



Australian
Competition &
Consumer
Commission

Determination

Application for revocation of authorisation
A91237 and substitution of new authorisation A91488

lodged by

Liquor Stax Australia Pty Ltd

in respect of

collective bargaining with suppliers

Date: 1 July 2015

Authorisation number: A91488

Commissioners: Sims
Rickard
Schaper
Cifuentes
Court
Featherston
Walker

Summary

The ACCC has decided to allow buying group Liquor Stax Australia Pty Ltd to negotiate collectively on behalf of its liquor retailer members with suppliers over the terms and conditions for buying inputs, such as alcohol, advertising and poker machines. The ACCC initially authorised collective negotiations in 2010 and has re-authorised this conduct for a further 10 years, covering Liquor Stax's current and future members.

The application for authorisation

1. On 25 March 2015 Liquor Stax Australia Pty Ltd (Liquor Stax) applied for the revocation of authorisation A91237, which expires on 6 October 2015, and its substitution with a new authorisation (A91488). Liquor Stax is seeking re-authorisation to continue bargaining on behalf of current and future members, largely small liquor retailers, with their suppliers, for a further 10 years.
2. On 21 May 2015 the ACCC issued a draft determination proposing to grant authorisation to Liquor Stax for 10 years.

The applicant and the conduct

3. Liquor Stax, whose members are mostly small liquor retailers, is seeking, in effect, re-authorisation for collective negotiations on behalf of current and future members in relation to the following terms:
 - price of product
 - terms of supply
 - settlement discounts
 - product development and
 - joint advertising and marketing.(the Conduct).
4. Liquor Stax advises that collective boycott is not contemplated;¹ that in all cases the collective bargaining will be voluntary; and target suppliers can opt to deal directly with Liquor Stax members.
5. Liquor Stax has identified 63 'target' suppliers that it wishes to negotiate with but it advises that there may be others over time and it seeks authorisation to allow it to negotiate with new targets in the future.² The target suppliers are in sectors including wine, beer and spirit supplies (direct suppliers and wholesalers),

¹ A collective boycott occurs when a group of competitors agree not to acquire goods or services from or not to supply goods or services to a business with whom the group is negotiating, unless the business accepts the terms and conditions offered by the group.

² For example, the list of target suppliers specifically nominated in its 2010 application and this application is amended as follows: Deleted: ARA Wines, Constellation Wines, Copak Packaged Beverages, Grant Burge Wines and Independent Distillers; Added: Qantas Airlines, Virgin Australia, Toll Holdings, Star Track, SCT Logistics, Linfox Transport, Australia Post and Treasury Wine Estates.

energy, advertising, poker machines, cigarettes, soft drinks, insurance and confectionery.

6. Liquor Stax states that:
 - liquor retailers use it to undertake bulk buying, distribution and some product development
 - it does not handle products; it simply arranges the buying terms and
 - it was established 20 years ago with about six members and now has about 400, primarily located in New South Wales.
7. At the time of Liquor Stax's initial authorisation application in 2010 it had about 200 members. In that application, Liquor Stax proposed to bargain with a similar number of suppliers as now, in the same nominated industries. The ACCC granted authorisation on 6 October 2010.
8. In granting authorisation, the ACCC said it considered that the arrangements were likely to provide Liquor Stax members with greater input into the terms and conditions of supply contracts; and both suppliers and members were likely to experience transaction cost savings as a result of reducing the number of parties to negotiations. The ACCC also considered that the arrangements' potential anti-competitive detriment was likely to be mitigated by, among other factors, the relatively small size of the bargaining group.
9. In its current application, Liquor Stax states that: 'In all cases collective negotiation has occurred before and is welcomed by the target.' Liquor Stax has amended its list of target suppliers since its 2010 application; and this current application extends to potential future target suppliers as well as targets that have had experience in dealing with Liquor Stax.

Consultation

10. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process. The ACCC invited submissions on Liquor Stax's application from about 80 suppliers of the range of inputs Liquor Stax seeks to negotiate with on behalf of its members, particularly the businesses it nominated as targets. The ACCC did not receive any responses.
11. After issuing a draft determination as required by section 90(1) of the *Competition and Consumer Act 2010* (Cth) (the CCA), the ACCC invited submissions on the draft determination. The ACCC did not receive any responses. Under the CCA, applicants and interested parties may also ask the ACCC to hold a conference to allow oral submissions on the draft determination. No conference was requested.

