



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

Lottery Agents Queensland Ltd

in respect of

collective bargaining with Tatts Group
(including Golden Casket Corporation)

Date: 27 February 2014

Authorisation number: A91397

Commissioners: Sims
Rickard
Schaper
Cifuentes
Court

Summary

The ACCC proposes to re-authorise, for a further five years, Lottery Agents Queensland (LAQ) and its members to collectively bargain over the terms and conditions of agency agreements with Tatts Group and any other organisation licenced to conduct lotteries in Queensland.

Next steps

The ACCC will seek submissions in relation to this draft determination before making its final decision. The applicants and interested parties may also request that the ACCC hold a pre-decision conference to allow oral submissions on the draft determination.

The application for authorisation

1. On 22 November 2013, Lottery Agents Queensland Ltd (LAQ) lodged an application with the Australian Competition and Consumer Commission (the ACCC) under of the *Competition and Consumer Act 2010* (the Act) for the revocation of authorisation A91101 and the substitution of authorisation A91397 for the one revoked (re-authorisation).¹ The application was lodged because authorisation A91101 was due to expire on 10 December 2013 and the authorised arrangements may contain a cartel provision and may have the effect of substantially lessening competition within the meaning of section 45 of the Act.
2. The re-authorisation was originally sought to cover the continuation of collective bargaining by LAQ and its members with Tatts Group (including Golden Casket). On 4 February 2014, LAQ amended its application to include as potential targets of the collective bargaining, any holders of a lottery licence in Queensland, since the exclusive lottery licence held by Tatts Group will expire in 2016.
3. LAQ also requested interim authorisation to enable it to continue to collectively bargain with Tatts Group while the ACCC is considering the application for re-authorisation. On 4 December 2013, the ACCC decided under section 91 of the Act to suspend the operation of authorisation A91101 and granted interim authorisation in substitution. Interim authorisation does not extend to collective bargaining in relation to matters not currently included in agency agreements and matters currently unforeseen. 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.

The conduct

4. Re-authorisation is sought for five years to enable LAQ to continue to negotiate on behalf of itself, its current members and any future members (the Applicants) in relation to the terms and conditions of agency agreements and arrangements with Tatts Group (including Golden Casket) on matters including:
 - i. commissions paid to lottery agents;

¹ Detailed information about the authorisation process is contained in the ACCC's *Authorisation guidelines June 2013* available on the ACCC's website www.accc.gov.au.

- ii. handling fees paid to lottery agents;
 - iii. agency application fees;
 - iv. support service levies;
 - v. freight charges;
 - vi. product ordering fees;
 - vii. equipment hire costs (in relation to terminals and validators);
 - viii. retail image design; and
 - ix. changes to the Agents Manual.²
5. LAQ has also sought authorisation to negotiate matters not currently included in agency agreements and matters currently unforeseen and to allow it to collectively bargain with any future holders of a lottery licence in Queensland.
6. Collective bargaining by Queensland lottery agents was first authorised by the ACCC in 2003 and re-authorised in 2008.³ LAQ does not seek authorisation for members to take collective action in the form of boycotts or otherwise against Tatts Group or any future holders of a lottery licence in Queensland.
7. The ACCC can authorise potentially anti-competitive conduct, such as the collective bargaining conduct proposed by LAQ, if it is satisfied that the likely public benefits of the conduct will outweigh the likely public detriments.⁴ Further details regarding the re-authorisation application may be found on the ACCC's Public Register on its website.⁵

Background

Industry

8. Lotteries in Queensland are regulated by the Queensland Office of Liquor, Gaming and Racing (Queensland Gaming). The standard agreements which govern the commercial relationships between a licenced lottery licence holder and its lottery agents must be approved by Queensland Gaming. Tatts Group (through its subsidiary Golden Casket) is the only organisation currently licenced to run lotteries in Queensland as it holds an exclusive licence until 2016.
9. Queensland Gaming regulates many aspects of the standard lottery agent agreement under the *Lotteries Act 1997* (QLD) and *Lotteries Regulation 2007* (QLD), including:
- (a) the types of locations and businesses in which lotteries may be sold;

² The Agents Manual is produced by Golden Casket (and may be amended by Golden Casket from time to time) and covers issues such as the agency appointment process, the sale of an agent's business, the termination of agency agreements, the agent's agreement to commit to an annual business plan, the achievement of minimum sales levels, any requirement to extend trading hours and training requirements.

