

SHOPPING CENTRE

COUNCIL OF AUSTRALIA

14 March 2014

Ms Susan Philp
Director, Adjudication Branch
Australian Competition and Consumer Commission
23 Marcus Clarke Street
CANBERRA ACT 2601

Dear Ms Philp,

Application for authorisation lodged by Australian Newsagents Federation

1. Introduction

We have been asked to respond on behalf of members of the Shopping Centre Council of Australia (SCCA) regarding the application by the Australian Newsagents Federation (ANF) for revocation of authorisation A91134 and A91174 and substitution of new authorisation A91407. All of the 'Shopping Centre Landlords' listed on page 4 of the document headed '2014 ACCC Authorisation – Targets for the Australian Newsagents Federation', attached to the ANF application, are members of the SCCA and this list appears to have been taken from the SCCA website.

We wrote to the ACCC on 19 February 2014 requesting further details from the ANF "of the sorts of arrangements the ANF has in mind and the matters on which the ANF proposes to bargain collectively" with our members. The ACCC forwarded to us the reply from Mr Hank Spier, consultant to the ANF, on 26 February 2014. Mr Spier advised that the ANF "wishes to collectively deal negotiate with commercial landlords in relation to rents and terms and conditions, including the apparent differentials between small newsagents and large tenants and even franchise newsagents marketing groups". We comment below on this response by the ANF and also provide factual data to assist the ACCC with its assessment of the ANF application.

2. Background

It may be useful, in considering the application, for the ACCC to have additional factual background on newsagents in shopping centres. According to the Directory of Shopping Centres, compiled by the Property Council of Australia, there are 1,030 newsagencies in the shopping centres included in the Directory. (We have excluded those in 'bulky goods centres', 'factory outlet centres' and 'themed centres' since these are not owned by those landlords covered by the ANF application. The excluded centres have a total of 19 newsagencies.)

According to the ANF's website "there are 5,000 individually owned and operated newsagencies" in Australia although the ANF application states that "the newsagent industry is comprised of a network of approximately 4,500 small businesses", of which nearly 2,000 are represented directly or indirectly by the ANF. Therefore approximately only 20%-23% of Australian newsagencies are located in shopping centres.

Of the 1,030 newsagencies in shopping centres, 59 (or 6%) are located in city centres; 189 (or 18%) are located in regional shopping centres (i.e. shopping centres with at least one department store as the major anchor store), including what the PCA Directory describes as super-regional and major regional shopping centres; 242 (or 23%) are located in sub-regional shopping centres (i.e. those with at least one discount department store as the major anchor); and 540 (or 53%) are located in neighbourhood shopping centres (i.e. those with at least one supermarket as the major anchor). Over half of the newsagencies in shopping centres are located in neighbourhood shopping centres.

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The vast majority of shopping centres which include newsagencies as part of their retail offer only have one newsagency but there are some, depending on the size of the shopping centre and the characteristics of the surrounding trade area, which have two or more newsagencies. In the latter situation, the newsagencies may be in competition with each other. In these circumstances collective bargaining may be inappropriate as it will impact the extent of competition between such newsagencies.

While the majority of newsagencies are individually owned, there are others which operate as newsagency chains, marketing groups or franchise arrangements. These include Nextra, NewsXpress, SupaNews, NewsPower and News Plus. Once again these are mainly located outside shopping centres. Nextra, for example, has 74 stores inside shopping centres and 283 outside shopping centres; NewsXpress has 46 stores inside shopping centres and 154 outside shopping centres; while NewsPower has 14 stores inside shopping centres and 245 outside shopping centres.¹

The ANF application does not, in our view, provide a factual basis for the ACCC's consideration of the issues and does not address how collective negotiation/bargaining appropriately balances the competitive issues raised above.

3. Absence of Homogeneity

3.1 Location

There is no homogeneity among newsagents in shopping centres. The circumstances of a newsagent in a neighbourhood shopping centre in, say, a country town in Western Australia is different to one in a sub-regional centre in, say, a regional city in NSW and is vastly different again to a newsagent in a super-regional shopping centre in, say, Melbourne. The demand for retail space; the traffic flow in the shopping centre; the characteristics of the surrounding trade area; the extent of competition from other newsagencies and similar stores within the shopping centre and within the surrounding trade area; the nature and location of the premises within the centre; the cost structure of the centre; and the moving average turnover of the shopping centre will vary significantly from shopping centre to shopping centre. This divergence is most relevantly reflected in the rental arrangements that will apply from situation to situation.

