90853 and substitution with new authorisation A91101. Authorisation was sought to continue to collectively negotiate on behalf of its members the terms and conditions of agency agreements with Golden Casket (which has an exclusive licence to run lotteries in Queensland until 2016). The LAQ represented 500 of approximately 1100 licensed agents. The ACCC re-authorised this arrangement on 19 November 2008 for five years.
- 1.15. In December 2008, the ACCC also considered application for authorisation A91117 from NANA, the Queensland Newsagents Federation and the Victorian Association for Newsagents to collectively negotiate on behalf of member newsagents with publishers and distributors of newspapers and magazines. The ACCC authorised this arrangement subject to conditions in April 2009 for five years.

Interim authorisation

- 1.16. On 1 August 2011, NANA requested interim authorisation for the proposed collective bargaining arrangements.

- 1.17. On 3 August 2011, the ACCC advised NANA and interested parties it would make its decision on the request for interim authorisation at the same time the ACCC issued its draft determination.
- 1.18. The ACCC grants interim authorisation to NANA in respect of A91269 with effect from the same date as this draft determination, that is 26 August 2011. The ACCC notes that no objections were raised by interested parties to interim authorisation.
- 1.19. 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.

2. Background to the application

The New South Wales and Australian Capital Territory lottery industry

- 2.1. Lotteries is a broad term which includes various products incorporating instant lotteries (known as ‘scratchies’), lotteries and lotto.
- ‘Scratchies’ require a player to scratch the coating from a ticket to determine whether the ticket is a winner. Prizes are paid on a set return. Returns are based on the number of tickets in a set, the cost to purchase the ticket and a set percentage retained by the operator for costs.
 - Lotteries involve the purchase of a ticket, a draw and a prize. The prize is based on the total amounts wagered on a particular lottery after deducting a set percentage to cover operator costs. Tickets are sold at various outlets including newsagents.
 - Lotto is a game where a player selects six numbers (from 1 - 45) in anticipation that these will be randomly drawn from a ball draw device (six numbers and two supplementary numbers are drawn). The prizes vary based on the number of correct numbers drawn and the amount of wagers made. There are a variety of lottery games including Tattslotto, Oz Lotto and Powerball.¹
- 2.2. Lotteries in NSW are regulated by the Office of Liquor, Gaming and Racing. The relevant legislation regulating lotteries includes the *Public Lotteries Act 1996* (NSW).
- 2.3. Lotteries in the ACT are regulated by the ACT Gambling and Racing Commission. The relevant legislation regulating lotteries and pools are the *Lotteries Act 1964* (ACT) and *Pool Betting Act 1964* (ACT).
- 2.4. In 2008-09 national expenditure on ‘scratchies’ was approximately \$236 million of which approximately \$66 million (around 28 per cent) was spent in NSW and approximately \$2 million in the ACT (less than one per cent).² The national expenditure on lotteries was approximately \$48 million of which approximately \$44 million was spent in NSW (around 92 per cent) and \$1 million in the ACT (around 2 per cent).³ National expenditure on Lotto was approximately \$1705 million of this expenditure approximately \$505 million was spent in NSW (around 30 per cent) and \$18 million in the ACT (around one per cent).⁴

¹ Office of Economical and Statistical Research, Queensland Treasury; *Australian Gambling Statistics, 1983-84 to 2008-09*, 27th edition, June 2011 p. 4-5.

² Office of Economical and Statistical Research, Queensland Treasury; *Australian Gambling Statistics, 1983-84 to 2008-09*, 27th edition, Table D ‘Total Gambling Expenditure 2008-09’, June 2011.

³ Office of Economical and Statistical Research, Queensland Treasury; *Australian Gambling Statistics, 1983-84 to 2008-09*, 27th edition, Table D ‘Total Gambling Expenditure 2008-09’, June 2011.

⁴ Office of Economical and Statistical Research, Queensland Treasury; *Australian Gambling Statistics, 1983-84 to 2008-09*, 27th edition, Table D ‘Total Gambling Expenditure 2008-09’, June 2011.

NSW Lotteries

2.5. NSW Lotteries is a wholly owned subsidiary of Tattersall's Holdings Pty Ltd, a subsidiary of Tatts Group Limited.⁵ On 1 April 2010, Tattersall's Holdings Pty Ltd was granted an exclusive licence to operate lotteries in NSW for 40 years.⁶ Prior to this date, NSW Lotteries was a statutory corporation owned by the NSW Government.

2.6. At the time the NSW Government announced the grant of an exclusive licence to NSW Lotteries, they also announced a number of protections for newsagents. The then Treasurer's Media release identified these as including:

- NSW Lotteries' existing agency agreements transferred to the new operator without change
- amendments to the Public Lotteries Act to include the following protections:
 - a five year freeze on any types of agents⁷
 - automatic extension of any agreements expiring during the five year protection period on the same terms
 - a five year guarantee of no new obligations with respect to store fit outs and signage
 - a five year guarantee to maintain agent support and training.⁸

2.7. NSW Lotteries has a non-exclusive licence to operate lotteries in the ACT.

2.8. NSW Lotteries provides a number of products in NSW and the ACT. NANA identified these products as including:

- Monday and Wednesday Lotto
- Saturday Lotto (known as Tattslotto in Victoria and Gold Lotto in Queensland)
- Lotto Strike
- OZ Lotto
- Powerball
- 6 From 38 Pools
- Lucky Lotteries and
- Instant Scratchies.

