



Australian
Competition &
Consumer
Commission

Determination

Application for authorisation

lodged by

Lottery Agents' Association of Tasmania Inc

in respect of

collective bargaining with Tatts Group and Intralot Australia Pty Ltd

Date: 26 July 2012

Commissioners: Sims
Rickard
Court
Dimasi
Willett

Authorisation no.: A91309

Public Register no: C2012/366

Summary of decision

The Australian Competition and Consumer Commission (ACCC) has decided to grant authorisation to the Lottery Agents' Association of Tasmania and its current and future members to collectively bargain with Tatts Group and Intralot Australia Pty Ltd until 17 August 2017.

1. The application for authorisation

The applicants

- 1.1. On 30 April 2012, Lottery Agents' Association of Tasmania Inc (**LAAT**) lodged authorisation application A91309 (the **application**) with the ACCC under sections 88(1A) and 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. LAAT applied for authorisation for five years on behalf of itself, 72 of its current members (the **Applicants**) and any future members to collectively negotiate through LAAT with Tatts Group (**Tatts**) and Intralot Australia Pty Ltd (**Intralot**) (together, the **Targets**) over:
 - commissions paid to the lottery agents;
 - agency application fees;
 - fees payable by agents to each of the Targets (including franchise fees, establishment fees and the price of lottery entries);
 - terms of supply and rights of termination under agent agreements (including sales targets and training and equipment requirements); and
 - alterations and amendments to ancillary matters contained within agent procedure manuals.(the **Collective Bargaining Conduct**).
- 1.3. In essence, the ACCC can authorise anti-competitive conduct such as collective bargaining if it is satisfied that the likely public benefits of the conduct will outweigh the likely public detriments.¹ Further details regarding the authorisation application may be found on the ACCC's Public Register.²

Interim authorisation

- 1.4. At the time of lodging the application, the Applicants sought interim authorisation to commence the Collective Bargaining Conduct, which the ACCC considered with the substantive application. Following concerns raised by Tatts in response to the ACCC's initial consultations, LAAT restricted its request for interim authorisation to exclude collective negotiation of:
 - (a) franchise fees and establishment fees;

¹ The ACCC's Guide to Authorisation (available from the ACCC website) has more details regarding the ACCC's authorisation process.

² <http://www.accc.gov.au/content/index.phtml/itemId/1040237/fromItemId/278039/display/application>.

- (b) the price of lottery entries;
 - (c) sales targets; and
 - (d) issues regarding staff training and equipment.
- 1.5. On 24 May 2012, the ACCC granted interim authorisation under section 91 of the Act to enable collective negotiation by LAAT and its members with the Targets. Interim authorisation did not extend to the areas set out at 1.4(a) above.
 - 1.6. 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.

Draft determination

- 1.7. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.
- 1.8. On 24 May 2012, the ACCC issued a draft determination proposing to grant authorisation to the Applicants to engage in the Collective Bargaining Conduct, subject to certain exclusions, for five years.
- 1.9. A conference was not requested in relation to the draft determination.

2. Background to the application

- 2.1. There are currently 94 lottery agents in Tasmania that distribute physical and instant lottery products³ for Tatts and/or Intralot. The majority of agents are newsagents and all are small businesses employing fewer than 20 staff.⁴ Lottery sales are a significant source of revenue for LAAT's members and are also important in driving sales on non-lottery products in agents' businesses.⁵
- 2.2. LAAT has previously been able to raise issues on behalf of its members with the Targets but it has been limited to a reactive role and has not negotiated fees, commissions or terms of supply.
- 2.3. Most potential areas of competition between lottery agents are regulated by the Tasmanian Gaming Commission (**Tasmanian Gaming**) (including purchase price, advertising and staffing)⁶ and/or are determined by the Targets under standard form distribution agreements and detailed manuals (commission, advertising and operation of the lotteries business).⁷ The Targets are the only lottery providers currently licensed to offer lottery products within Tasmania, with the exception of

³ Physical lotteries determine winning tickets using randomising equipment to draw numbered objects which correspond to numbers on winning tickets e.g. Powerball, Tattslotto, Oz Lotto, Lucky Keno. Instant lotteries use scratch cards (scratchies) printed and sold in a randomised manner.

