



Determination

Application for authorisation AA1000515
lodged by
National Lotteries and Newsagents Association Ltd
in respect of
collective bargaining with Tabcorp on behalf of its members
Authorisation number: AA1000515

17 September 2020

Commissioners:

Sims

Keogh

Rickard

Court

Ridgeway

Summary

The ACCC has decided to grant authorisation to enable the National Lotteries and Newsagents Association Ltd (NLNA) to collectively bargain with Tabcorp on behalf of its current and future members.

The ACCC considers that the proposed conduct is likely to result in some public benefits by providing NLNA members with improved opportunity for input into contracts and some small transaction cost savings relative to a situation where its members negotiate individually with Tabcorp. The ACCC is of the view that these public benefits are likely to arise notwithstanding that there are other industry associations (such as VANA and ALNA) which currently collectively bargain on behalf of lottery retailers.

The ACCC considers that the proposed conduct is likely to result in minimal, if any, public detriments.

The ACCC has decided to grant authorisation until 9 October 2025.

1. The application for authorisation

- 1.1. On 20 May 2020, the National Lotteries and Newsagents Association Ltd (NLNA) lodged application for authorisation AA1000515 with the Australian Competition and Consumer Commission (the ACCC) on behalf of its current and future members located Australia-wide (except Western Australia). The NLNA is seeking authorisation to collectively bargain on behalf of its members with Tabcorp Holdings Limited and its subsidiaries (Tabcorp) for five years.
- 1.2. This application for authorisation AA1000515 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the Act).
- 1.3. The ACCC may grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching the competition law but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.4. On 6 August 2020, interim authorisation was granted under subsection 91(2) of the Act to enable the NLNA to engage in the Proposed Conduct (defined below) while the ACCC considers the substantive application. Interim authorisation 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 Proposed Conduct

- 1.5. The NLNA is seeking authorisation to represent its current and future members in discussions and collective bargaining negotiations with Tabcorp in those Australian States and Territories in which Tabcorp operates. The proposed collective bargaining conduct relates to the terms and conditions applicable to the arrangements between Tabcorp and the NLNA's members including:
 - commissions paid by Tabcorp to Lottery Retailers¹
 - handling Lottery Retailer application fees

¹ In its application, the NLNA defines 'Lottery Retailers' as 'Any person who subscribes as a member of the NLNA (which may be any Australian newsagent, lottery retailer/agent, Tabcorp lotto kiosk, and/or any general & gifting stores that sell newspapers or has a licence with Tabcorp (including pharmacies)), collectively, **Lottery Retailers.**'

- service and freight charges
- point of sale equipment hire costs
- the ability of Lottery Retailers to participate in online sales undertaken by Tabcorp
- retail image and subsidies (with respect to Tabcorp imagery in retail stores)
- support service levels and training
- sales incentive schemes, marketing and promotion
- product sales restrictions in the area dedicated to the sale of lottery products
- retail insurances, and
- alterations to retailer procedures manuals

(the **Proposed Conduct**).

- 1.6. Originally, the NLNA also sought authorisation to collectively bargain in relation to the following matters:
- processes for the approval of incoming retailers
 - matters not currently included in retailer agreements and matters that are currently unforeseen
 - promotion around a pillar (Tabcorp) that provides over 50% of a newsagent's income and provides opportunities to on-sell general items such as gifts, magazines, greeting cards, stationery and confectionery, and
 - convenience stores and other distribution channels.
- 1.7. However, following a submission by Tabcorp, which set out a number of suggestions and proposed limitations,² the NLNA amended its application and these four matters (in paragraph 1.6) now do not form part of the conduct sought to be authorised.

2. Background

NLNA and VANA

- 2.1. The NLNA was created on 25 February 2020 as an Australia-wide industry body representing the newsagency and lottery industry. The NLNA's sole shareholder is VANA Ltd, trading as the Victorian Association of Newsagents (**VANA**). VANA has over 400 members, which represents 61% of the newsagents in Victoria. Each member of VANA has automatic membership of the NLNA.
- 2.2. VANA is currently authorised by the ACCC (until 2024) to collectively negotiate over the terms and conditions of lottery agency agreements and arrangements with Tattersall's Sweeps Pty Ltd (**Tatts**), Intralot Australia Pty Ltd and other licensed public lottery providers in Victoria, including in relation to:
- commission fees
 - handling fees
 - agency application fees

² See submission from Tabcorp, dated 12 June 2020, and the NLNA's response to ACCC information request of 26 June 2020, dated 30 June 2020, available on the ACCC's [public register](#).

