

**Australian Competition
&
Consumer Commission**

PRE-DECISION CONFERENCE

Minutes

**Application for reauthorisation A91407 lodged by Australian Newsagents'
Federation Ltd**

6 June 2014

The information and submissions contained in this minute are not intended to be a verbatim record of the pre-determination conference but a record of the discussions sufficient to set out the matters raised by the persons participating in the conference. A copy of this document will be placed on the ACCC's public register.

**Pre-Decision Conference:
Application for authorisation A91407
lodged by Australian Newsagents' Federation Ltd**

6 June 2014

Australian Competition and Consumer Commission (ACCC), Sydney.
Videoconference facilities to the ACCC's Melbourne office.

Attendees:

Australian Competition and Consumer Commission

Jill Walker, Commissioner (in Sydney)

Richard Chadwick, General Manager, Adjudication Branch (in Sydney)

Gavin Jones, Director, Adjudication Branch (in Melbourne)

Megan Cunningham, Senior Project Officer, Adjudication Branch (in Sydney)

Tanya Dunne, Deputy General Counsel (in Melbourne)

Australian Newsagents' Federation

Alf Maccino, Executive Director (in Sydney)

Ann Nugent, Director, Queensland (in Sydney)

Spier Consulting Pty Ltd

Hank Spier, Principal (in Sydney)

Shopping Centre Council of Australia

Milton Cockburn, Executive Director (in Sydney)

Angus Nardi, Deputy Director (in Sydney)

Charter Hall Retail REIT

John Courtney, Head of Development and Leasing (in Sydney)

Stockland

Robyn Stubbs, General Manager Leasing (in Sydney)

Sarah Neilson, Regional Leasing Manager (in Sydney)

Westfield Group

Tim Leibbrandt, Regional Manager Leasing (in Sydney)

Ruth Newfield, Corporate Solicitor (in Sydney)

QIC

Katrina Swift, Senior Legal Counsel (in Sydney)

Conference commenced: 10:35am AEST

Submissions received from interested parties, including the Shopping Centre Council of Australia's submission tabled at the conference, are available at www.accc.gov.au/authorisations.

Commissioner Jill Walker welcomed attendees, made some introductory remarks outlining the purpose of the conference, declared the pre-decision conference open and invited the party that called the conference, Mr Milton Cockburn, on behalf of the Shopping Centre Council of Australia (**SCCA**), to make an opening statement.

Mr Milton Cockburn noted that representatives of a range of the SCCA's members representing different shopping centre interests such as regional, sub-regional and neighbourhood shopping centres were in attendance given all these types of shopping centres are named in the Australian Newsagents' Federation (**ANF**) application, as counterparties with whom they may seek to collectively negotiate. Mr Cockburn submitted that the onus is on the ANF to satisfy the ACCC that authorisation should be granted, including providing evidence where possible. The SCCA does not consider that such evidence has been provided. Mr Cockburn submitted that it would be a poor precedent for the ACCC to authorise the arrangements in these circumstances.

Mr Cockburn stated that there was no detail about the matters the ANF wished to negotiate with shopping centres about or how negotiations would occur in the ANF's application. Mr Cockburn stated that it appeared that shopping centre landlords had been included as a counterparty in the ANF's application as an afterthought.

Mr Cockburn questioned how collective bargaining would work with SCCA members as leases do not have common expiration dates. Retail tenancy laws in each state stipulate when negotiations can occur in relation to lease renewals. Therefore, shopping centre landlords can not, unless lease expirations align, negotiate leases across tenants simultaneously. For example, one SCCA member has leases with around 17 different newsagents which expire at various times over the next 8 years.

Mr Cockburn stated that unlike many other suppliers with whom newsagents negotiate, shopping centres do not have standard form contracts that are amenable to collective negotiation. There are some standardised conditions that might apply to newsagent leases in shopping centres, however arrangements vary based on issues such as the type of centre, demand for space and foot traffic.

Mr Cockburn stated that the ANF had made assertions about transaction cost savings, but had not provided evidence in support of this. Mr Cockburn added that the ACCC had accepted that there would be public benefits arising from newsagents being able to share professional services, however there was no information to support this and the ANF should be able to collect a great deal of information to share with its members to support their negotiations without raising issues under the *Competition and Consumer Act 2010* that would necessitate an application for authorisation.

Mr Cockburn concluded by stating that based on these reasons the SCCA opposes the application for authorisation in so far as it relates to collective bargaining with SCCA members.

Commissioner Walker asked **Mr Alf Maccino**, on behalf of the ANF, whether he would like to make a statement.

Mr Maccino submitted that the ANF wanted to use this opportunity to explain to the SCCA and its members the reasons why some shopping centres have been listed as proposed counterparties for collective negotiations. The ANF considers that the negotiations are important because there is no existing relationship between the ANF and shopping centres. Mr Maccino stated that given collective bargaining is voluntary, the ANF was surprised when SCCA raised concerns. Mr Maccino stated that the reason there was not as much detail provided in the ANF's application about the issues they may seek to negotiate with shopping centres about was because the submissions they had made about matters they would seek to negotiate with other counterparties about were informed by previous discussions and negotiations with those counterparties. In the case of shopping centres, it was difficult to be specific without the benefit of having engaged in discussions with SCCA members.