⁴ Application A91309, Attachment 5 p.1.

⁵ Application A91309, Attachment 5 pp 7-8.

⁶ Tasmanian Gaming is an independent statutory body which licenses both lottery providers and lottery agents in Tasmania under the *Gaming Control Act 1993* (Tas) and the *Gaming Control Regulation 2004* (Tas).

⁷ Application A91309, Attachment A, p 10.

online lottery products sold from outside the state.⁸ Tasmania does not restrict the number of lottery providers that may be licensed to operate in Tasmania.

Related applications

- 2.4. The ACCC has previously granted authorisations to newsagent and lottery agent associations to collectively bargain with lottery operators, including the following:

A91269 – Newsagents Association of NSW and ACT Ltd (6 October 2011)

- 2.5. The ACCC granted authorisation until 28 October 2016. Authorisation permits Newsagents Association of NSW and ACT Ltd (**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.
- 2.6. NANA was granted authorisation to collectively bargain on:
- (a) contract terms and conditions including: commission fees, handling fees, agency application fees, support services levies, freight charges, product ordering fees, equipment hire costs, retail image design, agency subsidy and insurances, and any conduct protocols issued by NSW Lotteries; and
 - (b) a dispute resolution regime using an arms-length mediator to resolve disputes between NANA, or individual NANA members, and NSW Lotteries.

A91126 - Lottery Agents' Association of Victoria Inc (3 June 2009)

- 2.7. The ACCC granted authorisation until 25 June 2014 to allow Lottery Agents' Association of Victoria Inc (**LAAV**) to negotiate, on behalf of itself and its current and future members, with Tattersall's and Intralot.
- 2.8. LAAV was granted authorisation to collectively bargain on:
- (a) the terms and conditions of lottery retailer agreements, including (but not limited to): retailer commissions, application fees, service charges, point of sale equipment hire costs, retail image, sales incentives, and alterations to retailer procedure manuals;
 - (b) product sales restrictions in the Tattersall's dedicated sales area;
 - (c) new retailer approval processes; and
 - (d) insurance requirements.

A91101 - Lottery Agents Queensland Ltd (19 November 2008)

- 2.9. The ACCC granted authorisation to Lottery Agents Queensland Ltd (**LAQ**) until 10 December 2013. The authorisation allows for the continuation of collective negotiation by LAQ, on behalf of its members, with the Golden Casket Lottery Corporation. These arrangements were previously authorised by the ACCC on 4 September 2003.
- 2.10. LAQ was granted authorisation to collectively bargain on:
- (a) the terms and conditions of agency agreements including: commissions, handling fees, application fees, support service levies, freight charges,

⁸ Application A91309 (Attachment A, pp 2-3, 6).

- product ordering fees, equipment hire costs, retail image design and agency subsidies and insurances;
- (b) changes to the Agent's Manual, including: the agency appointment process, sale of an agent's business, termination of agency agreements, the agent's agreement to commit to an annual business plan, achievement of minimum sales levels, any requirement to extend trading hours and training requirements; and
 - (c) other relevant matters as they arise.

3. ACCC evaluation

Information considered by the ACCC

- 3.1. In its evaluation of the Collective Bargaining Conduct the ACCC has taken into account:
- (a) the issues raised by Tatts in its submissions in response to the ACCC's initial and post draft determination consultations, and LAAT's responses (discussed in more detail below);
 - (b) LAAT's submission in response to the ACCC's draft determination (discussed in more detail below);
 - (c) the lack of response from other interested parties that were consulted by the ACCC;⁹
 - (d) information available to the ACCC from consideration of previous relevant matters;¹⁰
 - (e) the likely future if authorisation is not granted.¹¹ In particular, the ACCC considers that, without authorisation, LAAT members will continue to be individually offered and sign standard form contracts with the Targets;¹²
 - (f) the relevant areas of competition likely to be affected by the conduct, particularly competition to provide lottery distribution services within Tasmania to the Targets and competition to supply lottery products to Tasmanian consumers;¹³
 - (g) the five year authorisation period requested;
 - (h) that no collective boycott activity is proposed and participation in the Collective Bargaining Conduct is voluntary. The ACCC notes in this regard that the proposed collective group currently does not include eight LAAT members (those which did not return signed consent forms) and 16 Tasmanian lottery agents which are not members of LAAT. None of these parties have raised concerns regarding the proposed Collective Bargaining Conduct; and

