



Australian
Competition &
Consumer
Commission

Draft Determination and interim authorisation

Application for revocation of authorisation A91126
and substitution with A91425

lodged by

Lottery Agents Association of Victoria

in respect of

collective bargaining by lottery agents with
Tatts, Intralot and any other holders of
Victorian lottery licences

Date: 18 June 2014

Authorisation number: A91425

Commissioners: Sims
Rickard
Schaper
Cifuentes
Court
Featherston

Summary

The ACCC proposes to authorise the Lottery Agents Association of Victoria (LAAV) for ten years to collectively bargain on behalf of its members with Tatts Group, Intralot and any other holders of Victorian lottery licences.

The ACCC does not propose to authorise LAAV to collectively bargain about the terms and conditions on which lottery distribution services are supplied by non LAAV members or about any agreements to which LAAV members would not be a party (including the impact on LAAV members of agreements entered into by lottery providers with non LAAV members).

The ACCC invites submissions in response to this draft determination before making its final decision.

The application for authorisation

1. On 8 May 2014, the Lottery Agents Association of Victoria Inc trading as Lottery Retailers Association (LAAV) lodged application A91425 with the ACCC under section 91C(1) of the *Competition and Consumer Act 2010* (the Act) for the revocation of authorisation A91126 and the substitution of authorisation A91425 for the one revoked (**re-authorisation**).
2. LAAV has applied for re-authorisation for ten years to allow it to continue collectively bargaining on behalf of its members with Tatts Group, Intralot Australia (Intralot) and any future holders of Victorian lottery licences. LAAV seeks to negotiate in relation to the terms and conditions of retailer agreements and arrangements including:
 - commissions paid to retailers
 - handling and retailer application fees
 - service and freight charges
 - point of sale equipment hire costs
 - online sales
 - retail image and subsidies
 - support service levels and training
 - sales incentive schemes, marketing and promotion
 - product sales restrictions in the Tatts Group dedicated sale area
 - processes for the approval of incoming retailers
 - convenience and other distribution channels
 - retail insurances
 - alterations to retailer procedures manuals, and
 - matters not currently included in retailer agreements and matters that are currently unforeseen.

(the Conduct)

3. LAAV also requested interim authorisation to enable it to engage in the Conduct due to the imminent expiry of its current authorisation A91126 on 25 June 2014.

4. LAAV has around 600 member lottery agents across Victoria, whose main businesses include lottery kiosks, newsagents, post office/news outlets, tobacconists, pharmacies, supermarkets and country general stores.

Related authorisation - A91399

5. On 21 May 2014, the ACCC granted authorisation A91399 to the Victorian Association of Newsagents (VANA) to collectively bargain with Tatts Group, Intralot and any future holders of Victorian lottery licences for ten years. As many of LAAV's members are newsagents, there is significant actual and potential overlap in membership between VANA and LAAV.

Consultation

6. The ACCC invited submissions from Tatts Group, Intralot, Australian Newsagents Federation, Victorian Association of Newsagents, National Retailers Association, Australian Retailers Association, and the Victorian Department of Justice, Office of Liquor, Gaming and Racing and the Victorian Commission for Gambling and Liquor Regulation.
7. A submission was received from Tatts Group which noted that the scope of re-authorisation application A91425 is wider than authorisation A91126 and expressed concerns regarding LAAV collectively negotiating in relation to:
 - online sales
 - convenience and other distribution channels, and
 - matters not currently included in retailer agreements and matters that are currently unforeseen.
8. Tatts Group considers that LAAV members are all part of its agency network distribution channel and does not consider it appropriate for LAAV to negotiate with it about how Tatts Group's products are sold through other distribution channels, namely online sales and convenience stores and other distribution channels. Tatts Group is also concerned by the potential breadth of the undefined term 'matters not currently included in retailer agreements and matters that are currently unforeseen'. These concerns are discussed in the ACCC's evaluation section of this draft determination.
9. Tatts Group submitted that it has no objection to the proposed arrangements other than in respect of the issues noted above.
10. LAAV submitted a response to Tatts Group's submission in relation to negotiation over online sales, convenience channels and unforeseen matters. Tatts Group's and LAAV's submissions are discussed further below.

Further information in relation to the application for re-authorisation, including the submissions received by the ACCC as this matter progresses, may be obtained from the ACCC's website www.accc.gov.au/authorisations.

ACCC evaluation

11. The ACCC's evaluation of the Conduct is in accordance with the relevant net public benefits tests¹ contained in the Act.

¹ Subsections 90(5A), 90(5B), 90(6) and 90(7) of the Act.