⁵ NSW Lotteries submission, 15 August 2011.

⁶ Office of Liquor, Gaming and Racing, *Public Lotteries*, accessed August 2011, <http://www.olgr.nsw.gov.au/public_lotteries_home.asp#top>

⁷ Section 42, Schedule 2 of the *Public Lotteries Act 1996* (NSW) states that NSW Lotteries must not enter into agency agreements during the agency protection period that would increase the number of agents to more than 100 over the allowable limit.

⁸ Treasurer Roozendaal: *NSW Lotteries sale – more than \$1 billion in proceeds delivered to NSW taxpayers*' Media release, 2 March 2010; http://www.treasury.nsw.gov.au/treasurers_media_releases/previous_government_media_release_archive, accessed 17 August 2011

Newsagents Association of NSW and ACT (NANA)

- 2.9. NANA submits that it represents 505 newsagents of which 492 are in NSW and 13 are in the ACT. Of the agents represented by NANA, all but nine sell lottery products pursuant to an agency agreement with NSW Lotteries.⁹
- 2.10. In their supporting submission, NANA notes that ‘many newsagents are not members’.
- 2.11. In their supporting submission, NANA also notes that the Australian Newsagents’ Federation (ANF) represents NANA members on national issues.
- 2.12. On 25 May 2011, NANA and the ANF announced that beginning 1 July 2011 all member newsagents in NSW and the ACT will be offered joint benefits and services provided by the ANF and NANA.¹⁰
- 2.13. NANA submits that agents who distribute NSW Lotteries’ lottery products to consumers do so in return for a commission on the sale of these products of between six and seven percent. The average annual commission for agents who are NANA members is \$57,000.¹¹
- 2.14. NANA identifies that it provides the following services to its members:
- Newsagent’s commercial: legal services for newsagents including purchase and sales
 - Newstrade: Broker service specialising in buying and selling newsagencies
 - Insurance Advice: Insurance brokers for newsagencies
 - Liaising with publishers
 - Representation to NSW Lotteries
 - Wage Advice: Assistance adhering to NSW, ACT and federal awards
 - Newsagent relief managers: Relief management for holiday, sickness and emergency cover
 - Newsagent shop fitters - Referrals and advice.¹²

⁹ In its *Submission in support of its application*, NANA submitted that it represents some 600 newsagents in NSW and the ACT. On 12 August 2011, NANA provided a revised list of its members confirming that the current number of NANA members is 505.

¹⁰ NANA website, <http://www.nana.com.au/>; accessed 15 August 2011.

¹¹ NANA, *Submission in support of the application*, 1 August 2011, p.3.

¹² NANA website, <http://www.nana.com.au/>, accessed 18 August 2011.

3. Submissions received by the ACCC

- 3.1. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. To this end the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application.

Applicant's supporting submission

- 3.2. Broadly, NANA submits that:
- Collective negotiation will improve the bargaining position of newsagents which would otherwise be weighted in favour of the target (NSW Lotteries).
 - Collective negotiation provides an opportunity for newsagents to have greater input into the terms and conditions of contracts to approximate the outcomes in markets with matched buyers and sellers [in terms of bargaining power].

Interested party submissions

- 3.3. The ACCC sought submissions from nine interested parties potentially affected by the application, including NSW Lotteries (the target of the proposed collective negotiation), the NSW and ACT regulators and 7/Eleven who also distribute lottery products in NSW.
- 3.4. **7/Eleven** submits that it does not oppose the application.
- 3.5. **NSW Lotteries** does not oppose the application, noting that it would make the negotiation process with agents more efficient. However, NSW Lotteries raised concerns about two aspects of the authorisation sought by NANA. Specifically:
- that the reference to 'any protocols issued by NSW Lotteries' as one of the terms and conditions to be negotiated was too broad and should instead refer to an Agent's Manual which is similar to that used in other jurisdictions where lotteries are conducted and
 - negotiating the development of a dispute resolution scheme is unnecessary as there are existing regulatory protections in place.
- 3.6. In response to the concerns raised by NSW Lotteries, NANA provided a further submission advising that:
- it would amend its application and change the reference to protocol to read 'any procedures issued by NSW Lotteries that are directly relevant to the conduct of lotteries' as requested by NSW Lotteries and

- it reserves the right to seek a minor variation to the authorisation in respect of a dispute resolution scheme with NSW Lotteries should the regulatory requirements no longer apply.¹³

3.7. The views of NANA and interested parties are outlined in the ACCC's evaluation of the proposed authorisation A91269 in Chapter 4 of this draft determination. Copies of public submissions may be obtained from the ACCC's website (www.acc.gov.au/AuthorisationsRegister) and by following the links to this matter.