⁹ Please see the ACCC's Public Register for more details, including a list of parties consulted
¹⁰ Newsagents Association of NSW and ACT – Authorisation – A91269; Australian Newsagents' Federation Ltd – Collective Bargaining Notification – CB00156; Lottery Agents' Association of Victoria Inc – Authorisation – A91126; Lottery Agents Queensland Ltd – Revocation and Substitution - A91101.

¹¹ For more discussion see paragraphs 5.38-5.40 of the ACCC's Authorisation Guide.

¹² Consistent with application A91309 (Attachment 5, p 7) and ACCC decision A91269 D11/2319030 [4.20-4.24].

¹³ Consistent with application A91309 (Attachment 5, pp 6-7) and ACCC decision A91269 D11/2319030 [4.3-4.16].

- (i) that the Targets can legally distribute lottery products through a variety of alternative channels (and in some cases already do), including through:
 - i. small retail businesses or retail chains which are not members of LAAT, for example delicatessens, supermarkets, service stations and chemists;
 - ii. company owned kiosks or concession stands in shopping centres; and
 - iii. online.

Tatts' submissions and LAAT's responses

- 3.2. Tatts submits that it does not have any in-principle objection to collective negotiations by LAAT on behalf of its members. This is on the basis that the proposed conduct does not involve any collective boycott activity and will be entirely voluntary in that:
 - each LAAT member will be free to conclude contractual arrangements with the Targets outside the scope of the Collective Bargaining Conduct; and
 - the Targets will not be obliged to participate in the Collective Bargaining Conduct.
- 3.3. In addition, Tatts submits that it does not object to the application of the authorisation to future LAAT member who may become party to the Collective Bargaining Conduct.
- 3.4. However, Tatts submits that it is concerned that the scope of the Collective Bargaining Conduct is excessively broad. In particular, Tatts objects to the following aspects of the proposed scope of the Collective Bargaining Conduct:
 - (a) franchise fees and establishment fees;
 - (b) the price of lottery entries (made up of the fee for subscription to the lottery and the agent's commission);
 - (c) sales targets; and
 - (d) staff training and equipment requirements.
- 3.5. LAAT has responded generally to Tatts' concerns submitting that:
 - (a) the proposed conduct is entirely voluntary, therefore, the level of any potential public detriment is substantially mitigated by the Targets' ability to choose not to bargain collectively, either in relation to particular matters or at all;
 - (b) the purpose of the application is to gain statutory protection for the Applicants to engage in conduct that might otherwise raise concerns under the Act. LAAT submits that commercial circumstances may change during the five year proposed bargaining period. Accordingly, LAAT submits that it is irrelevant that one of the Targets may be presently disinclined to collectively negotiate over particular aspects;
 - (c) LAAT initially applied for authorisation to include collective negotiation of matters currently subject to legislative restrictions, on the basis that the legislation may change. However, LAAT has subsequently amended the scope of the proposed collective bargaining to exclude bargaining in relation to matters currently determined by legislation; and

- (d) Intralot, the other target of the Collective Bargaining Conduct, has not raised concerns; and
- (e) the conduct sought to be authorised is closely analogous with authorised conduct in respect of the sale of lottery products in other Australian jurisdictions.

Public benefits

- 3.6. In general, competition can be relied upon to deliver the most efficient market arrangements. However, in circumstances where there are market failures (for example, high transaction and bargaining costs, market power or information asymmetries) regulation and/or restrictions on competition (such as collective bargaining arrangements) may be required to deliver efficient outcomes.
- 3.7. LAAT submits that the proposed Collective Bargaining Conduct is likely to result in a number of public benefits including:
 - (a) improved lottery agent input into terms and conditions;
 - (b) transaction cost savings; and
 - (c) better informed markets.

