

PREDECISION CONFERENCE WITH ACCC – FRI 6 JUNE 2014

Summary

The onus is on ANF to satisfy the ACCC that the authorisation should be granted. The ANF must satisfy the ACCC that there is sufficiently substantial public benefit to outweigh the detriment. The ANF is obliged to "provide comprehensive and detailed submissions"; "respond fully to issues raised by interested parties or the ACCC" and, where possible, "provide evidence to substantiate claims" about the extent of public benefit and detriment. The ANF has done none of those things.

With respect, we believe the ACCC has taken easy way out and simply thrown the onus back on shopping centre landlords to refuse to bargain collectively, risking adverse publicity as 'obstructionist' or 'uncooperative'. It creates a poor precedent for ACCC to authorise collective bargaining when so little information has been supplied by the applicant on how such collective negotiations would occur.

Responsibility of the ANF

The onus is on ANF to satisfy the ACCC that the authorisation should be granted. In particular, ANF must demonstrate that there is a sufficiently substantial public benefit to outweigh any detriment and so justify the authorisation (Queensland Co-operative Milling Association Ltd (1976) ATPR, 40-102 at 17,244).

This is set out in paragraphs 5.9 – 5.12 of the ACCC's Authorisation Guidelines 2013:

Onus on the applicants to satisfy the ACCC:

5.9 *It is for applicants to satisfy the ACCC that authorisation should be granted. In particular the applicant must satisfy the ACCC that there is sufficiently substantial public benefit to outweigh the detriment and so justify the authorisation.*

5.10 *Applicants for authorisation should:*

- *provide comprehensive and detailed submissions in support of their application;*
and
- *respond fully to issues raised by interested parties or the ACCC during the authorisation process.*

5.11 *Where possible applicants should provide evidence to substantiate claims about the extent of public benefit and detriment.*

5.12 *Generally, the evidentiary burden on applicants to prove the existence of public benefits increases with the level of public detriment that is likely to result from the conduct.*

"Comprehensive and detailed submissions"

The ANF has not provided "comprehensive and detailed submissions" to the ACCC. There was no detail at all provided in the ANF's original application (29 January 14), unlike the 'newspaper publisher' and 'magazine distributor' targets where the ANF itemised the matters on which it proposed to bargain. When the SCCA asked (through the ACCC) for additional information, the ANF supplied only 37 words of explanation. (See the second sentence of Hank Spier's email to Susan Philp, 26 February 14). Even within that sentence, there are only 8 words of information: the ANF wanted to negotiate "in relation to rents and terms and conditions". This is hardly a "comprehensive and detailed submission". How can the ACCC determine 'public benefits' and 'public detriments' with such a paucity of information?

No information has been supplied by the ANF on how it will collectively bargain rents, given leases have different expiry dates (one of our members, across its portfolio, has 2 leases expiring in 2014, 3 in 15, 1 in 16, 1 in 17, 6 in 18, 1 each in years 19, 20 and 21). Rents for newsagents within each owner's portfolio vary substantially from centre to centre, depending on a range of circumstances (demand for retail space; development/construction costs of centre; foot traffic of centre; degree of competition within and without centre etc). This is unlike the contracts which newsagents hold with a range of other suppliers (e.g. newspaper and magazine publishers, lottery operators etc.) where contracts and rates of commissions etc. tend to be standardised.

Given expiry dates for newsagent leases within a portfolio (and even within a centre) vary greatly (in terms of years, not months), owners can't be expected to negotiate on leases that still have several years before they expire. Retail tenancy legislation lays down a strict timetable ("no earlier than 12 months, no later than months") when a lessor can begin to negotiate on a new lease. How can a landlord be expected to agree to a rent that will apply in, say, three years' time. The ANF hasn't explained how this is consistent with collective bargaining and the ACCC has ignored this.

(Quote from first paragraph of our submission on page 6).

No information has been supplied by ANF on which "terms and conditions" of leases it wishes to negotiate. These are not standardised, like lottery contracts and newspaper/magazine contracts, and can also vary depending on individual negotiations. How can the ACCC assess public benefits if it does not know what terms and conditions are to be bargained collectively?

Contrast this with the Application lodged by Victorian Association of Newsagents to bargain collectively with Tattersalls etc. and recently authorised by ACCC. VANA clearly spells out (p.1 of Determination) the 9 terms and conditions of lottery agency agreements it wishes to negotiate. As a result ACCC's assessment runs over 6 pages. The ACCC assessment of the ANF application (as it affects shopping centre landlords) takes less than one page.

"Evidence to substantial claims"

What was the evidence provided by the ANF "to substantiate claims" of public benefit? Two generalisations: "individual newsagents find it difficult to deal with landlords despite the existence of retail leases legislation in most jurisdictions". And "ANF members feel totally at a loss when dealing with major commercial landlords and want assistance from the ANF".

What is the evidence for these generalisations? None is provided by the ANF. But the occupancy cost ratio for newsagents in supermarket-based shopping centres – where the majority of shopping centre newsagents are located – is only 11-12%. The headline on an article in the most recent issue of the ANF's Newsagent Magazine is "Leasing – it's a tenant's market". The ANF's specialist leasing adviser is quoted as advising newsagents to seek to take advantage of this "tenant's market" by seeking to renegotiate their existing leases (although he correctly points out the landlord has no obligation to do so). This article is also published on the Newsagents Blog (National Newsagent Portal) and one newsagent is quoted on the blog as saying he has reduced the rent on his new lease by \$80,000 in one year.

Justification of the ACCC

None of the specific objections we outlined in our submission of 14 March has been taken into consideration by the ACCC. How is it possible for the ACCC to assert this "is likely to continue to deliver public benefit through reduction in transaction costs" when the ANF has supplied no information on how the ANF intends to bargain? We supplied 8 pages of argument; ANF supplied 37 words.

The ACCC has stated "the ability for the ANF, on behalf of its members, to address common contractual issues in a more streamlined and effective manner will provide transaction cost savings". This is an assertion, not an assessment, since it has no information from the ANF on the "more streamlined and effective manner".

The ACCC has also claimed that there would be transaction costs savings from the process. Again this is assertion given it has no information on how the ANF will get around matters such as varying lease expire dates. It is not necessary to undertake collective bargaining to gain the 'transaction cost savings' claimed by the ACCC from "sharing information" and "professional assistance". This is information that can and should be routinely collected by an industry association and supplied to those members to assist them in lease negotiations.

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