- support service levels
- freight charges
- product ordering fees
- equipment hire costs
- retail image design and agency subsidy and insurances, and
- changes to the agents' manual.³

2.3. VANA's authorisation enables it to negotiate with Tatts, which since 2017 has been a licensed subsidiary of Tabcorp.

Tabcorp

- 2.4. Tabcorp is a diversified gambling entertainment group. Tabcorp is listed on the ASX and is the largest provider of lotteries, Keno, wagering and gaming products and services in Australia.
- 2.5. Tabcorp is the official Government licensed operator of lottery products in all States and Territories of Australia, except for Western Australia. Tabcorp's lotteries products can be purchased in over 3,700 retail outlets across Australia.

Newsagents and lotteries industry associations and related authorisations

- 2.6. In addition to the NLNA and VANA, there are at least two other newsagent and lotteries industry associations in Australia.
- 2.7. The Australian Newsagents Federation, trading as the Australian Lottery and Newsagents Association (**ALNA**), is currently the only national lottery retailers and newsagents' association authorised to collectively bargain with Tabcorp.
- 2.8. ALNA has recently merged with the Lottery Agents Association of Tasmania, Lottery Agents Queensland and the Lottery Retailers Association in Victoria.
- 2.9. The Newsagents Association of NSW and ACT Ltd (**NANA**) is a representative and membership organisation for newsagents in NSW and the ACT. Most of these newsagents are lotteries franchisees. NANA has an alliance with ALNA and, while independent from ALNA, all NANA members are members of ALNA.

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including Tabcorp, relevant industry associations, state governments and regulatory bodies.
- 3.3. The ACCC received six submissions from four interested parties in relation to the application.
- 3.4. Tabcorp was broadly supportive of the application, but objected to the initial scope of the collective bargaining, as noted above in paragraphs 1.6-1.7.

³ Authorisation A91399, see: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/victorian-association-of-newsagents-vana-ltd-authorisation-a91399>

- 3.5. newsXpress, ALNA and NANA either raised issues with, or opposed, the application for authorisation. One concern raised by each of these interested parties was in relation to the NLNA's members. ALNA submits that the NLNA's only members are VANA members, who already have protection under the VANA authorisation, such that the current application is unnecessary. NANA and newsXpress both submit that the NLNA's only member is VANA Ltd. NANA further submits that without members who may form a class of businesses to be represented, the NLNA cannot realistically claim that it does or intends to represent members.
- 3.6. The NLNA has provided its membership list to the ACCC. The ACCC is satisfied that the NLNA is a representative body that has members with commercial relationships with Tabcorp. The ACCC notes that, while there is considerable overlap in membership between the NLNA and VANA, the NLNA has members who are not VANA members.
- 3.7. Public submissions by the NLNA and interested parties are available on the ACCC's [public register](#).
- 3.8. On 6 August 2020, the ACCC issued a draft determination proposing to grant authorisation for five years. A pre-decision conference was not requested following the draft determination and no submissions were received.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. The NLNA has sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45(1)(a) and (b) of the Act. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (**authorisation test**).

Relevant areas of competition

- 4.3. To assess the likely effect of the Proposed Conduct, the ACCC will identify the relevant areas of competition likely to be impacted.
- 4.4. The ACCC considers that the relevant areas of competition are likely to be:
 - national representation of lottery retailers
 - supply of lottery products to Australian consumers, and
 - provision of lottery distribution services to Tabcorp.

Future with and without the Proposed Conduct

- 4.5. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.6. ALNA submits that it is unlikely that the Proposed Conduct will result in improved retail competition by lottery agents in the retail market or savings benefiting consumers, as

the price of lottery products is set by regulators and VANA already has authorisation to collectively bargain with Tatts on behalf of NLNA's members.