- 3.8. These are discussed below.

Improved lottery agent input into terms and conditions

- 3.9. LAAT is seeking greater agent input into the development of contracts, operational manuals and materials for lottery agents. Currently, individual agents have very little input into such arrangements because of their weak bargaining position compared with the Targets. The Collective Bargaining Conduct may increase the input that agents have into such arrangements and therefore create greater opportunities for the negotiating parties to identify and achieve business efficiencies.¹⁴
- 3.10. The ACCC considers that collective bargaining can result in benefits to the public by improving each party's capacity to provide input into contractual negotiations. This can provide a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their businesses and lead to 'win-win' situations. For example, they may be able to make 'better' (better informed and more efficient) investment and production decisions, including on costs, price and quantity.
- 3.11. The ACCC considers that the Collective Bargaining Conduct is likely to result in public benefits in the form of improved agent input into terms and conditions.

Transaction cost savings

- 3.12. LAAT submits that the proposed Collective Bargaining Conduct is likely to lead to a variety of transaction cost savings, due to a single negotiation process rather than a series of individual negotiations.¹⁵ In particular, LAAT considers that there

¹⁴ Application A91309 (Attachment 5, pg 4) and consistent with ACCC decision A91269 D11/2319030 [4.38-4.49].

¹⁵ Application A91309 (Attachment 5, pg 11) and consistent with ACCC decision A91269 D11/2319030 [4.30-4.37].

are likely to be savings where agents require professional or legal advice or other information in the process of making properly informed decisions.

- 3.13. The ACCC notes Tatts' strong submissions which indicate that it is reluctant to negotiate on certain aspects of LAAT's proposals. Due to the voluntary nature of the proposed Collective Bargaining Conduct, Tatts may choose not to negotiate collectively on some points. Accordingly, the full potential transaction cost savings from collective bargaining may not arise. Nonetheless, the ACCC considers that some transaction cost savings are likely to arise due to the proposed Collective Bargaining Conduct. Accordingly, the ACCC considers that the Collective Bargaining Conduct is likely to result in public benefits in the form of transaction cost savings.

Better informed markets

- 3.14. LAAT submits that more efficient bargaining outcomes may occur as lottery agents and LAAT may become more informed of market information through the information exchanged during the collective negotiation process.¹⁶
- 3.15. The ACCC accepts that LAAT already facilitates the flow of information between its members and that collective bargaining is likely to increase its market knowledge. Accordingly, this would help to further improve the transparency and availability of information about market conditions. Accordingly, the ACCC considers that the Collective Bargaining Conduct is likely to result in public benefits in the form of better informed markets.

Public detriments

- 3.16. Detriment may arise where collective bargaining arrangements result in an increased price to consumers or less choice or lower quality of products for consumers. 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.
- 3.17. The ACCC considers that, broadly, the Collective Bargaining Conduct is likely to result in limited public detriment since:
- (a) Tasmanian Gaming will continue to regulate most aspects of the retail supply of lottery products;
 - (b) current competition between lottery agents to supply lottery products to Tasmanian consumers is low due to the level of regulation and the standard form contracts under which lottery agents operate;
 - (c) participation in the Collective Bargaining Conduct is voluntary from the view of both the Targets and LAAT members; and
 - (d) there is a lack of any proposed collective boycott activity.
- 3.18. Further consideration is given to the issues raised by Tatts regarding the potential for LAAT's members to coordinate in order to reduce the standard of services

¹⁶ Application A91309 (Attachment 5, pg 4) and consistent with ACCC decision A91269 D11/2319030 [4.50-4.53].

provided to lottery purchasers or inefficiently increase the price paid for their services.