¹³ NANA *Submission in response to interested party submissions*, 17 August 2011.

4. ACCC evaluation

4.1. The ACCC's *evaluation* of the proposed collective bargaining arrangement is in accordance with tests found in:

- sections 90(6) and 90(7) of the Act which 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 in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public and
 - that benefit, in the case of section 90(6) 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 was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision.
- sections 90(5A) and 90(5B) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:
 - the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public and
 - that benefit, in the case of section 90(5A) 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 were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

4.2. For more information about the tests for authorisation and relevant provisions of the Act, please see [Attachment C](#).

The relevant areas of competition

4.3. 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. However, depending on the circumstances, the ACCC may not need to comprehensively define the relevant markets as it may be apparent that a net public benefit will or will not arise regardless of this definition.

4.4. NANA submits the relevant areas of competition are:

- the provision of lotto and instant lotto distribution services to NSW lotteries, and
- the supply of lottery products to consumers.

- 4.5. NSW Lotteries submits that the relevant markets are:
- the supply of lottery products in NSW and
 - the supply of lottery products in ACT.
- 4.6. NSW Lotteries concludes that there are separate markets for NSW and the ACT for the supply of lottery products as they are subject to different regulation. Specifically NSW Lotteries notes that ‘each state is heavily regulated and there are very limited cross-border sales of lottery products due to restrictions on the conduct of “foreign” lotteries in each state’.¹⁴
- 4.7. The ACCC understands that although NSW Lotteries has an exclusive licence in NSW, there are no regulatory impediments to foreign lotteries in the ACT (subject to compliance with other regulations). Notwithstanding this, NSW Lotteries is the only supplier of lottery products in the ACT.
- 4.8. For the purpose of assessing this application, the ACCC considers the relevant areas of competition affected by the proposed conduct are:
- the provision of lottery distribution services to NSW Lotteries in NSW and the ACT, and
 - the supply of lottery products to consumers in NSW and the ACT.
- 4.9. This approach is consistent with previous decisions in relation to applications on behalf of lottery agents seeking authorisation to collectively negotiate the terms and conditions of agency agreements with the supplier of lottery products. For example, LAQ in respect of collective negotiation with the Golden Casket Lottery Corporation (A91101) and LAAV with respect to collective negotiation with Tattersall’s and Intralot (A91126).

The provision of lottery services to NSW Lotteries

- 4.10. NSW Lotteries is the sole supplier of lottery products to lottery agents in NSW by virtue of its exclusive licence granted by the NSW Government.
- 4.11. NSW Lotteries has advised they supply lottery products to 1653 lottery agents in NSW and the ACT. Of these, 1483 are newsagents in NSW, 50 are newsagents in the ACT and 120 are 7/Eleven outlets.¹⁵ Of these agents, 496 are NANA members.¹⁶ Not all agents provide the full complement of lottery services offered by NSW Lotteries.
- 4.12. NSW Lotteries has advised that in NSW, there are limits on the number of agents that can distribute lottery products for five years (commencing 1 April 2010) due to the conditions placed on NSW Lotteries as part of the licence agreement. These limitations are set out in section 42 of Schedule 2 of the *Public Lotteries Act 1996* and require that the number of agencies cannot exceed 100 more than the number that existed at the time that NSW Lotteries acquired its exclusive licence.

¹⁴ NSW Lotteries submission, 15 August 2011.

¹⁵ NSW Lotteries submission, 15 August 2011.

¹⁶ NANA, updated advice on members provided to the ACCC on 12 August 2011.

- 4.13. The ACCC understands that in the ACT, lottery products are distributed through approximately 50 agents¹⁷ which include NSW Lotteries' designated kiosks and sub-agencies which are located in newsagents. Thirteen of these agents are newsagents who are also NANA members.¹⁸

The supply of lottery products to consumers

- 4.14. Although lottery agents (including newsagents) compete with each other in the supply of lottery products to consumers, price competition is limited as lottery prices are set by NSW Lotteries under supervision by the state regulator. Lottery agents compete instead on non-price factors such as service and location.
- 4.15. Lottery agents also compete for the supply of some lottery products to consumers with NSW Lotteries who offer online distribution of lotteries and lotto (but not scratchies). In its 2010 Annual Report, Tatts Group notes that "internet sales have continued to enjoy solid growth to now contribute more than 5 per cent of total [NSW Lotteries] lottery sales".¹⁹
- 4.16. The ACCC also notes that there are a wide range of other gambling and wagering products also available to consumers. However, the area of competition most affected by the arrangements for which authorisation is sought is the supply of lottery products to consumers in NSW and the ACT. In the context of the current application for authorisation, the ACCC does not consider it necessary to form a definitive view on the substitutability of other gambling products for lottery products.