4.7. The ACCC considers that without the Proposed Conduct:

- VANA will continue to represent its members in Victoria
- ALNA will continue to represent its members nationally
- there may be some overlap of members between VANA and ALNA
- there may be members of the NLNA who would continue to individually negotiate with Tabcorp because they are not also members of other industry associations, and
- there may be lottery retailers who would continue to individually negotiate with Tabcorp because they are not members of any relevant industry association.

4.8. In a future with the Proposed Conduct, lottery retailers will have a choice of national representative bodies (ALNA and NLNA), which can compete for members on price and service and to represent their members in negotiations with counterparties.

4.9. The ACCC notes that VANA is authorised to collectively negotiate with Tatts (or any other licensed public lottery operator in Victoria), which is Tabcorp's licensed subsidiary in Victoria. The NLNA's members who are not based in Victoria will benefit from the NLNA's representation in negotiations with Tabcorp's subsidiaries in other Australian States and Territories.

Public benefits

4.10. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*⁴

4.11. The ACCC has considered the following public benefits:

- improved input into contracts
- transaction cost savings, and
- improved customer experience and improved income for lottery retailers.

Improved input into contracts

4.12. The NLNA submits that authorisation would assist in:

- allowing small lottery retailers to redress imbalances in bargaining power with Tabcorp
- producing more efficient commercial outcomes by providing lottery retailers with greater input into the terms and conditions of contracts with Tabcorp
- producing more effective negotiation processes

⁴ Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

- allowing members of the industry association to become better informed of relevant market information, which is likely to improve their input into contractual negotiations with Tabcorp to achieve more efficient and balanced contracts, and
 - reducing the likelihood of manifestly unfair contractual terms and conditions.
- 4.13. The ACCC accepts that most of the NLNA's members are small businesses who, individually, are unlikely to be in a strong bargaining position with a large supplier. Collective bargaining may increase the input that the NLNA's members have into contractual arrangements with Tabcorp, to the benefit of all parties.
- 4.14. The ACCC considers that the Proposed Conduct is likely to result in public benefit in the form of improved input into contracts between Tabcorp and lottery retailers. However, the extent of this benefit from collective bargaining by NLNA is limited since the majority of the NLNA's current members would not otherwise be negotiating with Tabcorp on an individual basis, as they are already represented by VANA.

Transaction cost savings

- 4.15. The NLNA submits that the collective bargaining arrangement is likely to result in public benefits from transaction cost savings (including legal and expert advisor costs) for the NLNA members, and lottery retailers generally, due to a single negotiating process occurring (with respect to those NLNA members) rather than a series of individual negotiations. The NLNA submits sharing transaction costs will enable more of the potential benefits from the parties negotiating improved terms with each other to be maximised, thus making all parties better off. The NLNA notes the ACCC has previously accepted that such costs savings would arise from having a single negotiating process.
- 4.16. The NLNA further submits that while, with authorisation being granted to the NLNA, there will be multiple industry associations collectively bargaining on behalf of lottery retailers, transaction cost savings will be achieved by:
- the NLNA dealing with Tabcorp and the NLNA representing its members at a national level, rather than representation occurring on a State or Territory basis. The NLNA submits that this national level representation will result in cost savings for Tabcorp and the NLNA's members
 - the NLNA has plans for growth and their expectations are that they will have 700 members by the end of 2021 and over 1,000 members by 30 June 2022. Collectively bargaining on behalf of this number of members presents a significant saving for those members
 - Tabcorp is free to choose which industry association(s) it deals with, which will ultimately promote competition and potential cost savings for lottery retailers, and
 - even if there are higher transaction costs from having more than one body negotiating on behalf of lottery retailers, the NLNA submits that these will not be significant, and any increases will not likely constitute a net detriment.
- 4.17. ALNA submits that the NLNA's parent entity, VANA, already has authorisation; thus, any additional public benefit in conducting a single coordinated negotiation process, rather than a series of individual ad hoc negotiations covering common issues, is negated. ALNA submits that the authorisation would not reduce duplication of negotiation, approval and monitoring processes; it actually increases them and is not likely to lead to any significant cost savings.