Franchise fees and establishment fees

- 3.19. Tatts submits franchise fees and establishment fees generally apply to new agencies which may or may not be members or prospective members of the LAAT. Accordingly, Tatts submits that current LAAT members may have an incentive to ensure that these fees are as high as possible in order to create barriers to entry.
- 3.20. Tatts notes that its opposition to the collective negotiation of fees paid by new entrants also extends to fees paid when a new entrant acquires an existing outlet (change of ownership fee). Tatts further submits that establishment fees and franchise fees (which include change of ownership fees) are not included in any of the other authorisations granted by the ACCC and that the \$500 agency application fee is the only fee included under previous authorisations granted to lottery agents in other Australian jurisdictions.
- 3.21. LAAT submits that the fees referred to by the terms ‘franchise and establishment fees’ cover three types of fees:
 - (a) fees paid by a person in order to establish a new agency outlet. Existing LAAT members may pay these fees, if they establish a second outlet, and most new agents who pay these fees become LAAT members. Therefore, LAAT submits that it has an interest in negotiating low entrance fees on behalf of people who already are or are likely to become members;
 - (b) fees paid by agents for a number of years after establishing a new outlet. Given that most new agents become LAAT members shortly after establishing a new outlet, LAAT submits that it has a clear interest in negotiating these fees since they affect the profitability of its members; and
 - (c) yearly franchising fees that may be paid by all agents. Given that all LAAT members pay these fees, LAAT submits that it has a clear interest in negotiating the fees.
- 3.22. LAAT acknowledges that sufficient capital and liquidity available to lottery agents in the early stages of operating a new outlet is an important determinant of overall success or failure in an agent’s first year. LAAT considers that high fees, and an inability on LAAT’s part to negotiate lower fees, jeopardises the welfare of new outlets. LAAT notes the strong countervailing power exercised by Tatts as the dominant operator in the Tasmania’s lottery operators’ duopsony.
- 3.23. LAAT further submits that it has no incentive to attempt to artificially raise the fees paid by new entrants since:
 - (a) as small businesses, its members rely upon being able to sell their businesses to new franchisees quickly and easily in order to realise gains (particularly for retirement) or to cover large unforeseen expenses and emergencies; and
 - (b) it would also raise the barriers to expansion of ownership or relocation of premises to new outlets by existing members.
- 3.24. LAAT notes that previous ACCC authorisations of collective bargaining by other lottery agent associations (for example, see section 2) do not explicitly permit collective bargaining in relation to new entrant fees. However, this is also not prohibited by the terms of the authorisations. In addition, LAAT notes that the

terms of the authorisations would permit the interstate lottery agent associations to canvas for and represent Tasmanian members in collective negotiations with Intralot and/or Tatts.

- 3.25. The ACCC notes the concerns raised by Tatts, namely, that existing lottery agents may have the incentive to use collective negotiation of fees paid in relation to new outlets to raise the barriers to entry, resulting in significant potential competitive detriment which outweighs any potential public benefit.
- 3.26. The ACCC considers that, if a negotiated fee is an ongoing one paid by existing members or in relation to the acquisition of an existing outlet, then LAAT's members have a direct interest in keeping the fees as low as possible. However, the ACCC does not consider that there is the same incentive for LAAT members in relation to fees paid by new agents opening new outlets. In particular, by the time that a new agent becomes a LAAT member, any fees that are incurred only in relation to opening a new outlet will already have been incurred and will function in the nature of a sunk cost. Accordingly, the new member no longer has an economic interest in attempting to negotiate lower new outlet fees for future new agents.
- 3.27. Existing LAAT members have a range of potential incentives to raise barriers to entry for the opening of a new outlet by an existing member. For example, for fees paid in relation to the opening of a new outlet by existing members, only a small proportion of LAAT's membership is likely to consider opening a new outlet in any year since the low growth in the industry implies that relatively few new outlets are opened per year. If higher fees for new outlets have the effect of limiting the total number of outlets, any growth in total lottery sales will be enjoyed by existing outlets rather than shared with agents operating new outlets. Therefore, the majority of LAAT's existing members do not necessarily have an incentive to keep these fees low. Further, the majority of members may have an incentive to attempt to raise fees to reduce the possibility of expansion by existing members. Alternatively, there is a risk that existing members may have an incentive to negotiate artificially low fees for existing agents which are expanding in order to disadvantage new agents (in a relative sense), raising barriers to entry.
- 3.28. As such, the ACCC proposes to exclude, from the scope of the authorised Collective Bargaining Conduct, negotiation of fees that are paid only for a new outlet (that is, an outlet at a new physical location where there was no outlet immediately prior to the establishment of the outlet).
- 3.29. The ACCC has not extended this exclusion to the collective negotiation of fees for the acquisition of an existing outlet. The ACCC considers that agents operating existing outlets do not have an incentive to negotiate high fees for the acquisition of an existing outlet either by an existing agent or a new agent. Agents operating an existing outlet have a stronger incentive to be able to exit the business in a timely manner, given the nature of lottery agent businesses and the desire to ensure the widest buyer pool for the purchase of their business.