³ A90853 (2003) and A91101 (2008).

⁴ The ACCC's Authorisation guidelines June 2013 (available from the ACCC website) has more details regarding the ACCC's authorisation process and the relevant tests are set out in full at Attachment A.

⁵ <http://registers.accc.gov.au/content/index.phtml/itemId/1128236/fromItemId/278039>.

- (b) the allowed method and grounds for termination or suspension of a lottery agent agreement; and
 - (c) the procedures and standards for conducting the lottery and distributing prizes.
10. Currently, two separate groups are authorised to collectively bargain in relation to the terms and conditions of lottery agency agreements in Queensland. LAQ has been authorised to collectively bargain on behalf of its members since 2003.⁶ In 2013, authorisation was granted for the Queensland Newsagents Federation (QNF) to collectively bargain over certain terms and conditions of agency agreements on behalf of its members.⁷
11. There is a significant overlap in actual and potential membership between LAQ and QNF. In particular, LAQ's members include both lottery agents who operate as standalone businesses and lottery agents who operate their agencies in conjunction with other businesses, including newsagencies. The QNF is a newsagent-specific trade association. Many of its members are also lottery agents and some of those are also LAQ members. Tatts Group submits that it presently negotiates with both groups.

Submissions

12. The only submission the ACCC received in response to the application for re-authorisation was from Tatts Group on behalf of Golden Casket (received prior to the ACCC's decision to grant interim authorisation). Tatts Group did not have any concerns regarding the authorisation per se but was concerned about the scope of the authorisation which includes negotiation in relation to matters currently not included in agency agreements and matters currently unforeseen (see paragraphs 28-36 below). Tatts Group also stated that since the QNF was authorised to collectively bargain on behalf of its members there has been some duplication in dealing with similar issues across both groups (see paragraphs 20-25).

ACCC assessment

Information considered by the ACCC

13. In its evaluation of the application for re-authorisation the ACCC has taken into account:
- (a) the issues raised in Tatts Group's submission in response to the current authorisation application;
 - (b) the existence of the QNF as an alternative bargaining group, at least for newsagents, with some overlap of membership and potential membership with LAQ;
 - (c) information available to the ACCC from consideration of previous relevant matters and the fact that no issues have arisen during the life of LAQ's previous authorisation;⁸

⁶ Authorisations A90853 (2003) and A91101 (2008).

⁷ Authorisation A91353.

⁸ Queensland Newsagents Federation - Authorisation - A91353, Australian Newsagents' Federation Limited – Authorisation – A91349; Lottery Agents' Association of Tasmania Inc – Authorisation - A91309; Newsagents Association of NSW and ACT – Authorisation – A91269; Lottery Agents

- (d) the likely future without LAQ's collective bargaining.⁹ In particular, the ACCC understands that lottery agents who are not members of the LAQ or QNF bargaining groups are currently offered and accept standard form contracts that have been negotiated with the bargaining groups. The ACCC considers that, absent authorisation, negotiations would be likely to continue to occur between Tatts Group and the QNF. LAQ members who are also QNF members would be able to participate in, and/or be represented in the Tatts Group negotiations. Some LAQ members who are newsagents but are not currently QNF members may also choose to join the QNF. Newsagents who did not join the QNF would likely continue to be offered standard form contracts based on the contract negotiated with the QNF. Standalone lottery agents (that is, lottery agents who do not run a newsagency in conjunction with their lottery business) would also likely continue to be offered standard form contracts, possibly on the same terms as those offered to newsagents. No collective bargaining would be likely to occur with any organisation other than the Tatts Group which may be licenced to conduct lotteries post 2016;
- (e) the relevant areas of competition likely to be affected by the proposed conduct, particularly competition to provide lottery distribution services within Queensland to lottery licence holders and competition to supply lottery products to Queensland consumers;¹⁰
- (f) the five year authorisation period requested; and
- (g) that no collective boycott activity is proposed and participation in LAQ's collective bargaining group is voluntary.