- 4.18. In general, when the ACCC has previously considered the public benefits of collective bargaining by newsagents and lottery agents, the ACCC has accepted that there are likely to be transaction cost savings from collective bargaining relative to individual negotiations. For Tabcorp, the reduced duplication of the negotiation, approval and monitoring process is likely to lead to cost savings, while NLNA members can share the cost of obtaining professional services and benefit from reduced negotiation costs.
- 4.19. The ACCC notes that Tabcorp has indicated it is willing to negotiate with the NLNA on behalf of its members. The ACCC considers that the parties involved in any collective bargaining have the means and incentive to minimise the transaction costs associated with contracting, particularly where there is a commonality of issues across the bargaining groups. In addition, competition between ALNA and the NLNA may provide incentives for each bargaining group to minimise bargaining costs, leading to improved efficiencies in bargaining outcomes.
- 4.20. The ACCC considers that, absent the authorisation, the NLNA members who are not also VANA members would be required to negotiate with Tabcorp individually or accept standard form contracts. In these cases, the collective bargaining arrangements would deliver a public benefit by providing opportunities for transaction cost savings for both Tabcorp and the lottery retailers.
- 4.21. The ACCC considers that the Proposed Conduct is likely to result in a public benefit in the form of transaction cost savings. However, the extent of the additional transaction cost savings from collective bargaining by the NLNA is limited since the majority of the NLNA's current members would not otherwise be negotiating with Tabcorp on an individual basis, as they are already represented by VANA.

Improved income for lottery retailers and improved customer experience

- 4.22. The NLNA submits that granting authorisation for it to collectively bargain with Tabcorp regarding proposals such as sales incentive schemes, changes to shop images, changes to training provided by Tabcorp, improved point of sale information, increased product information, and other means of improving customer service and customer experience would lead to improved customer shopping experience and promote lottery retailers' businesses.
- 4.23. In principle, the ACCC accepts that the Proposed Conduct may facilitate some improved customer shopping experience and promote the businesses of NLNA members. However, the ACCC does not consider there is currently sufficient evidence to conclude that these outcomes are likely to occur and result in a public benefit.

Significance of VANA authorisation and other bargaining groups

- 4.24. newsXpress submits that the NLNA authorisation is not needed. newsXpress submits that newsagents are already well covered through ALNA's representation and that it has found ALNA to be accessible, transparent and engaged in the representation of newsagents in dealing with Tabcorp, including ALNA helping and representing small business retailers beyond its immediate membership base.
- 4.25. ALNA submits that:
- the public benefit claimed by the NLNA is already obtained for VANA members by way of the long-standing VANA authorisation
 - NLNA's application is not necessary and technically flawed, as it adds nothing to the public benefit flowing from the VANA authorisation

- if there are agents in other states that wish to join VANA, they can and the VANA authorisation would cover them, and
 - Governments do not like multiple representatives of the same industry and are concerned that those said to represent a particular sector do so.
- 4.26. In response, the NLNA submits that it does not consider authorisation would weaken the bargaining position of lottery retailers by splitting the pool of members between industry associations for the following reasons:
- it provides an opportunity for each industry association to negotiate agreements reflecting the different operational practices and needs of different types of retailers selling lottery products, and facilitate newsagent-lottery retailers who are not members of another industry association being better represented in negotiations with lottery providers
 - the proposed arrangements are voluntary and, accordingly, opportunities for collective bargaining to improve input into contract terms and conditions will generally only arise if both sides are likely to benefit from collectively negotiating an outcome, and
 - three similar industry associations do not reduce the potential for the realisation of mutually beneficial outcomes between Tabcorp and lottery retailers
- 4.27. The NLNA further submits that having competition between two or more industry associations that deal with Tabcorp would not result in public detriment because:
- it promotes competition between those industry associations to ensure the respective industry associations offer the best services and prices to their members which would lead to better representation for lottery retailers
 - if a member decides to leave one industry association and join the NLNA, they would be doing so freely and because they consider the NLNA to be better able to supply support services to their businesses, which may include collectively bargaining with lottery providers, and
 - the NLNA submits that Tabcorp having to deal with a new industry association would not result in any confusion or frustrations for Tabcorp as:
 - the key executive team of the NLNA already have established relationships with Tabcorp from their dealings at VANA
 - NLNA will be dealing with Tabcorp at a national level which will streamline representation and avoid Tabcorp and its subsidiaries having to liaise with various industry associations on a State-by-State basis, and
 - should Tabcorp have concerns about dealing with multiple industry associations, it can refuse to engage in collective bargaining with any particular industry association.
- 4.28. The ACCC has previously allowed collective bargaining arrangements where there is another collective bargaining authorisation in place and there is significant overlap in actual and potential membership between the bargaining groups.
- 4.29. The ACCC notes that Tabcorp has not raised concerns about having to deal with two bargaining groups. However, if multiple collective bargaining groups cause confusion or frustration for Tabcorp, Tabcorp is able to elect to deal with a subset of those collective bargaining groups or lottery agents individually.