Sales targets

- 3.30. Sales targets are currently individually negotiated with agents having regard to each agent's specific circumstances including size and location. Tatts considers that it is inappropriate to include sales targets in the Collective Bargaining Conduct since it may negatively impact the extent of inter-agent competition for lottery sales to consumers. In particular, Tatts submits that sales targets are determined by a range of circumstances that are unique to each outlet including

environmental factors, size, location of the outlet and the performance of each outlet. As these factors vary from outlet to outlet, Tatts considers that it is inappropriate for sales targets to be negotiated on a collective basis.

- 3.31. Tatts also notes that meeting (or failing to meet) the sales targets is not tied to any financial incentives for franchisees over and above the standard commission earned from each unit sold. The sales targets are used by Tatts to measure the growth of each outlet and the opportunities which may exist for growing each individual business. Tatts submits that it would consult with each relevant industry association on any incentive programs (should it decide to introduce one) but does not consider that this is an appropriate area for collective negotiation.
- 3.32. LAAT acknowledges that Tatts is currently opposed to the collective negotiation of sales targets on the basis that LAAT may seek to undermine their intent. LAAT submits that this would be inconsistent with its objectives and past efforts to promote higher lottery sales. LAAT considers that Tatts may change its position in relation to collective negotiation of sales targets during the five year authorisation period proposed and the authorisation should provide for this possibility. In addition LAAT would like to explore the possibility of collective sales targets with Tatts.
- 3.33. The ACCC considers that it may not be appropriate for LAAT and its members to collectively negotiate the level of sales target to be assigned to each individual member. However, although there may be no direct financial effects of reaching or failing to reach a sales target, failure to do so may lead to termination of the franchise agreement or a decision not to renew it. Accordingly, the ACCC considers that LAAT and its members have a clear interest in negotiating the method and criteria by which such sales targets are set.
- 3.34. The ACCC notes Tatts' strong opposition to negotiations with LAAT in this regard. However, the ACCC considers that, should Tatts reconsider its position during the life of the authorisation, the criteria and method of calculation of sales targets may particularly benefit from win-win efficiency gains due to the input of lottery agents. These kinds of gains may occur where Tatts has access, in bargaining collectively with lottery agents over sales targets, to a broader perspective on the fitness of the criteria and method used to calculate the sales targets than is available from individual negotiations. Accordingly, the ACCC has not excluded negotiation of sales targets, other than the level to be assigned to each particular agent, from the scope of the authorised conduct.

Staff training and equipment requirements

- 3.35. Tatts objects to collectively negotiating staff training and equipment requirements on the basis that they relate directly to issues of security, integrity and the proper conduct of the lottery system. Tatts is concerned that it always be in a position to protect the security and integrity of the process for the sale of its lottery products, for commercial reasons and to ensure that it complies with its regulatory requirements. Tatts is concerned that including these aspects in the Collective Bargaining Conduct may inhibit its ability to do so.
- 3.36. Tatts notes that these issues are matters relevant to how Tatts manages and operates its franchise system and not the commercial terms and conditions of the franchise agreements. Tatts considers that such matters are more appropriately subject to discussion with individual agents. Tatts already provides several processes through which individual lottery agents can provide such feedback

including through the call centre, retail territory managers and the Retailer Consultative Group.