3.2 Rental arrangements

The customer traffic and turnover of these various categories of shopping centres varies substantially and, as a result, so does the demand for retail space. Shopping centres also have different cost structures depending on their size, location, utilities pricing, state and local government charges and the planning and infrastructure requirements imposed upon them. The market value of particular premises inside each centre will also vary depending on a range of factors, including the location, size, traffic flow, strength of catchment areas etc. As a result, the rents and total occupancy costs paid by the newsagencies in these different categories of shopping centres, and between the various categories of shopping centres, varies substantially.

The average occupancy cost ratio for newsagencies in neighbourhood shopping centres, where most newsagencies are located, is between 11% and 12%. (The occupancy cost ratio is the total cost of occupancy, exclusive of marketing levies, as a percentage of turnover). Within this overall average, however, there is also variation depending on the location of the centre. The occupancy cost ratio for newsagencies in neighbourhood shopping centres in metropolitan areas generally tends to be higher than this figure while those in neighbourhood centres in non-metropolitan areas would tend to be lower.

In larger centres, where foot traffic, turnover and cost structures are higher, and the competition for retail space is usually more intense, occupancy costs will be higher.

¹ Numbers obtained from the PCA Directory of Shopping Centres and relevant websites.

In sub-regional centres the average occupancy cost ratio for newsagencies would tend to be several percentage points higher than in neighbourhood shopping centres. Even within this broad category, however, there will be variations. In those centres with more than one discount department store the occupancy cost ratio will be higher than the average, while in those with only a single discount department store, the occupancy cost will tend to be lower than the average. At the same time, the average sales productivity (i.e. sales per square metre) of newsagencies in sub-regional shopping centres is higher than it is in newsagencies in neighbourhood shopping centres.

In regional shopping centres, where there is even greater competition for retail space given the limited number of such centres in Australia, rents and total occupancy costs will be higher again. At the same time, however, the sales productivity of newsagencies will also be higher in such centres than it is for newsagencies in sub-regional shopping centre and for those in neighbourhood centres.

Given there are wide differences in the nature of newsagency leases in shopping centres it is difficult to see how rents can be bargained collectively. Although we have been given no detail by the ANF this suggests that rents would have to be standardised on some basis – such as setting a standard rate per square metre. This ignores the commercial realities (referred to above) which determine the respective market value of premises. Standardisation of rental arrangements would inevitably mean a significant reduction in competition in the market for newsagency leases.

3.3 Lease terms and conditions

Just as rental arrangements vary from centre to centre so do other terms and conditions of the lease. Standard leases (such as those prepared by Law Societies and the Real Estate Institutes) are rarely used by SCCA members. Each company has its own precedent lease (which differs from company to company) and retail tenancy legislation requires this be given to prospective tenants when negotiations commence. The individual terms and conditions of the final lease will have been negotiated between the landlord and the tenant. Since lease terms and conditions vary widely from newsagency lease to newsagency lease it is difficult to see how these can be bargained collectively. This suggests that certain terms and conditions would have to be standardised although we don't know which terms and conditions the ANF has in mind. Standardisation would inevitably mean a reduction in competition in the market for newsagency leases.

3.4 Expiry dates of leases

Newsagency leases, even within an individual owner's portfolio, expire at different times. Bargaining over rent and other terms and conditions of a lease can only occur as the lease approaches the end of term. It is unrealistic to expect that shopping centre owners would reopen negotiations on leases which have already been entered into if those leases still have some years to run.

On average, assuming that most newsagencies would be on the statutorily imposed minimum term of five years, around 20% of newsagency leases expire each year. This means, even if all shopping centre owners were willing to bargain collectively (and leaving aside the divergent position on the particular factual circumstances of each lease as noted earlier), such a bargaining arrangement could only cover around 200 of the leases which are on foot in Australian shopping centres. Any arrangements which came out of such negotiations (assuming that it is possible to 'standardise' rents and other lease conditions across newsagencies and across centres) could not necessarily apply to other leases as they expire since leasing conditions could be substantially different in two or three years' time.

The ANF also appears to have overlooked the fact that retail tenancy legislation in the various states and territories imposes requirements on landlords on how they must approach end-of-lease negotiations. These requirements also differ from state to state - see for example sections 44, 44A and 45 of the (NSW) *Retail Leases Act* and Part 4A, Division 3 of the *SA Retail and Commercial Leases Act*. We believe that these legislative requirements are not consistent with a collective approach to lease negotiations as they are subject to a specific statutory process.