- 4.30. The ACCC considers that, should members of ALNA or NANA decide to leave and join the NLNA, they would be doing so freely and because they consider the NLNA to be better able to supply support services to their businesses, which may include collectively bargaining with lottery providers. The ACCC does not consider that this would constitute a public detriment.
- 4.31. The ACCC recognises that enabling the NLNA to collectively bargain on behalf of its members could impact ALNA's ongoing activities in representing lottery agents in negotiations with Tabcorp. In particular, a second bargaining group may impact ALNA's membership base if current ALNA members choose to join, and be represented by, the NLNA instead. However, the ACCC considers that, should this be an outcome of the introduction of a second bargaining group, it would reflect competition between the two groups, which – as concluded in the ACCC's assessment of the public benefits of the proposed arrangements – is likely to lead to better representation of lottery agents in collective negotiations.
- 4.32. The ACCC considers that:
- public benefits in the form of improved input into contracts and small transaction cost savings are likely to arise notwithstanding that there are other industry associations (such as VANA and ALNA) that currently collectively bargain on behalf of lottery retailers, and
 - the Proposed Conduct is unlikely to have an anti-competitive impact on other bargaining groups.

ACCC conclusion on public benefits

- 4.33. The ACCC considers that the Proposed Conduct is likely to result in some public benefits from improved input into contracts and small transaction cost savings.

Public detriments

- 4.34. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁵

- 4.35. The ACCC has considered whether the Proposed Conduct is likely to result in a public detriment because of reduced competition between lottery retailers.
- 4.36. The NLNA submits that the Proposed Conduct would not result in public detriment for the following reasons:
- participation in collective bargaining is voluntary for both Tabcorp and lottery retailers
 - there is no proposed boycott activity
 - the level of competition between lottery retailers for both distribution services and the supply of lottery products to consumers is unlikely to be significantly affected, and

5 Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- in the absence of collective bargaining, the level of competition between lottery retailers in negotiating with Tabcorp is likely to be low due to the use of standard form contracts by Tabcorp.

4.37. The ACCC considers the Proposed Conduct is likely to have a very limited impact on competition between lottery retailers because participation in the NLNA's collective bargaining is voluntary for both Tabcorp and NLNA members and there is currently a low level of competition between lottery retailers individually negotiating with Tabcorp.

ACCC conclusion on public detriments

4.38. The ACCC considers that the Proposed Conduct is likely to result in minimal, if any, public detriments.

Balance of public benefit and detriment

4.39. For the reasons outlined in this determination, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

5. Determination

The application

5.1. On 20 May 2020, the NLNA lodged application AA1000515 with the ACCC, seeking authorisation under subsection 88(1) of the Act.

The authorisation test

5.2. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.

5.3. For the reasons outlined in this determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.

5.4. Accordingly, the ACCC has decided to grant authorisation.

Conduct which the ACCC authorises

5.5. The ACCC has decided to grant authorisation AA1000515 to enable the NLNA to collectively bargain for and on behalf of its current and future members with Tabcorp, as described in paragraph 1.5 as the Proposed Conduct, in respect of the following:

- commissions paid by Tabcorp to Lottery Retailers
- handling Lottery Retailer application fees
- service and freight charges
- point of sale equipment hire costs
- the ability of Lottery Retailers to participate in online sales undertaken by Tabcorp

- retail image and subsidies (with respect to Tabcorp imagery in retail stores)
- support service levels and training
- sales incentive schemes, marketing and promotion
- product sales restrictions in the area dedicated to the sale of lottery products
- retail insurances, and
- alterations to retailer procedures manuals

5.6. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45(1)(a) and (b) of the Act.

5.7. The ACCC has decided to grant authorisation AA1000515 until 9 October 2025.

6. Next steps

6.1. This determination is made on 17 September 2020. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 9 October 2020.