The counterfactual

- 4.17. The ACCC applies the 'future with-and-without test' established by the Australian Competition Tribunal (the Tribunal) to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.²⁰
- 4.18. 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 the impact on the competitive environment if authorisation is not granted. This prediction is referred to as the 'counterfactual'.
- 4.19. NANA submits that in the past NSW Lotteries' agency agreements were approved by the regulator, with any changes discussed with agents.²¹
- 4.20. NANA submits that absent authorisation, NSW Lotteries is likely to continue to offer individual agents standard form contracts weighted in favour of the target.

¹⁷ NSW Lotteries, submission, 15 August 2011.

¹⁸ NANA, updated advice on members provided to the ACCC on 12 August 2011.

¹⁹ Tatts Group Limited, *Annual Report 2010*, p.4.

²⁰ *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.

²¹ NANA, *Submission in support of application*, 1 August 2011, p.2.

- 4.21. Although NANA's website notes that it currently makes representations to NSW Lotteries on behalf of its members, it also notes that absent authorisation it is 'not legally able to collectively negotiate in relation to such agreements'.²²
- 4.22. The ACCC notes that the announcement by the then NSW Treasurer to grant an exclusive licence to NSW Lotteries in March 2010 was to be accompanied by regulatory protections for newsagents.²³ Schedule 2 of the Public Lotteries Act sets out these protections which include that the terms and conditions of existing agency agreements are to remain during the 'agency protection period' which is five years (ending 1 April 2015) unless varied by agreement between the licensee and agent.²⁴
- 4.23. In the absence of authorisation, the ACCC considers it unlikely that NANA would negotiate with NSW Lotteries on behalf of its members in relation to such matters as fees, commissions and other terms and conditions given that such conduct would be likely to raise concerns under the Act.
- 4.24. The ACCC considers that absent authorisation of the proposed collective bargaining arrangements, individual newsagents are likely to be offered standard form contracts by, and enter into individual agreements with, NSW Lotteries.

Public benefit

- 4.25. 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.²⁵
- 4.26. Generally, competition can be relied upon to deliver the most efficient market arrangements. In circumstances where there are market failures (for example, high transaction and bargaining costs²⁶, market power or information asymmetries²⁷)

²² NANA, *Submission in support of application*, 1 August 2011, p.3.

²³ Treasurer Roozendaal: *NSW Lotteries sale – more than \$1 billion in proceeds delivered to NSW taxpayers*' media release, 2 March 2010; http://www.treasury.nsw.gov.au/treasurers_media_releases/previous_government_media_release_archive

²⁴ *Public Lotteries Act 1996*, Schedule 2, Section 40: Protections for existing agency agreements:

(1) The following protections apply to an existing retail agency agreement:

- (a) the agreement continues in force after the commencement of the new licensing arrangements on the same terms and conditions as applied to the agreement immediately before the commencement of the new licensing arrangements,
- (b) the terms and conditions of the agreement cannot be varied during the agency protection period except by agreement between the licensee and the agent,
- (c) if the agreement is due to expire before the end of the agency protection period, the term of the agreement is extended until the end of that period unless the agent and the licensee otherwise agree.

²⁵ *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.

²⁶ Bargaining costs are part of the transactions costs of contracting. If transactions costs are high, markets may not work efficiently.

²⁷ This refers to a situation where one party has more or better information than another in a transaction. This imbalance can lead to a situation where the party who knows less accepts or offers different terms than they otherwise would, leading to inefficient outcomes.

regulation and/or restrictions on competition (such as collective bargaining arrangements) may be required to deliver efficient outcomes.

- 4.27. Therefore the Act recognises that, in certain circumstances, arrangements which restrict competition can deliver public benefits where they address a potential market failure and therefore improve economic efficiency.
- 4.28. Broadly, NANA submits the proposed collective bargaining will deliver public benefits, including:
- improved bargaining power, including increased input into contract terms and
 - transaction cost savings.
- 4.29. The ACCC's assessment of the likely public benefits from the proposed conduct follows.

Transaction cost savings

- 4.30. As noted in the counterfactual, the ACCC accepts that absent the authorisation, NANA members would be required to negotiate with NSW Lotteries individually and/or accept standard form contracts.
- 4.31. In these circumstances, it is likely that if NANA members were to enter into individual contracts with NSW Lotteries the level of negotiation that would occur between individual NANA members and NSW Lotteries in respect of those contracts is likely to be low.
- 4.32. Nevertheless, there are transaction costs associated with contract negotiations between NSW Lotteries and lottery agents. Both parties would be responsible for the costs associated with each negotiation, including drafting contracts, obtaining professional/legal advice and other administration fees.
- 4.33. If transaction costs are high this can reduce the incentive to enter into an agreement, or increase the incentive to offer 'take it or leave it' standard form contracts. Both situations result in potentially inefficient outcomes. Actions which reduce transaction costs can improve economic efficiency.
- 4.34. Transaction costs can be lower with a collective bargaining arrangement compared to a situation where contracts are negotiated individually.
- 4.35. This argument was supported by NSW Lotteries who notes that:
- The primary reason why NSW Lotteries supports the application for authorisation lodged by NANA is because it makes the negotiation process with agents more efficient. It allows NSW Lotteries to consult with the agents as a group on various commercial matters. Tatts Lotteries (which includes NSW Lotteries) has collective bargaining arrangements and authorisations in place with agents in respect of other jurisdictions and has found this to be an efficient way to conduct negotiations.²⁸
- 4.36. Collective bargaining may decrease transaction costs to both NANA members and NSW Lotteries. Where contracts are collectively negotiated this is likely to result in fewer negotiations with consequently lower total negotiation costs for both parties.