Public benefits

14. The ACCC has previously recognised that a range of public benefits are likely to arise in relation to collective bargaining conduct with lottery providers of the type proposed by LAQ. In particular, public benefits are likely to arise from:
- (a) transaction cost savings; and
 - (b) improved input of the bargaining group's members into their terms and conditions of selling lottery tickets.

Transaction cost savings

15. In general, when the ACCC has previously considered the public benefits of collective bargaining by lottery agents, the ACCC has accepted that there would be transaction cost savings due to a single negotiation process rather than a series of individual negotiations.¹¹
16. Tatts Group submitted that since the QNF was authorised to collectively bargain on behalf of its members in addition to LAQ there has been some duplication in dealing with similar issues with both groups.

Association of Victoria Inc – Authorisation – A91126; Lottery Agents Queensland Ltd – Revocation and Substitution - A91101.

⁹ For more discussion see paragraphs 5.20-5.23 of the ACCC's Authorisation guidelines June 2013.

¹⁰ See A91353 Queensland Newsagents Federation final determination p. 6 and A91269 Newsagents Association of NSW and ACT final determination [4.3-4.16].

¹¹ Ie A91269 Newsagents Association of NSW and ACT final determination [4.30-4.37].

17. The ACCC considers that collective bargaining by both QNF and LAQ with Tatts Group may lead to higher transaction costs compared to the future in which LAQ does not continue to collectively bargain but QNF does. However, the ACCC considers that the parties involved in any collective bargaining have the means and the incentive to minimise transaction costs, particularly where there is a commonality of issues across the bargaining groups. In addition, competition between LAQ and QNF may provide incentives for each bargaining group to seek to minimise bargaining costs, leading to improved efficiencies in bargaining outcomes.
18. Finally, the ACCC notes that the collective bargaining in the case of QNF and as proposed by LAQ is voluntary for all parties. This means that the parties will only incur the higher transaction costs if the benefit to all the parties involved in any collective negotiations is expected to outweigh these higher costs.
19. Accordingly, the ACCC considers that any higher transaction costs as a result of LAQ's collective bargaining would be a consequence of negotiations which achieve more efficient contracts and would not outweigh the public benefits of such efficiencies. Therefore, although the ACCC does not consider that LAQ's collective bargaining is likely to lead to transaction cost savings, it does not consider that any increased transaction costs are likely to constitute a net detriment.
20. There is potential that another organisation than the Tatts Group may be granted a licence to conduct lotteries in Queensland from 2016 onwards. If LAQ was to remain the only bargaining group authorised to collectively bargain with other licence holders, the ACCC considers that LAQ's collective bargaining would be likely to generate transaction cost savings due to a single negotiation process rather than a series of individual negotiations.

Improved input into the development of contracts, operational manuals and materials

21. LAQ has submitted that as Tatts Group, through Golden Casket, is the sole provider of lottery products in Queensland, collective negotiation is required in order to have an effective voice in negotiations with the operator.
22. The ACCC accepts that collective bargaining is likely to result in public benefits resulting from improved input into the development of contracts, operational manuals and materials for lottery agents. Individual lottery agents often have very little input into such arrangements because of their weak bargaining position. Further, past experience suggests that where a single bargaining group has been operating those lottery agents that are not members of the group have nonetheless been offered standard form contracts based on the outcome of the collective negotiation.
23. Collective negotiations may increase the input that lottery agents have into such arrangements and therefore create greater opportunities for the negotiating parties to identify and achieve business efficiencies.¹²
24. Despite the overlap in membership between QNF and LAQ, the ACCC considers that standalone lottery agents may have different operational practices and needs compared to newsagents. For example, the number of staff, the size of the premises and the space available for lottery advertising. LAQ is the only bargaining group that represents

¹² Ie A91269 Newsagents Association of NSW and ACT final determination [4.38-4.49].

standalone lottery agents (while also representing its newsagent members). The ACCC considers that the proposed arrangements will lead to a better and more diverse offering of bargaining services and increase the input that these lottery agents have into contract terms and conditions.

25. The ACCC considers that the LAQ's collective bargaining is likely to lead to public benefits in the form of more efficient terms and conditions as a result of improved input by lottery agents.