3.5 Nature of the newsagency business

Not all newsagency businesses are the same. Some have lottery agencies; others do not. Some sell gifts and toys; others do not. The NewsXpress blog, for example, lists the following products and services sold by members, in addition to newspapers, magazines and stationery. These include: art supplies, attraction tickets, banking, ticketing, binding, books, classified ad placements, cold drinks, confectionary, corporate stationery, Darrell Lea, digital photo equipment, dry cleaning, express post products, fax services, gift cards, gift ideas, greeting cards, groceries, home delivery, inkjet printer cartridges, internet starter kits, invitation service, laminating, legal stationery, laser print cartridges, licensed post office, lotteries and lotto, magazine putaways, maps and directories, mobile phones and starter kits, music and DVDs, OFFICEsmart, overseas papers and magazines, phone cards, photocopying black and white and colour, postage stamps, printing from media, public transport tickets, rubber stamps, shredding, tax forms, text books, Ticketek, Ticketmaster, tolling/licenses.

NewsXpress notes that "these are just a sample of what may be on offer at your local store." Some newsagencies provide a full suite of such products and services while others offer a more limited range. The market value of a newsagency offering a full suite of products and services would, prima facie, be higher than one offering a more limited range. At the same time, however, such an agency is likely to face greater competition (both from within and without the shopping centre) since these 'non-traditional' products and services would also be included in the retail offer of other speciality stores, as well as of discount department stores and supermarkets.

Once again this emphasises the lack of homogeneity in newsagency businesses in shopping centres and therefore the difficulty in understanding how collective negotiations of rents and conditions would apply given the differences in the nature of these businesses.

3.6 Franchisors and marketing groups

The ANF states that it also wishes to include, within the scope of the application, "the issue of the apparent differentials between small newsagents and large tenants and even franchise newsagents marketing groups". We have no information concerning rental arrangements for newsagency franchise groups or newsagency marketing groups and are not aware of whether there are such differentials. We noted earlier (in section 2) that the vast majority of the stores of such groups lie outside shopping centres so it is likely that there are not significant differentials inside shopping centres between independent newsagencies and those under the banner of franchise or marketing groups.

It is not unusual in retail leasing, however, for franchisors and retail chains to be able to negotiate more favourable rental arrangements where they are seeking multi-site deals from individual landlords. These 'favourable' arrangements, however, often involve the retailer taking on greater risk, such as from taking some of those sites in centres that are currently underperforming or are in the process of being redeveloped. It should also not be overlooked that the franchisee pays a franchise fee to the franchisor which adds to their occupancy costs. There is nothing unusual or anti-competitive about such outcomes. The commercial advantages of 'buying in bulk' are commonplace to ANF members and should therefore be familiar to the ANF.

3.7 Large tenants

We are uncertain about the reference to “apparent differentials between small newsagents and large tenants” in the ANF’s correspondence to the ACCC. We assume this is a reference to large non-newsagency tenants. It is not unusual for large tenants, which attract significant foot traffic to a shopping centre, to be able to negotiate a more favourable rental arrangement. (“More favourable”, that is, when measured on a dollar per square metre basis; such large tenants, because they occupy a much larger floorspace, pay a much higher dollar amount in rent than small tenants). This is no different to what occurs in office buildings where large prestige tenants are able to negotiate cheaper rental rates than smaller tenants.

3.8 Summary of diversity within group of newsagencies seeking authorisation

We believe, for the reasons set out in this section, there are many differences between ANF members and that they have few common characteristics which would assist collective bargaining in this industry. Indeed it is difficult to see efficiencies that will arise compared to possible increased costs in seeking to apply a ‘one size fits all’ approach to lease arrangements. Accordingly the SCCA believes there will be limited benefits and significant detriments associated with this aspect of the ANF application.

4. Absence of detail in the ANF application

The initial application lodged with the ACCC gave no information on why ‘shopping centre landlords’ were listed as ‘targets’ of the collective bargaining application. The application (on page 6) lists the specific matters on which the ANF wishes to bargain collectively with ‘newspaper publisher targets’ and ‘magazine distributor targets’. For example, with newspaper publisher targets, the ANF specifically wishes to bargain collectively over: newsagents’ commissions and home delivery fees; insert fees; settlement discounts; late paper fees; split papers; terms of supply; and rights of termination. These are all standardised arrangements which apply equally to all newsagencies. Similarly the ANF wishes to negotiate over seven specific matters with magazine publisher targets.

There is no such list of specific matters on which the ANF wishes to collectively bargain with shopping centre landlords. There is also no mention of shopping centre landlords in the application (other than in the list of ‘targets’ and a reference to ‘commercial landlords’ in a list of suppliers on page 2). The existing authorisations (which are to be revoked) do not include any reference to ‘commercial landlords’ or ‘shopping centre landlords’. This seems to suggest that the inclusion of ‘shopping centre landlords’ is very much a ‘catchall’ in seeking to allow collective bargaining or perhaps an afterthought by the ANF.