- 3.37. Tatts also submits that these issues are not within the scope of any of the other authorisations previously granted by the ACCC to lottery agent associations in other jurisdictions.
- 3.38. LAAT notes that many aspects of staff training and equipment maintenance are regulated by Tasmanian Gaming. However, LAAT considers that LAAT, its members and the Targets also share a common interest in ensuring the integrity and continued wellbeing of the Tasmanian lottery system. LAAT submits that its members would appreciate the opportunity to collectively discuss with the Targets a range of legitimate commercial concerns which include quality, timing, content and cost effectiveness of training and administration, servicing, upgrades and repair of equipment.
- 3.39. Some minimum staff training and equipment requirements are set by Tasmanian Gaming and are therefore not part of the scope of the proposed Collective Bargaining Conduct.
- 3.40. The ACCC notes Tatts' contention that the ACCC has not previously authorised lottery agents to collectively bargain in relation to staff training and equipment requirements. However, the scope of previous authorisations was in part determined by the terms of the applications and is not necessarily determinative of the scope of what the ACCC may be willing to authorise in future. Further, the scope of these previously authorised arrangements is likely to be wider than the explicit items of negotiation listed in the authorisations due to the use of an 'includes' definition.
- 3.41. Nonetheless, the ACCC notes that all three early authorisations listed in section 2 explicitly authorised Collective Bargaining in relation to agent procedure manuals and equipment hire costs. In A91101, granted to LAQ, the ACCC explicitly authorised collective bargaining in relation to training.
- 3.42. Other than matters regulated by Tasmanian Gaming, the ACCC considers that staff training and equipment requirements are areas of business operation which may particularly benefit from win-win efficiency gains due to the input of lottery agents via collective negotiation. For example, LAAT members may be able to collectively suggest more efficient and effective methods to organise the delivery of training.
- 3.43. Given the voluntary nature of the Collective Bargaining Conduct and the potential public benefit that may arise from collective negotiation in these areas, the ACCC has not excluded training and equipment requirements from the scope of the authorised conduct. The ACCC notes Tatts' strong opposition to negotiations with LAAT in regard to negotiation of these areas of business operations and notes that Tatts may choose not to collectively negotiate on these aspects.

Balance of public benefits and detriments

- 3.44. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including from any lessening of competition.
- 3.45. The ACCC considers that the Collective Bargaining Conduct proposed by LAAT is likely to result in a number of public benefits including:
- (a) improved lottery agent input into terms and conditions
 - (b) transaction cost savings; and
 - (c) better informed markets.
- 3.46. The ACCC considers that, in general, the Collective Bargaining Conduct (with the exclusions noted) is likely to result in limited public detriment due to:
- (a) the gaming regulations;
 - (b) the low level of current competition between lottery agents to sell lottery products to consumers;
 - (c) the voluntary nature of the Collective Bargaining Conduct; and
 - (d) the lack of any proposed collective boycott activity.
- 3.47. On balance, the ACCC considers that the Collective Bargaining Conduct (with the matters in paragraph 4.1 excluded) is likely to result in a benefit to the public and that this benefit would outweigh the detriment to the public due to any lessening of competition that is likely to result from the Collective Bargaining Conduct.

4. Determination

Grant of authorisation

- 4.1. For the reasons in this determination, the ACCC is satisfied that the tests in sections 90(5A), 90(5B), 90(6) and 90(7) of the Act are met.¹⁷ Accordingly, under sections 88(1A) and 88(1) of the Act, the ACCC grants authorisation A91309 to the Applicants until 17 August 2017 for Collective Bargaining Conduct with the Targets over the terms identified in paragraph 1.2 of this determination, with the following exclusions:
- (a) the collective negotiation of fees that are paid or payable only in relation to an outlet at a new physical location (except where the franchisee moves from one physical location to another). A new physical location is a location where there was no outlet immediately prior to the establishment of the new outlet;
 - (b) the collective negotiation of the actual level of sales target to be assigned to each individual franchisee; and
 - (c) terms currently determined by legislation.

¹⁷ See Attachment A

- 4.2. Under section 88(10) of the Act, the ACCC extends the authorisation to future participants in the collective group that also distribute lottery products for the Targets and are members of LAAT.

Date authorisation comes into effect

- 4.3. This determination is made on 26 July 2012. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 17 August 2012.

Attachment A – Relevant Legislative Tests

Sections 90(5A) and 90(5B) 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.

Sections 90(6) and 90(7) 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.