²⁸ NSW Lotteries submission, 15 August 2011.

These lower costs could be shared amongst the bargaining group generating savings for individual members of the group compared with the costs that would be incurred if individuals acted alone.

- 4.37. The ACCC considers that the collective bargaining arrangements deliver a public benefit by providing opportunities for transactions cost savings for both sides of the negotiating process and therefore the potential for more efficient outcomes.

Greater input into contracts (increased bargaining power)

- 4.38. NANA notes that NSW Lotteries holds an exclusive licence to operate lotteries in NSW and is therefore the monopoly provider of lottery products.
- 4.39. NANA submits that there ‘is a clear disparity of bargaining power and the only way that might be remedied with possibly mutual beneficial outcomes is by collective negotiation.’²⁹ In addition, NANA submits that absent authorisation for collective bargaining, any benefits from negotiating with NSW Lotteries that may accrue to an individual newsagent are unlikely to be shared by other agents.
- 4.40. NANA submits that in the absence of collective bargaining NSW Lotteries will continue to offer lottery agents standard form contracts weighted in favour of NSW Lotteries.
- 4.41. NANA also submits that collective bargaining will provide its members with a greater opportunity to provide input into terms and conditions of agency agreements with associated efficiency gains. NANA did not elaborate on the nature of the associated efficiency gains.
- 4.42. NANA detailed a number of elements it considers it would like to include in negotiating terms and conditions of agency agreements. These include commission fees; handling fees; agency application fees; support services levies; freight charges; product ordering fees; equipment hire costs; retail image design and agency subsidy and insurances; and any conduct protocols issued by NSW Lotteries. In addition, NANA submits that in the future, it wishes to negotiate the development of a low cost dispute resolution process using an independent mediator.
- 4.43. NSW Lotteries submits that such a dispute resolution procedure is not necessary because specific regulation requires mandatory consultation between NSW Lotteries and NANA, and also between NSW Lotteries and individual agents. Further, NSW Lotteries submits that it always acts in good faith when negotiating with agents and will continue to do so. NSW Lotteries also expressed concern that the reference to ‘any conduct protocols issued by NSW Lotteries’ was too broad’.
- 4.44. The ACCC considers that NSW Lotteries, as the sole supplier of lottery products to lottery agents in NSW and the ACT, is in a strong bargaining position when negotiating the terms and conditions of agency agreements and distribution services with individual agents, particularly given the importance of lottery commission fees to individual agent’s total income.

²⁹ NANA, *Submission in support of application*, 1 August 2011, p.6.

- 4.45. In a recent submission to the Productivity Commission, the ANF submits that gaming represented 30 per cent of total newsagency sales which was the second largest category behind magazines and newspapers (at 40 per cent).³⁰
- 4.46. However, arguments based on changes in relative bargaining strengths as a result of a proposed collective agreement are not of themselves public benefits. The ACCC will consider the likely outcomes resulting from the change in relative bargaining strengths arising from the proposed collective bargaining agreement if the outcomes are likely to be more efficient than in the counterfactual. In these circumstances, the outcomes would be a public benefit.
- 4.47. The ACCC considers that participation in a collective bargaining group can result in benefits to the public by facilitating improvements in the level of input that newsagents who distribute lottery products have in contractual negotiations with NSW Lotteries.
- 4.48. Collectively, NANA members may be able to negotiate more favourable outcomes compared to a situation where they negotiate individually and/or sign standard form contracts. In particular, increased input into contract terms and conditions may result in terms and conditions that better reflect the bargaining group's circumstances compared to a standard form contract and thus create greater efficiencies for NANA members.
- 4.49. The ACCC notes that the proposed collective bargaining arrangement is voluntary. It is unlikely that individual agents, or NSW Lotteries, would enter into collective bargaining unless it is likely to lead to more efficient outcomes than are likely to arise from individual negotiations. The voluntary nature of the arrangements also means that the authorisation need not attempt to limit the range of issues that may be collectively negotiated, including for example a dispute resolution procedure. Rather, collective bargaining provides a mechanism to allow NANA and NSW Lotteries to discuss such issues. Neither party can be compelled to negotiate or agree on specific terms and conditions.