After we sought from the ACCC, in our letter of 19 February 2014, additional detail from the ANF, we were advised that “the ANF wishes to collectively deal negotiate with commercial landlords in relation to rents and terms and conditions . . .” We are disappointed in the generalised nature of the response provided by the ANF. As noted above, the rental arrangements and other terms and conditions of leases to newsagencies are not standardised but vary considerably from shopping centre to shopping centre. This is unlike the common or standardised arrangements which newsagencies have with newspaper publishers, magazine publishers and lottery companies. For example, the commissions received by newsagencies from lottery companies for each lottery product is standardised and each agency receives the same commission per product.

Is the ANF proposing that there should be a common rent (presumably on a dollar per square metre basis) paid by newsagencies in shopping centres, irrespective of the category of shopping centre, the location, the range of products sold, the characteristics of the premises etc.? If so, how does the ANF propose to handle the fairly significant increase in rents which would need to be paid by those newsagencies which currently pay much less than whatever common rate is struck? Does the ANF propose to negotiate a 'standard lease' for newsagencies in shopping centres and, if so, how will this take into account provisions of retail tenancy legislation which differ from state/territory to state/territory? How will it handle the scaling back of conditions which would occur for some newsagencies if standard conditions are struck? It is only necessary to pose such questions to highlight how problematic a collective approach to negotiations would be; what little thought the ANF appears to have given to its application as it affects shopping centre landlords; and what little information the ANF has supplied to the ACCC in order to enable a proper competition assessment to be made.

We note that the ANF, in the email of 26 February from Mr Spier, states "individual newsagents find it difficult to deal with landlords despite the existence of retail lease legislation in most jurisdictions"². The email also states that "ANF members feel totally at loss when dealing with major commercial landlords and want assistance from the ANF". Although Mr Spier has offered no factual material and basis for this claim, our members have no objection to the ANF providing assistance to ANF members in their individual lease negotiations with landlords. We fail to understand, however, how this can be done collectively and are concerned that this will create additional costs and uncertainty for all parties.

5. Shopping centre leases and the need for collective bargaining

As noted earlier the majority of newsagencies in shopping centres are in neighbourhood shopping centres. There are, according to the PCA Directory of Shopping Centres, 824 neighbourhood shopping centres in Australia and around 500 individual owners of these centres. The ownership of such centres is diverse and private ownership dominates. Most of these centres, therefore, are not owned by "major commercial landlords". Even if the majority were owned by institutional investors, the lesser demand for retail space in these centres (as reflected in the lower occupancy costs cited earlier) suggests there is no significant imbalance of bargaining power.

Mr Spier also states that the ANF "will only seek to collectively bargain with a limited number of SCCA members but it is not possible to specify those at this point in time." For this reason alone the ANF's 'broad brush' application should be declined. We note, for example, that relatively small shopping centre owners and managers have been included in the list of 'targets' nominated by the ANF. One of these targets only has one newsagency in its centres while two others have only two. Granting the ANF the power to collectively bargain with these members – as would be the case if the ANF's current application is authorised – would give rise to a public detriment since it would create a substantial imbalance in bargaining power in favour of the ANF and would therefore be anti-competitive.

² This statement is incorrect. Retail tenancy legislation exists in **all** states and territories. This lays down minimum conditions which must apply in a wide range of retail tenancy transactions. If a lease term fails to comply with the minimum conditions laid down in the legislation the lease term is void and the legislation prevails. The legislation also arranges for low-cost mediation of retail tenancy disputes. Very few other business-to-business contracts are as highly regulated by governments as retail leases.

6. Coverage of the ANF application

We noted above that around 80% of newsagencies are located outside shopping centres. The ANF has stated that it does not propose to be involved in lease negotiations for newsagents outside shopping centres. Mr Spier states that "in the experience of the ANF such situations involve smaller individual landlords who do not deal with more than one newsagent and collective bargaining may not be appropriate".

Over half of the newsagencies that are located in shopping centres, however, are located in neighbourhood shopping centres. As noted above there are more than 800 neighbourhood shopping centres in Australia and these are in the hands of around 500 separate owners. Given that ownership of such centres is widely dispersed, it would seem on the ANF's own logic that most of the owners of neighbourhood shopping centres do not deal with more than one newsagent and collective bargaining may not be appropriate in these circumstances.

It follows from this that the coverage of the ANF's application, even within shopping centres, is therefore very limited. In its present form, the application (if it was authorised) would be largely limited to newsagencies in regional shopping centres, around half of the newsagencies in sub-regional shopping centres and a very limited number of newsagencies in neighbourhood shopping centres.