Public detriments

26. The ACCC considers that the public detriment resulting from the collective bargaining conduct proposed by LAQ is likely to be limited since:

- (a) Queensland Gaming will continue to regulate most aspects of the retail supply of lottery products;
- (b) participation in LAQ's collective bargaining is voluntary for Tatts Group, any other organisation licenced to conduct lotteries in the future and LAQ members; and
- (c) no collective boycott activity is proposed.

27. The concerns expressed by Tatts Group regarding bargaining over matters 'not currently included in agency agreements' and 'matters currently unforeseen' are considered below.

Bargaining over matters 'not currently included in agency agreements' and 'matters currently unforeseen'

28. In seeking re-authorisation LAQ proposes to include collective negotiation 'in relation to matters not currently included in agency agreements' and 'matters currently unforeseen.'
29. Tatts Group is concerned about the potential scope of the arrangements sought by LAQ and submits that the authorisation should be limited to the defined heads of bargaining listed in LAQ's application.
30. The ACCC notes that LAQ's existing authorisation covers collective bargaining in relation to the terms and conditions of agency agreements and arrangements with Tatts Group *including* defined heads of bargaining listed in its application. LAQ is also currently authorised to collectively bargain 'in relation to other relevant matters as they arise.'
31. Authorisation on these terms provides the parties with the flexibility to address new and unforeseen issues in their commercial agreements and provides certainty that all aspects of the commercial relationship between the parties, as it may evolve over the life of the authorisation, can be addressed through collective negotiation. The ACCC notes that Tatts Group has not provided information to demonstrate that under the scope of the existing authorisation LAQ has sought to include inappropriate matters as part of the bargaining arrangements. Further, as is the case with the existing authorisation, the voluntary nature of the arrangements means that Tatts Group, and any other licenced lottery provider, will remain free to limit negotiations to those matters it considers are appropriately addressed through collective bargaining.
32. The ACCC also notes that LAQ seeks authorisation to collectively bargain with any organisation that may hold a licence to conduct lotteries in Queensland from 2016 onwards. Limiting the re-authorisation to the defined heads of bargaining in LAQ's application, which are defined by reference to the current arrangements with the Tatts

Group, would unduly restrict the terms of negotiation with any future licence holder. This would potentially make such negotiation impractical.

33. Accordingly, the ACCC does not propose to exclude collective negotiation in relation to matters not currently included in agency agreements and matters currently unforeseen from the scope of the proposed arrangements.
34. In considering previous collective bargaining applications for authorisation by lottery agent groups, the ACCC has not extended authorisation to collective bargaining in relation to arrangements concerning the terms and conditions of new lottery agencies being established. This was due to concerns that existing lottery agents are likely to have an incentive to resist the opening of new agencies that are likely to impact their business. To the extent that existing agents may be successful in limiting new entry, and thereby competition among lottery agents, this is likely to be anti-competitive and constitute a likely public detriment.
35. LAQ has not explicitly identified matters relating to granting new lottery agencies as an issue in relation to which it seeks to collectively bargain. However, for the avoidance of doubt the ACCC proposes to limit the scope of the authorised collective bargaining to exclude matters concerning the establishment of new agencies and/or the terms and conditions under which those agencies will operate.
36. As in relation to collective bargaining more generally, the ACCC notes that the voluntary nature of the arrangements means that lottery providers are able to limit negotiations to those matters they consider are appropriately addressed through collective bargaining. However, in relation to matters concerning new agencies, collective negotiation between LAQ and the lottery provider is likely to produce outcomes which, while to the benefit of both existing agents and lottery providers, nonetheless limit new entry thereby restricting competition among lottery. Accordingly, the ACCC considers that the scope of the authorisation should be explicitly limited to preclude collective negotiation of these matters.

Balance of public benefit and detriment

37. The ACCC considers that LAQ's collective bargaining is likely to lead to public benefits arising from better representation of the interests of lottery agents, leading to better input into contracts. The ACCC considers that the collective bargaining, subject to the proposed limitation of matters concerning the establishment of new agencies and/or the terms and conditions under which new agencies will operate, is likely to result in limited public detriments.
38. On balance, the ACCC considers that collective bargaining by LAQ is 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.