Information asymmetry

- 4.50. Competitive, efficient markets are generally based on the assumption that buyers and sellers are well informed about market conditions. In situations where a buyer or seller has incomplete information (i.e. there is an information asymmetry between the buyer and the seller) the party who is not well informed may accept less or offer different terms (or prices) than they would if more information was available to them. As a result, market outcomes may not promote efficiency and welfare. Information asymmetries can often be addressed by improving the transparency of market information.
- 4.51. While not provided in NANA's supporting submission, NANA advised that a significant proportion of its members are from non-English speaking backgrounds. Information asymmetries, such as those that may arise from language barriers, add to the imbalance of bargaining power in negotiations and can result in less efficient outcomes.

³⁰ ANF submission to the Productivity Commission Inquiry *Economic Structure and Performance of the Australian Retail Industry*, June 2011, p.39.

- 4.52. The ACCC considers that a large company such as NSW Lotteries (which is a subsidiary of the Tatts Group) generally has better access to resources and market information than individual small businesses such as individual newsagents.
- 4.53. The ACCC considers that collective bargaining may improve the quality of information available to newsagents during negotiations by enabling members to share their individual business experience and market information. This would help to address information asymmetries and may result in more efficient outcomes for agents, NSW Lotteries, and the public. The ACCC considers that this would be a public benefit.

Conclusion on public benefits

- 4.54. For the reasons set out above, the ACCC considers that the proposed collective bargaining arrangement is likely to result in some public benefit.

Public detriment

- 4.55. 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.³¹

- 4.56. Collective bargaining refers to an arrangement under which two or more competitors in an industry come together to negotiate terms and conditions, which can include price, with a supplier or customer. Detriment may arise where collective bargaining arrangements result in an increased price to consumers or less choice or lower quality of products for consumers.
- 4.57. Generally, the ACCC considers that collective bargaining arrangements have the potential to result in public detriment arising from reduced economic efficiencies through coordinated rather than competitive actions by individuals in a group.

Reduced economic efficiencies

- 4.58. Generally speaking, competition between individual businesses generates price signals which direct resources to their most efficient use. This is often referred to as allocative efficiency. Agreements between competitors to collectively negotiate terms and conditions can interfere with these price signals and accordingly lead to allocative inefficiencies and public detriment. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.
- 4.59. The ACCC has identified that the capacity for collective bargaining arrangements to result in inefficiencies and public detriment is likely to be limited where the following features are present:

³¹ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- the current level of negotiations between individual members of the group and the proposed counterparties is low
- there are restrictions on the coverage, composition and representation of the bargaining group
- participation in the collective bargaining arrangement is voluntary and
- there is no secondary boycott activity.

4.60. In this matter, regulatory oversight of retail lottery prices is also relevant.

Current level of negotiation

4.61. The anti-competitive effect of collective bargaining is likely to be limited where the level of individual negotiations between members of the bargaining group and the counterparty is low.

4.62. In the absence of any collective negotiation, the ACCC considers that many NANA members are unlikely to engage in individual negotiations with NSW Lotteries. Rather, individual lottery agents are likely to be offered standard form contracts where they have limited ability to negotiate the terms and conditions of agreements.

4.63. Therefore, absent the collective bargaining arrangement, the level of negotiation between NANA lottery agents and NSW Lotteries is likely to be low.

Coverage, composition and representation of the bargaining groups

4.64. NANA considers that the public detriment generated by the collective bargaining arrangements is likely to be minimal as the current level of competition between NANA members is unlikely to be significantly affected.

4.65. NANA has nominated 505 of its members as participants in the proposed collective bargaining group which represents approximately one third of lottery agents in NSW and the ACT. NANA has also sought authorisation for future members of NANA. The ACCC also notes that NANA members face competition from non-newsagent distributors and NSW Lotteries own on-line distribution of certain lottery products.

4.66. The ACCC considers that where the size and composition of the bargaining group is restricted, any anti-competitive effect is likely to be reduced having regard to the smaller area of trade directly affected and the competition provided by those suppliers outside the group.

4.67. The ACCC notes that NANA does not represent all newsagents that distribute lottery products and presently represents one third of lottery agents in NSW and the ACT.

4.68. The ACCC notes that the coverage of the bargaining group has the potential to result in public detriment. However, NSW Lotteries, as the monopsony acquirer of the distribution services, has considerable bargaining power when negotiating with agents, whether individually or collectively. The ACCC considers that the bargaining power of NSW Lotteries is likely to act as a constraint on any potential anti-competitive outcomes arising from the proposed arrangement.