Mr Maccino stated that, initially at least, the types of issues they would seek to discuss with shopping centres would not include individual rents as there was significant variation in these rents. Rather, the ANF would seek to negotiate about broader conditions in leases such as 'permitted use' by newsagents of their tenancy. The ANF also wished to assist shopping centres in understanding changes occurring to newsagent businesses and how these changes might affect shopping centres.

Ms Ann Nugent (Director, Queensland, ANF) stated that the business model of newsagents is constantly evolving and the ANF wished to assist shopping centres in understanding these changes. Ms Nugent argued that such a dialogue would be beneficial for shopping centres and newsagents. Ms Nugent added that some large regional shopping centre landlords have approached the ANF noting that they would like to commence negotiations with the ANF if the ACCC authorises the conduct.

Mr Cockburn stated that the SCCA is happy to facilitate discussions between the ANF and shopping centres. This is something that the SCCA does with other industries. For example, the SCCA has recently been facilitating discussions between SCCA members and the Pharmacy Guild of Australia. However, the SCCA did not consider that an application for authorisation was necessary for such discussions to take place.

Commissioner Walker noted that the ANF's authorisation application is not prescriptive about the issues they wish to negotiate with SCCA members about. Commissioner Walker noted that the types of matters about which there may be advantages in negotiating collectively will vary from group to group. As the arrangements would be voluntary if there is nothing to be gained by collective bargaining, the parties would simply not continue their discussions. Commissioner Walker asked whether there are some terms and conditions in leases that could be amenable to collective negotiation that could achieve a 'win-win' result for both the ANF and shopping centres.

Ms Robyn Stubbs (General Manager Leasing, Stockland) submitted that there are high levels of variation between leases. For instance, usage clauses vary dramatically from tenant to tenant. Ms Stubbs considered that given the variations in terms of individual leases it is difficult to see what clauses would be suitable for collective negotiation.

Mr Maccino submitted that one example is that newsagents may be moving into offering parcel delivery services. This could constitute a change of use of newsagent retail tenancies. It might be more efficient for the ANF to discuss this issue with shopping centres, rather than shopping centres having individual discussions with each of their newsagents.

Mr Tim Leibbrandt (Regional Manager leasing, Westfield Group) submitted that these issues are very site-specific.

Commissioner Walker noted that in cases such as this where there is no history of discussions between the parties it can be difficult to know without coming together to talk where there may be mutual benefits in collective negotiations. However, engaging in discussions can often identify a variety of unforeseen issues where a lot can be gained by collective negotiation. This varies based on individual circumstances, in some cases there may be a lot to be gained, and in others there may be less to be gained by collective negotiation.

Mr Cockburn reiterated the SCCA's view that collective bargaining is not necessary for discussions regarding how the newsagent industry is changing to occur. Mr Cockburn argued that if it did become apparent during the course of such discussions that there were issues about which the parties wished to collectively bargain the ANF could apply for authorisation at that point.

Commissioner Walker noted that the ANF has sought authorisation to collectively bargain with a wide array of counterparties and that if they were to lodge separate applications for authorisation in relation to each counterparty when they reached the point in discussions where they wished to commence bargaining this would impose a significant regulatory burden on the parties.

Commissioner Walker also noted that the draft determination proposes a condition of authorisation that specifies that the ANF would only be able to collectively bargain with counterparties that are not named in its application if they obtain the written consent of the proposed counterparty to do so. Commissioner Walker asked whether SCCA members would be comfortable with the proposed collective bargaining arrangements if SCCA members were removed from the list of named counterparties in the ANF's application. This would mean that the ANF would require written consent of the relevant SCCA counterparty before collective bargaining can commence.

Mr Cockburn expressed some hesitation as shopping centres do not currently know what terms the ANF is asking to negotiate about. The preference is for a separate authorisation application to be sought in the future, should both sides wish to engage in collective negotiations.

Ms Nugent submitted that the ANF is seeking to be able to commence discussion and that if discussions progress to the point where the parties wish to engage in collective bargaining, they should be able to do so without interruptions while the ANF seeks authorisation.

Ms Ruth Newfield (Corporate Solicitor, Westfield Group) expressed concern that this application might establish a process or precedent for other parties wishing to collectively negotiate.

Ms Nugent said that the ANF would consider the approach proposed by Commissioner Walker.

Mr Cockburn said that the SCCA would also consider this approach.

Mr Cockburn asked how the ACCC could be satisfied that the net public benefit test is met when there was no specificity about the matters over which the applicants sought to negotiate.

Dr Richard Chadwick (General Manager, Adjudication Branch, ACCC) noted that the ACCC has a history of authorising collective bargaining across a range of industries. The ACCC's approach has generally been to be flexible about the scope of the conduct

authorised so as not to limit the parties options in relation to matters they could collectively negotiate about. Dr Chadwick stated that it was often the case that it was not until the parties had gone through the negotiation process that they were able to identify those matters that could benefit from collective negotiation. Because the arrangements are voluntary, each party to the negotiations is able to limit negotiations to those matters they wish to collectively negotiate about.

Dr Chadwick said that if the ACCC required parties to be prescriptive about the issues they wished to include in collective negotiations this would require them to seek a variation to their authorisation every time a new matter arose which would impose a significant regulatory burden on them.

Commissioner Walker then called for any further comments. No further comments were made.

Chair's closing comments

Commissioner Walker closed the conference with some final statements. Commissioner Walker noted that submissions following the conference are due by 20 June 2014. Commissioner Walker noted that staff will prepare a summary of the day's proceedings.

Conference closed: 11:35am AEST