

NLNA



National Lotteries and Newsagents Association

6th March 2024

By email: Naomi.Menon@acc.gov.au

Naomi Menon
Director
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Australian Competition & Consumer Commission
GPO Box 3131
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With a copy to Rebecca Ryan and Sam O'Connor via email: Rebecca.Ryan@acc.gov.au and Sam.O'Connor@acc.gov.au

Dear Ms. Menon,

National Lotteries and Newsagents Association Ltd application for minor variation of authorisation AA1000515 (“Minor Variation Application”)

Response to submissions from Newsagents Association of NSW & ACT Limited (“NANA”)

Thank you for the opportunity to respond to the submissions received by the ACCC on 28 February 2024 from NANA (**NANA Submissions**) in response to our Minor Variation Application.

Background and context

The National Lotteries and Newsagents Association Ltd (**NLNA**) made the Minor Variation Application to request that the parts of the conduct authorised under authorisation AA1000515 (the “**Authorisation**”) that refer to ‘Tabcorp’ be altered to refer to ‘The Lottery Corporation Limited’ (**Proposed Variation**). This was occasioned by a demerger transaction in 2022 by Tabcorp that resulted in The Lottery Corporation Limited taking over the operation of Tabcorp’s lotteries and Keno businesses.

The basis of the Minor Variation Application is that the Proposed Variation does not change the basis upon which the ACCC originally decided to grant the Authorisation and that the Proposed Variation would not involve a material (if any) change in the effect of the Authorisation. This is relevant because, broadly, the ACCC may grant an application for minor variation if it is satisfied that the variation sought is minor and will not reduce the extent of the net public benefit resulting from the conduct detailed in the current authorisation.

The NANA Submissions were received by the ACCC following an invitation by ACCC to interested parties dated 12 February 2024 (**ACCC Invitation**) to make a submission on the Minor Variation Application. Relevantly, and consistent with the matters set out above, the ACCC Invitation contained the following request to interested parties:

“In making your submission, please provide information, evidence and views about the likely effect of the proposed variations on the net public benefit resulting from the current authorised conduct.”

Essentially, therefore, interested parties were requested by ACCC to address the effect that the Proposed Variation would be likely to have on the net public benefit resulting from the current conduct authorised under the Authorisation (“**Net Public Benefit**”).

NANA was the only interested party to make a submission in response to the ACCC Invitation.

NLNA comments on the NANA Submissions

Given the above background and context, NLNA makes the following comments in response to the NANA Submissions:

1. The NANA Submissions do not provide any commentary on, or address in any way (meaningfully or otherwise), the effect that the Proposed Variation would have on the Net Public Benefit;
2. The only aspect of the NANA Submissions that can reasonably be held to be relevant to the matters that the ACCC Invitation requested interested parties to address in their submissions, is the statement in the third paragraph of the NANA Submissions in which NANA expressly accepts that the Minor Variation Application sought by NLNA is unlikely to involve a material change in the effect of the Authorisation. Needless to say, NLNA concurs;
3. The remainder of the NANA Submissions essentially boils down to a claim by NANA that NLNA only has one member (i.e., VANA Limited) and, on this basis, NLNA does not have any membership base in respect of which the conduct authorised by the Authorisation would apply, and the Net Public Benefit can be assessed (**Membership Claim**);
4. In respect of the Membership Claim, NLNA notes as follows:
 - (a) The Membership Claim is wholly irrelevant to the matters that interested parties were requested by the ACCC Invitation to address in their submissions on the Minor Variation Application (i.e., to address the effect that the Proposed Variation would be likely to have on the net public benefit resulting from the current conduct authorised under the Authorisation);
 - (b) The Membership Claim was previously (and unsuccessfully) raised by NANA on 15 June 2020 in its public submissions opposing the grant of the Authorisation to NLNA by the ACCC. Further, NLNA responded to the Membership Claim in a public submission to the ACCC dated 22 June 2020 (**Membership Claim Response**). Relevantly, in making its determination to grant the Authorisation, the ACCC did not, seemingly, consider the Membership Claim to have sufficient merit. Undeterred, NANA has rehashed the Membership Claim in the NANA Submissions, despite:
 - (i) the irrelevance of the Membership Claim to the Minor Variation Application as noted above;
 - (ii) the content of NLNA’s Membership Claim Response; and

- (iii) the fact that the Membership Claim did not prevent the ACCC from granting the Authorisation when originally raised by NANA on 15 June 2020;
- (c) In the Membership Claim Response, NLNA responded to the Membership Claim as follows:
 - (i) NLNA clarified that the correct term that it should have been used in referring to VANA Limited is “member” as opposed to “shareholder”, given that “member” is the term used in the *Corporations Act 2001* (Cth) and the NLNA Constitution; and
 - (ii) NLNA’s use of the term “member” to refer to the owners and operators of newsagencies and lottery retailers in respect of whom the conduct authorised under the Authorisation relates, was not intended to be a reference to how that term is defined in the *Corporations Act 2001* (Cth) and the NLNA Constitution. Rather, it was used in a more general sense to refer to “a person, ... or a thing that is part of a group”. Accordingly, the use of the term “member” by NLNA in this context was a reference to those owners and operators of newsagencies and lottery retailers that have paid a fee to NLNA in return for certain services, including representation in collective bargaining with Tabcorp, if the Authorisation was granted.

Therefore, for NANA to rehash the Membership Application in the NANA Submissions, while already aware of the above matters as set out in the Membership Claim Response, is disingenuous;

- (d) NLNA reiterates the matters set out in the Membership Claim Response (as set out in item 4(c) above) with respect to the Minor Variation Application and notes that the use of the terms “shareholder” and “member” in the Minor Variation Application was for consistency with the same terminology as used in paragraph 2.1 of the Authorisation; and
- (e) In the Membership Claim Response, NLNA noted to the ACCC that, in making the Membership Claim, NANA (among others) did not seek to establish any real form of public detriment that would arise if the ACCC were to grant the Authorisation. The focus of NANA (and others) instead seemed to be on criticising the legitimate business activities of an active competitor in their market (being NLNA), which was irrelevant to determining whether the public benefit of granting the Authorisation outweighed the public detriment.

NLNA contends that the same assessment could reasonably be made of NANA’s motivation in making the Membership Claim again in relation to the Minor Variation Application, bearing in mind the matters raised by NLNA above in items 4(a) to 4(c) of this letter.

Conclusion

In conclusion, NLNA draws the following matters to the ACCC’s attention in relation to the NANA Submissions:

1. The NANA Submissions do not identify (or even attempt to identify) any detrimental effect that the Proposed Variation would have on the net public benefit resulting from the current conduct authorised under the Authorisation; and
2. In the NANA Submissions, NANA expressly accepts that the Minor Variation Application sought by NLNA is unlikely to involve a material change in the effect of the Authorisation.

NLNA also notes that no other interested party has made any submissions identifying any detrimental effect that the Proposed Variation would have on the net public benefit resulting from the current conduct authorised under the Authorisation.

Based on the above, NLNA submits that it would be reasonable in the circumstances for ACCC to be satisfied that the Proposed Variation is minor and will not reduce the extent of the net public benefit resulting from the conduct detailed in the Authorisation, and therefore to grant the Minor Application Variation.

Yours sincerely,



Brendan Tohill

CEO

National Lotteries and Newsagents Association

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