12. In its evaluation of the application the ACCC has taken into account:
- (a) the application and submissions received from interested parties;²
 - (b) information available to the ACCC from consideration of previous matters;³
 - (c) the likely future without the Conduct.⁴ In particular, the ACCC considers that, absent authorisation, it is likely that LAAV members will either negotiate individually with lottery licence holders which will likely result in them receiving mainly standard form contracts or will be represented in collective negotiations by VANA if they are members of VANA;
 - (d) the relevant areas of competition likely to be affected by the Conduct, particularly competition to provide lottery distribution services within Victoria to lottery licence holders and competition to supply lottery products to Victorian consumers;
 - (e) the ten year authorisation period requested; and
 - (f) that no collective boycott activity is proposed and participation in LAAV's collective bargaining group is voluntary.

Public benefits

13. The ACCC considers that the Conduct is likely to result in the following public benefits:
- (a) sharing of transaction costs between lottery agents (such as legal and expert advisor costs) can improve their input into contracts resulting in more efficient contracts that better reflect the circumstances of the lottery agents; and
 - (b) enabling lottery agents to become better informed of relevant market information which assists them in developing more efficient contracts with lottery providers provides greater certainty to individual lottery agents thus encouraging industry investment.
14. The ACCC notes that if the LAAV application is granted, two groups will be authorised to collectively bargain with lottery providers. The ACCC considers that collective bargaining by both LAAV and VANA with Tatts and Intralot will not necessarily lead to the same level of transaction cost savings as would be the case if there was only one bargaining group negotiating with Tatts and Intralot. 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 VANA and LAAV may provide incentives for each bargaining group to seek to minimise bargaining costs, leading to improved efficiencies in bargaining outcomes.
15. The ACCC also considers that, while a situation in which both VANA and LAAV collectively bargain with Tatts and Intralot may lead to higher transaction costs compared to a situation in which only VANA does, there may be some transaction

² Please see the ACCC's Public Register for more details, including a list of parties consulted.

³ See Lottery Agents Queensland Ltd - Revocation and Substitution - A91397 (2014), Victorian Association of Newsagents (VANA Ltd) - Authorisation - A91399 (2013), Lottery Agents' Association of Tasmania Inc - Authorisation - A91309 (2012) and Lottery Agents' Association of Victoria Inc - Authorisation - A91126 (2009).

⁴ For more discussion see paragraphs 5.16-5.23 of the ACCC's Authorisation Guide.

cost savings from LAAV acting on behalf of those members who are not also members of VANA as contracts come up for renewal or new contracts are signed.

16. Finally, the ACCC notes that the collective bargaining in the case of VANA and as proposed by LAAV is voluntary for all parties, including Tatts and Intralot. This means that the parties will only incur any higher transaction costs that may result from having two bargaining groups rather than one if the benefit to all the parties involved in any collective negotiations is expected to outweigh these higher costs.
17. Accordingly, the ACCC considers that any higher transaction costs as a result of LAAV's collective bargaining would be a consequence of negotiations that achieve more efficient contracts and would not outweigh the public benefits of such efficiencies. Therefore, although the ACCC considers that the proposed arrangements may not lead to the same level of transaction cost savings as would be the case if there was only one bargaining group, the ACCC does not consider that any increased transaction costs are likely to constitute a net detriment.

Public detriments

18. Tatts Group expressed concerns at the effect on competition of collective negotiations in relation to:
 - online sales
 - convenience and other distribution channels, and
 - matters not currently included in retailer agreements and matters that are currently unforeseen.
19. Tatts Group submitted that as LAAV members do not participate in any distribution channels other than the agency network, any collective negotiations regarding how Tatts products are supplied through other distribution channels may decrease competition and will not create transaction cost savings, efficiency benefits, enhance product offerings or improve customer service in those channels.
20. In response, LAAV submitted that negotiations over online sales and convenience and other distribution channels are consistent with the intent of the proposed collective bargaining arrangements as these are issues where there is likely to be a commonality of shared interest between members of the bargaining group. LAAV also submitted that online and convenience sales are two of the most important issues facing and raised by LAAV members and there are clear expectations from LAAV members that the LAAV discuss and negotiate with Tatts Group and the government on these issues. LAAV submitted that it has already discussed and unsuccessfully attempted to negotiate with Tatts Group on these issues over a number of years.
21. Specifically in relation to each of these distribution channels, LAAV submitted that:
 - a. In relation to negotiations about online sales, its members are currently precluded by Tatts Group from participating in this sales channel in relation to Tatts products. LAAV would like to negotiate with Tatts Group and the Government and try to effect changes that allow lottery agents to either sell products on-line via their websites or to support Tatts Group's activity in return for additional commission.
 - b. In relation to the convenience channel, LAAV submitted that Tatts Group has embarked on a new strategy to open convenience outlets en-masse within 7-Eleven and Coles Express stores. Coles Express distribution is under trial in seven outlets and LAAV submits that Tatts Group is likely to expand it