Length of authorisation

39. The Act allows the ACCC to grant authorisation for a limited period of time.¹³ This allows the ACCC to be in a position to be satisfied that the likely public benefits will continue to outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

¹³ Subsection 91(1).

40. The ACCC proposes to grant authorisation for five years as requested by LAQ.

Draft determination

The application

41. On 22 November 2013, Lottery Agents Queensland Ltd (LAQ) lodged an application under subsection 91C(1) of the *Competition and Consumer Act 2010* for revocation of authorisation A91101 and the substitution of authorisation A91397 for the one revoked (re-authorisation) with the ACCC. Application A91397 was made using Form FC Schedule 1, of the Competition and Consumer Regulations 2010. The re-authorisation is sought to cover the actions of LAQ and its current and future members (the Applicants)
42. The Applicants seek re-authorisation to enable them to continue to make and give effect to collective bargaining arrangements with Queensland lottery licence holders. Re-authorisation is sought as the collective bargaining arrangements may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.¹⁴ As required under subsection 91C(7), the ACCC has considered whether it is satisfied that it would not be prevented under subsections 90(5A), (5B), (6) and (7) from making a determination granting the substituted authorisation, if it were a new authorisation sought under section 88(1) and 88(1A) of the Act.

The net public benefit test

43. For the reasons outlined in this draft determination, the ACCC considers that in all the circumstances the collective bargaining proposed by LAQ (with the limit on negotiations relating to new entry) is 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. Accordingly, the ACCC is satisfied that the tests in sections 90(5A), 90(5B), 90(6) and 90(7) of the Act are met.¹⁵
44. The ACCC therefore proposes to revoke authorisation A91101 and grant authorisation A91397 in substitution for the one revoked.
45. This draft determination is made on 27 February 2014.

Conduct which the ACCC proposes to authorise

46. The ACCC proposes to grant authorisation A91397 for five years to the Applicants to collectively negotiate over the terms and conditions of agency agreements and arrangements with Tatts Group (including Golden Casket Corporation) including:
- i. commissions paid to lottery agents;
 - ii. handling fees paid to lottery agents;
 - iii. agency application fees;

¹⁴ The initial authorisation (A90853) was made under subsection 88(1) of the Trade Practices Act 1974 (Cth) (now the Act) in 2002. With the introduction of the cartel provisions into the Act, transitional provisions were introduced to cover authorisations of agreements that may contain cartel provisions under subsection 88(1A). (See Division 1 of Part XIII of the Act).

¹⁵ See Attachment A.

- iv. support service levies;
- v. freight charges;
- vi. product ordering fees;
- vii. equipment hire costs (in relation to terminals and validators);
- viii. retail image design; and
- ix. changes to the Agents Manual.

47. The ACCC also proposes to grant the Applicants authorisation to negotiate matters not currently included in agency agreements and matters currently unforeseen. The ACCC also proposes to grant the Applicants authorisation to collectively bargain with any other organisation licenced to conduct lotteries in Queensland.

48. Due to concerns regarding the likely detriments associated with collective bargaining in relation to new entry, the ACCC proposes to exclude from the scope of its authorisation collective bargaining in relation to:

- (a) the impact on current lottery agents when new agencies are proposed;
- (b) the terms and conditions for new outlets;
- (c) fees which are paid only in relation to new outlets;

except for the terms and conditions (including fees) on which existing outlets of Tatts Group can become lottery agents of another person or entity in connection with the grant of a Queensland lottery licence to a person or entity other than Tatts Group.

49. Under section 88(10) of the Act, the ACCC proposes to include future members of LAQ in its authorisation.

Interim authorisation

50. The interim authorisation granted by the ACCC on 4 December 2013 (see paragraph 3) remains in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Further submissions

51. 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 - Summary of relevant statutory tests

Subsections 90(5A) and 90(5B) provide that the ACCC shall not authorise a provision of a contract, arrangement or understanding, or 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 subsection 90(5A), would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that the benefit, in the case of subsection 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 was made and given effect to, or the proposed understanding was arrived at and given effect to, or in the case of subsection 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.

Subsections 90(6) and 90(7) state that the ACCC shall not authorise a provision of a contract, arrangement or understanding, or 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 subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that the benefit, in the case of subsection 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 given effect to, or the proposed understanding was arrived at and given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.