ACCC assessment

12. The ACCC's assessment of the Conduct is in accordance with the relevant net public benefits tests contained in the CCA.³ The ACCC has taken into account:
 - the application and submissions received from the applicant

³ Subsections 90(5A), 90(5B), 90(6) and 90(7) of the CCA.

- other relevant information available to the ACCC, including information from consideration of previous matters⁴
- the relevant areas of competition impacted by the Conduct: being those for each of the products (goods or services) over which Liquor Stax would negotiate, particularly the wholesale acquisition of liquor in each of the states where Liquor Stax has members: NSW, Queensland, Victoria, Tasmania and Western Australia
- that Liquor Stax has requested authorisation for 10 years and
- that Liquor Stax is not proposing collective boycotts and members and suppliers can decide whether or not to participate in the Conduct.

13. The ACCC has also considered the likely future without the Conduct.⁵ In particular, the ACCC considers that, without the Conduct, it is likely Liquor Stax's members would negotiate and purchase inputs separately. Liquor Stax submits that in the past this has resulted in members being offered standard form contracts weighted in favour of the supplier on a take it or leave it basis.

Public benefits

14. Liquor Stax submits, among other things, that the Conduct promotes equitable dealings and saves costs. The ACCC considers that the Conduct is likely to result in the public benefits of:

Transaction cost savings:

15. An individual Liquor Stax member negotiating with a supplier will incur transaction costs, such as the time taken to negotiate and perhaps legal and other expert-advice costs. The supplier will also incur transaction costs in negotiating with individual customers. Individual negotiations will stop when the costs of continued negotiation outweigh the expected benefits for either party. At this point, it is likely that the contract will not fully capture the potential mutual benefits from trade. It may in fact mean that no negotiation occurs at all and customers are effectively provided with a standard-form contract prepared by a supplier. Collective bargaining is likely to result in public benefits from transaction cost savings, including the sharing of advisor costs for Liquor Stax members. By reducing the costs of negotiating for all parties, it is likely that more contractual issues can be addressed, because each party can obtain the benefit from negotiating these issues at less cost to itself, resulting in more comprehensive and efficient contracts of greater benefit to all parties.

Improved input into contracts:

16. Liquor Stax states that most of its members are small liquor retailers; and that they would buy mainly from Metcash and other large businesses such as Fosters, Coca Cola and Lion Nathan. The ACCC accepts that, when negotiating with large suppliers, small businesses can be at a disadvantage in terms of resources and experience of negotiating in complex commercial environments.

⁴ See Liquor Stax's previous authorisation, A91237 (2010). See also, for example, A91467 Tasmanian Farmers and Graziers Association (2015) (collective negotiation of growing contracts) and A91447 Anglo American Services and Jellinbah Group (2014) (Collective negotiation of purchasing of mining-vehicle tyres).

⁵ For more discussion see paragraphs 5.20-5.23 of the ACCC's Authorisation Guidelines.

One way in which a small business can seek to redress such disadvantage is to bargain collectively. Collective bargaining may allow for more effective negotiation, where the negotiating parties have a greater opportunity to identify and achieve business efficiencies that better reflect the circumstances of Liquor Stax members, in relation to common issues. Collective bargaining is also likely to enable members of the bargaining group to become better informed of relevant market conditions, which is likely to improve their input into contractual negotiations with suppliers to achieve more efficient outcomes.

Public detriments

17. Liquor Stax states that the Conduct produces no anti-competitive detriment. It submits, among other things, that it faces a market structure where suppliers have substantial power and can dictate terms.
18. The ACCC considers that collective bargaining can lessen competition and efficiency. However, the ACCC considers that the Conduct has resulted in minimal, if any detriment, and this is likely to remain the case because:
 - Across the range of product markets, Liquor Stax's members comprise a small proportion of the total number of customers that the target suppliers deal with, so these suppliers have many other options for sales. This includes for liquor, which would be the largest purchase the Liquor Stax members make.
 - Participation is voluntary for all parties and no collective boycott activity is contemplated. Parties on both sides can negotiate separately and seek to agree terms and conditions that better reflect their circumstances.