- 4.69. Public detriment may also arise from information sharing which is an inherent aspect of collective bargaining. In order to collectively negotiate terms and conditions with a supplier or customer, the members of the collective bargaining group must discuss their desired outcomes from negotiations and how these can best be achieved. It is difficult to imagine a collective bargaining arrangement that does not involve some form of information sharing between the members of the collective bargaining group.
- 4.70. The exchange of certain information among competitors, particularly in relation to prices, fees and costs, may facilitate coordination beyond that for which authorisation is sought, or otherwise reduce competition across the market more generally. This may result in increased prices or reduced quality and availability of goods or services. Outcomes of this nature are associated with significant public detriment.
- 4.71. The ACCC considers that the risk of detriment from information sharing is likely to be low. The price that lottery products are offered for sale by agents to consumers is determined by NSW Lotteries (and overseen by the NSW government) rather than by individual agents. Agents distribute these products to consumers in return for a commission on the sale of these products. As such there is no retail price competition between newsagents on lottery products.
- 4.72. Members of the collective bargaining group will still compete on non-price factors such as location and service and the collective bargaining arrangements are unlikely to impact on the levels of non-price competition given the extent of competition from agents who are outside the collective bargaining group. Accordingly the ACCC considers that the proposed collective bargaining arrangements are unlikely to have a detrimental effect on non-price competition between members of the bargaining group and between agents more generally for the supply of lottery products to consumers in NSW and the ACT.
- 4.73. Members of the collective bargaining group will also continue to compete for the sale of non-lottery products and services to consumers in competition with a wide range of retailers and distributors. The ACCC does not consider that the collective bargaining arrangements are likely to facilitate coordinated conduct in these broader areas because of the extent of competition from other suppliers who are not part of the bargaining group.

Voluntary participation

- 4.74. NANA submits that the public detriment generated by the collective bargaining arrangement is likely to be minimal as the arrangement is voluntary for all parties.
- 4.75. Collective bargaining is voluntary where members of the collective bargaining group and the counterparty 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 potential anti-competitive impact of the arrangements. Where participation is voluntary, those businesses who consider they can negotiate a more commercially attractive arrangement individually are able to do so. Consequently incentives for businesses to compete on price, to innovate, or to improve the quality of goods or services are not reduced to the extent that they might otherwise be.
- 4.76. The ACCC notes that participation in the collective bargaining arrangements is voluntary for both NANA members and NSW Lotteries.

- 4.77. The ACCC also notes that NSW Lotteries submits that it does not oppose authorisation.
- 4.78. The ACCC considers that the voluntary nature of collective bargaining arrangements for both sides of the negotiation is an important feature which limits the potential for public detriment through coordinated behaviour. The ACCC notes that collectively negotiated contracts will be entered into where both lottery agents and NSW Lotteries consider it is in their best commercial interest to do so.

Absence of boycott activity

- 4.79. NANA submits that the public detriment generated by the collective bargaining arrangement is likely to be minimal as the arrangement does not extend to collective boycott activity.
- 4.80. 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 a party, faced with the threat of withdrawal of supply/acquisition, will be under increased pressure to accept the terms and conditions offered by the collective bargaining group.
- 4.81. Importantly in this respect, the grant of authorisation does not compel any party to participate in the collective bargaining process.
- 4.82. NANA has not sought authorisation to engage in collective boycott activity. As such, any collective boycott activity would not be protected from legal action under the Act.

Conclusion on public detriments

- 4.83. The ACCC considers that for the reasons set out above, the anti-competitive detriment generated by the arrangements for which authorisation is sought is likely to be minimal.

Balance of public benefit and detriment

- 4.84. In the context of applying the net public benefit test in section 90(8)³² of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.³³
- 4.85. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the collective bargaining arrangement is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
- 4.86. For the reasons outlined in this chapter, the ACCC considers that the collective bargaining arrangements are likely to result in public benefits by reducing transactions costs and by providing NANA members with greater opportunity to have effective input into the terms and conditions of their distribution contracts. This improved input provides a mechanism through which NANA members may be able to negotiate more

³² 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.

³³ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

efficient outcomes compared to a situation where they negotiate individually and/or sign standard form contracts.

- 4.87. As a result, NANA members and NSW Lotteries may achieve greater efficiencies in their business, for example, by addressing common contractual problems in a more streamlined and effective manner. Further, collective negotiations have the potential to reduce information asymmetries that exist between NANA members and NSW Lotteries, which also enhances the potential for efficient outcomes to be achieved.
- 4.88. The ACCC considers that there is likely to be minimal public detriment as a result of the collective bargaining arrangements having regard to the following:
- the level of competition between lottery agents is unlikely to be significantly affected
 - collective bargaining arrangements are voluntary for both NANA members and NSW Lotteries, and
 - the arrangements do not include collective boycott activity.
- 4.89. Accordingly, the ACCC considers the public benefit that is likely to result from the conduct is likely to outweigh the public detriment. The ACCC is therefore satisfied that the tests in sections 90(6), 90(7) and 90(5A) and 90(5B) are met.

Length of authorisation

- 4.90. The Act allows the ACCC to grant authorisation for a limited period of time.³⁴ 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.
- 4.91. In this instance, NANA seeks authorisation for five years.
- 4.92. No submissions were received in respect of the proposed length of authorisation.
- 4.93. The ACCC proposes to grant authorisation to the collective bargaining arrangements for five years.

Variations to the collective bargaining arrangement

- 4.94. The ACCC notes that any amendments to the collective bargaining arrangement which is to negotiate the terms and conditions of agency agreements with NSW Lotteries during the proposed term of this authorisation would not be covered by the proposed authorisation.