quickly across the 169 Coles Express outlets (125 in the Melbourne metro area) after June 2014. LAAV considers that its members are disadvantaged as Tatts Group applies separate and (in its view) preferential contractual arrangements to this channel which competes directly with the traditional retail channel. LAAV proposes to negotiate with Tatts Group in relation to the placement of these outlets, the impact on LAAV member outlets and to negotiate over the terms and conditions of current franchise agreements to ensure LAAV members have requirements that are no less favourable and provide an equal opportunity to compete.

22. The ACCC considers that in general, LAAV members collectively negotiating in relation to the terms and conditions on which they provide lottery distribution services is likely to result in little if any public detriment since:
 - (a) in the absence of collective bargaining the level of competition between lottery agents in negotiating with the counterparties is likely to be low due to the use of standard form contracts by lottery providers;
 - (b) participation in the collective bargaining is voluntary for both lottery providers and lottery agents;
 - (c) the bargaining group is limited to Victorian lottery agents and Victorian lottery licence holders; and
 - (d) there is no proposed boycott activity.
23. However, the ACCC does have concerns about LAAV collectively bargaining in relation to the terms and conditions on which lottery distribution services will be provided by non LAAV members through other distribution channels in competition with LAAV members. In particular, LAAV members may have the opportunity in these circumstances to raise barriers to entry to competing distribution channels and/or negotiate outcomes that limit the extent to which alternative distribution channels provide a competitive constraint on LAAV members.
24. In relation to online sales LAAV submits that it wishes to explore options for its members to expand their product offering into this distribution channel. In relation to the convenience and other distribution channels route LAAV submits that some of its members are supermarkets or general stores. Thus these may be considered to be convenience stores (with special issues which arise due to their status as convenience stores) even if classified by Tatts Group as part of their agents' network.
25. Further, the ACCC notes that it is possible that the owners of stores classified by Tatts Group as part of its convenience channel may wish to join and be represented by LAAV in the future. Finally, Intralot and any potential new Victorian lottery licence holder may classify sales channels differently to the classifications used by Tatts Group such that limiting the matters which LAAV can negotiate over by reference to the way Tatts classifies distribution channels may restrict LAAV's ability to represent its members in negotiations with other lottery providers
26. Accordingly, the ACCC proposes to limit the scope of the collective bargaining arrangements to LAAV collectively bargaining in relation to the terms and conditions on which lottery distribution services will be supplied by LAAV members. This would not preclude LAAV from collectively negotiating with Tatts Group about the terms and conditions of agreements for online distribution or distribution of lottery products through the convenience route. However, such negotiations would be restricted to LAAV negotiating about the terms and conditions of agreements for its members to distribute lottery products through these distribution channels. LAAV

would not be authorised to negotiate about the terms of conditions on which these distribution services are provided by non LAAV members or the impact on LAAV members of agreements between lottery providers and non LAAV members.

27. The ACCC notes Tatts Group's submission that lottery agents do not provide lottery products through these distribution channels. As participation in the collective bargain arrangements is voluntary Tatts Group, and any other lottery provider, is free to not negotiate with LAAV about its members selling lottery products through distribution channels other than the traditional agent network.
28. The ACCC also has concerns about LAAV collectively bargaining about processes for the approval of incoming retailers. 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 is due to concerns that, similarly to LAAV collectively bargaining in relation to the terms and conditions of agreements on which lottery distribution services will be provided by non LAAV members, existing lottery agents are likely to have an incentive to resist the opening of new agencies that are likely to impact their business. While LAAV has not explicitly identified matters relating to the granting of new lottery agencies licences as an issue in relation to which it seeks to collectively bargain, they have sought authorisation to collectively bargaining about processes for the approval of incoming retailers. For the avoidance of doubt, the ACCC also proposes to exclude from the scope of the authorised conduct any matters concerning the establishment of new agencies and/or the terms and conditions under which those agencies will operate.
29. Tatts Group has raised concerns about LAAV's proposal to collectively bargain in relation to 'matters not currently included in retailer agreements and matters that are currently unforeseen.' The ACCC notes that LAAV's existing authorisation covers collective bargaining in relation to the terms and conditions of agency agreements and arrangements *including* those matters listed in its 2009 application. This list of matters is not an exclusive list. LAAV is also currently explicitly authorised to collectively bargain on 'matters not currently included in retailer agreements and contracts, and other matters as they arise.'⁵
30. 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 LAAV has sought to include matters that would raise concerns 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 licensed lottery provider, will remain free to limit negotiations to those matters it considers are appropriately addressed through collective bargaining.
31. The ACCC also notes that LAAV seeks authorisation to collectively bargain with any organisation that may hold a licence to conduct lotteries in Victoria. Limiting the re-authorisation to a defined list of matters may unduly restrict the terms of negotiation with any future licence holder. This would potentially make such negotiation impractical.