Balance of public benefit and detriment

19. For the reasons outlined in this determination, the ACCC is satisfied the Conduct is likely to result in a benefit to the public that would outweigh the likely detriment to the public including the detriment constituted by any lessening of competition. Accordingly the ACCC is satisfied that the relevant net public benefit test is met.

New target suppliers and Liquor Stax members

20. Liquor Stax has sought authorisation to enable it to collectively bargain with current and future target suppliers. It has identified a list of 63 target suppliers but indicated that this may change over time. Liquor Stax suggested a possible condition that essentially required it to contact new target suppliers to obtain their consent when it wished to commence negotiations on behalf of its members and to provide a report to the ACCC annually listing all targets.⁶
21. The ACCC has decided to grant authorisation to cover negotiations with the named and future unnamed target suppliers.
22. The ACCC has decided not to impose a formal condition of authorisation at this stage. This is firstly because the bargaining group is relatively small and so its conduct is unlikely to result in much, if any, detriment. As stated above, Liquor

⁶ Based on a condition imposed by the ACCC in granting authorisation to the Australian Newsagents Federation in 2014 (A91407).

Stax's members comprise a small proportion of the total number of customers that the target suppliers deal with across the range of product markets. These suppliers have many other options for sales. Secondly, the ACCC also notes that there is no collective boycott activity proposed and individual target suppliers are able to choose whether or not to deal with Liquor Stax on behalf of its members.

23. As a matter of practice, the ACCC expects that Liquor Stax would contact new target suppliers to explain the collective bargaining process and the nature of any ACCC authorisation under which it operates, to obtain their consent to deal with the group.
24. The ACCC has decided that, as Liquor Stax has requested, authorisation shall extend to allow future members of Liquor Stax to participate in the Conduct.
25. As is the case with all authorisations, the ACCC can revoke an authorisation where there has been, among other things, a material change of circumstances since it granted the authorisation.⁷

Length of authorisation

26. Liquor Stax sought re-authorisation for 10 years. It submitted that:
 - the conduct is largely benign and has already been authorised for five years with no issue
 - the existing authorisation has delivered 'comparative success' and that in all cases collective negotiation has occurred and the target welcomes it.
27. 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. Given the ACCC's conclusion on the balance of public benefits and public detriments, the ACCC has decided to grant authorisation for 10 years.

Determination

The application

28. Liquor Stax has sought re-authorisation for the collective bargaining Conduct as described in paragraphs 3 to 9 above. It has lodged an application, under subsection 91C of the CCA, for the revocation of authorisation A91237 and the substitution of a new authorisation (A91488) for the one revoked. Liquor Stax made the application using a Form FC, Schedule 1 of the Competition and Consumer Regulations 2010.

The net public benefit test

29. For the reasons outlined in this determination, the ACCC is satisfied, pursuant to sections 90(5A), 90(5B), 90(6) and 90(7) of the CCA, that in all the circumstances the Conduct is likely to result in a public benefit that would outweigh any likely detriment to the public constituted by any lessening of competition that would be likely to result.

⁷ Section 91B CCA

Conduct authorised

30. The ACCC has decided to revoke authorisation A91237 and substitute a new authorisation, A91488, for the one revoked. The re-authorisation is for the Conduct as described in paragraphs 3 to 9 above, for 10 years (until 23 July 2025).
31. Authorisation extends to Liquor Stax Pty Ltd, to current and future members of Liquor Stax and to negotiations with current and future target suppliers that agree to participate in the Conduct.

Interim authorisation

32. Liquor Stax sought interim authorisation in the event that the ACCC did not finalise the authorisation process by the time the current authorisation expires on 6 October 2015. As the determination will come into effect before the expiration of the current authorisation,⁸ the ACCC has not considered the application for interim authorisation.

Date authorisation comes into effect

33. This determination is made on 1 July 2015. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 23 July 2015.

⁸ Subject to any application to the Australian Competition Tribunal for review of the determination.