³⁴ Section 91(1).

5. Draft determination

The application

- 5.1. On 1 August 2011 the Newsagents Association of NSW and ACT lodged application for authorisation A91269 with the Australian Competition and Consumer Commission (the ACCC).
- 5.2. Application A91269 was made using Form B Schedule 1, of the Competition and Consumer Regulations 2010. The application was made 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.
 - Section 88(1A) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- 5.3. In particular, NANA seeks authorisation to collectively bargain on behalf of its member newsagents and future NANA members on the terms and conditions of agency agreements with NSW Lotteries.

The net public benefit test

- 5.4. For the reasons outlined in Chapter 4 of this draft determination, the ACCC considers that in all the circumstances the conduct 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 conduct.

Conduct for which the ACCC proposes to grant authorisation

- 5.5. The ACCC proposes to grant authorisation to NANA to represent its current and future members in collective bargaining arrangements in relation to the terms and conditions of agency agreements with NSW Lotteries.
- 5.6. This draft determination is made on 26 August 2011.
- 5.7. The attachments to this determination are part of the draft determination.

Interim authorisation

- 5.8. The ACCC grants interim authorisation for the arrangements. 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

- 5.9. 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.

Attachment A — the authorisation process

The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Competition and Consumer Act 2010* (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.

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’.

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.

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.

After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.

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.

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.

Attachment B — chronology of ACCC assessment for application A91269

The following table provides a chronology of significant dates in the consideration of the application by NANA.

DATE	ACTION
1 August 2011	Application for authorisation lodged with the ACCC, including an application for interim authorisation.
3 August 2011	ACCC requests information from interested parties on application for authorisation including interim authorisation.
15 August 2011	Closing date for submissions from interested parties in relation to the request for interim authorisation and draft determination.
26 August 2011	Draft determination and interim authorisation issued.

Attachment C — the tests for authorisation and other relevant provisions of the Act

Competition and Consumer Act 2010

Section 90—Determination of applications for authorisations

- (1) The Commission shall, in respect of an application for an authorization:
 - (a) make a determination in writing granting such authorization as it considers appropriate; or
 - (b) make a determination in writing dismissing the application.
- (2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (4) The Commission shall state in writing its reasons for a determination made by it.
- (5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:
 - (a) that the provision would result, or be likely to result, in a benefit to the public; and
 - (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
 - (i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and
 - (ii) the provision were given effect to.
- (5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:
 - (a) that the provision has resulted, or is likely to result, in a benefit to the public; and
 - (b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.
- (6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to

the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

- (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
- (b) the proposed covenant were given, and were complied with; or
- (c) the proposed conduct were engaged in;

as the case may be.

(7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.

(8) The Commission shall not:

- (a) make a determination granting:
 - (i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
 - (ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
 - (iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
 - (iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- (b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

(9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

(9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):

- (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
 - (i) a significant increase in the real value of exports;

- (ii) a significant substitution of domestic products for imported goods; and
- (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

Variation in the language of the tests

There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).

The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. 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 but the test under section 90(8) is not so limited.³⁵

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.³⁶

Consequently, when applying either test, the ACCC can take most, if not all, public 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.

Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7). Further, as the wording in sections 90(5A) and 90(5B) is similar, this approach will also be applied in the test for conduct that may be a cartel provision.

Conditions

The Act allows the ACCC to grant authorisation subject to conditions.³⁷

Future and other parties

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 future³⁸

³⁵ *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.

³⁶ *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.

³⁷ Section 91(3).

³⁸ Section 88(10).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.³⁹

Streamlined process

This application has been considered under the ACCC's streamlined process available to small businesses proposing collective bargaining arrangements. Under the streamlined authorisation process for small business collective bargaining arrangements, the ACCC will undertake to respond to requests for interim authorisation and issue a draft determination within 28 days of receiving an application and will finalise its consideration within three months, provided it has received sufficient relevant information.

A six-month time limit applies to the ACCC's consideration of new applications for authorisation⁴⁰. It does not apply to applications for revocation, revocation and substitution, or minor variation. The six-month period can be extended by up to a further six months in certain circumstances.

Minor variation

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation.⁴¹ The Act limits applications for minor variation to applications for:

... a single variation that does not involve a material change in the effect of the authorisation.⁴²

When assessing applications for minor variation, the ACCC must be satisfied that:

- the proposed variation satisfies the definition of a 'minor variation' and
- if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the conduct.

Revocation; revocation and substitution

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.⁴³ The ACCC may also review an authorisation with a view to revoking it in certain circumstances.⁴⁴

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.⁴⁵ The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.⁴⁶

³⁹ Section 88(6).

⁴⁰ Section 90(10A)

⁴¹ Subsection 91A(1)

⁴² Subsection 87ZD(1).

⁴³ Subsection 91B(1)

⁴⁴ Subsection 91B(3)

⁴⁵ Subsection 91C(1)

⁴⁶ Subsection 91C(3)