⁵ ACCC (2009) *Determination Application for authorisation lodged by Lottery Agents' Association of Victoria Inc A91126* p 11.

32. 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.

Balance of public benefit and detriment

33. For the reasons discussed in this draft determination, on balance, the ACCC considers that, subject to the exclusions below, the Conduct is likely to result in public benefit that would outweigh any detriment to the public constituted by any lessening of competition arising from the Conduct. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met.
34. The ACCC does not propose to grant authorisation for LAAV to collectively bargain on behalf of its members in relation to:
- the terms of conditions on which lottery distribution services are provided by non LAAV members,
 - any agreements to which LAAV members would not be a party (including in relation to the impact on LAAV members of agreements between lottery providers and non LAAV members), or
 - matters relating to the granting of new lottery agencies licences including the impact on current lottery agents when new licences are granted.

Length of authorisation

35. LAAV is seeking re-authorisation for ten years. The ACCC has generally granted authorisation for arrangements involving collective bargaining for five years. Where arrangements have already been in place for a period of time the ACCC may consider it appropriate to grant authorisation for a longer period.⁶ Given the ACCC's conclusion on the balance of public benefits and public detriments, the fact that LAAV has been authorised to represent members in collective bargaining since 2009, and that the ACCC has regularly authorised similar conduct, the ACCC is proposing to grant re-authorisation for ten years.
36. This is consistent with the term of authorisation recently granted to VANA collectively bargain on behalf of its members with Victorian lottery providers.⁷

Draft determination

The application

37. Application A91425 was made using Form FC Schedule 1, of the Competition and Consumer Regulations 2010. LAAV, on behalf of its present and future members, is seeking revocation of authorisation A91126 and substitution of authorisation A91425 in its place under section 91C(1) of the Act. Section 90A(1) of the Act requires that before determining an application for authorisation the ACCC shall issue a draft determination.

⁶ See for example, Australian Dairy Farmers Limited (A91263), in which authorisation to engage in collective bargaining by dairy farmers was granted for ten years. See also Lottery Agents Queensland (A91397).

⁷ See Victorian Association of Newsagents (A31399).

The net public benefit test

38. For the reasons outlined in this draft determination, the ACCC is satisfied that the tests in sections 90(5A), 90(5B), 90(6) and 90(7) of the Act are met.
39. The ACCC **proposes to grant** authorisation A91425 for ten years to LAAV to collectively bargain on behalf of its members with Tatts Group, Intralot Australia (Intralot) and any future Victorian lottery licence holders subject to the exclusions at paragraphs 41 and 42.
40. Under section 88(10) of the Act, the ACCC proposes to extend the authorisation to future members of LAAV.

Conduct not proposed to be authorised

41. The ACCC **does not propose to** authorise LAAV to collectively bargain in relation to the terms and conditions of agreements and arrangements to which its members are not a party and would not be a party if negotiations were successful. This exclusion includes negotiating about the impact on LAAV members of agreements between lottery providers and non LAAV members.
42. The ACCC **also proposes to exclude** from the scope of the 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; and
 - (c) fees which are paid only in relation to new outlets;

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

Interim authorisation

43. LAAV has sought interim authorisation to engage in the Conduct subject to the outcome of the ACCC's final determination.
44. The ACCC considers that there is a benefit in granting interim authorisation given the likely efficiencies arising from collective bargaining. The ACCC also notes that LAAV has been authorised to collectively bargain since 2009 and granting interim authorisation will preserve the status quo while the ACCC concludes its assessment of the substantive application for authorisation. The ACCC considers detriment will be minimised by the voluntary nature of the negotiations for all parties.
45. In accordance with section 91(2) of the Act, the ACCC therefore suspends the operation of authorisation A91126 and grants interim authorisation to the conduct set out in paragraphs 39 and 40 subject to the exclusions set out in paragraphs 41 and 42.
46. Interim authorisation commences immediately and 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 ACCC may review the interim authorisation at any time. The ACCC's decision in relation to the interim authorisation should not be taken to be indicative of whether or not the final authorisation will be granted.

Further submissions

47. 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.