Leaving aside for the moment the fact that the ANF is vague about which newsagencies inside shopping centres would be subject to collective negotiations, the ANF effectively seeks to divide the market for newsagency leases into two separate markets: those inside shopping centres and those outside shopping centres. The real world does not recognise such a distinction. The 'activity centres policy' or 'urban centres policy', which forms the strategic basis of most state and territory land use planning schemes, seeks to concentrate trip-generating activities, such as retail, in a designated hierarchy of 'activity centres' concentrated around transport hubs. In addition to other benefits this policy tends to concentrate retail competition in defined activity centres. Thus newsagencies inside shopping centres find themselves facing competition from newsagencies located outside the shopping centre but still within the centre's primary trade area. Subjecting only part of the market to a collective bargaining application obviously has significant competition implications.

In the case of newspaper/magazine publishing and lottery companies the limited nature of the coverage of the collective bargaining application does not matter since the benefits which may accrue from such collective negotiations (such as increased commissions) will flow to all newsagencies, irrespective of whether they are located inside or outside shopping centres or irrespective of whether they are located in regional, sub-regional or neighbourhood shopping centres. This would not be the case in relation to collective bargaining in shopping centres, based on the limited information supplied by the ANF. Any benefits would flow to a very limited number of newsagencies and would place them in a more advantageous position than the majority of newsagents and those seeking newsagency leases in shopping centres. We believe that this should be a factor taken into consideration by the ACCC in determining whether the proposed arrangements would deliver public benefits.

7. Conclusion

The ACCC, in granting authorisation under the *Competition and Consumer Act*, is required to be satisfied that:

- The provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public; and
- This benefit 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 was given effect to.

In our view the ANF's application, as it relates to shopping centre landlords, lacks sufficient detail on which the ACCC can be satisfied in relation to the statutory test. The ANF has given no information on how collective bargaining over rents would take place, given the vast differences in rental arrangements that already exist. Nor has the ANF given any information on which terms and conditions of newsagency leases it wishes to negotiate on – as it has for newspaper publishing and magazine publishing targets.

In these circumstances we do not believe that the ACCC has been provided with sufficient detail, and in particular sufficient facts, in order to be able to assess whether or not the authorisation would result in a benefit to the public or even assess what the impact on competition would be. On the extremely limited information that has been provided by the ANF we find it difficult to accept that there would be a public benefit that would outweigh any detriment arising from increased inefficiencies and uncertainty, as well as the lessening of competition that arises from collective bargaining by such a diverse group of newsagents. A further difficulty in this application is that a diverse range of newsagents would in turn be dealing with a group of suppliers that is also quite diverse.

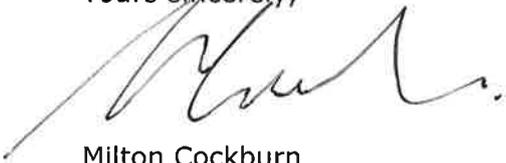
Although any authorisation of collective bargaining is entirely voluntary, and it would be up to individual SCCA members to decide whether or not to engage with the ANF in collective bargaining, in our view it would set a poor precedent for the ACCC to authorise the ANF application (as it relates to 'shopping centre landlords' or 'commercial landlords'). We make this statement because of the lack of specific detail provided by the ANF on how the proposed arrangements would operate; the lack of detail on the precise nature of the collective negotiations; and the lack of information on just which shopping centre owners will actually be subject to any authorised collective bargaining.

As a final matter we repeat our previous comment that SCCA members have no objection to the ANF assisting individual members on a case by case basis in negotiations. Our members believe this would be the most useful assistance to newsagents, given the diverse nature of the parties and the wide range of circumstances involving shopping centre leases. The SCCA believes that such assistance would provide a better commercial and competitive outcome than the likely limited public benefits and significant detriments which we believe would flow from allowing the ANF authorisation to extend to the nominated shopping centre landlords.

8. Shopping Centre Council of Australia

The Shopping Centre Council of Australia represents the major owners, managers and developers of shopping centres. Our members are AMP Capital Investors, Brookfield Office Properties, Charter Hall Retail REIT, Colonial First State Global Asset Management, DEXUS Property Group, Eureka Funds Management, Federation Centres, GPT Group, ISPT, Ipoh Management Services, Jen Retail Properties, Jones Lang LaSalle, Lend Lease Retail, McConaghy Group, McConaghy Properties, Mirvac, Perron Group, Precision Group, QIC, Savills, Stockland, Westfield Group and Westfield Retail Trust.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Milton Cockburn', written over a light blue horizontal line.

Milton Cockburn
Executive Director