



AUSTRALIAN
COMPETITION
& CONSUMER
COMMISSION

Statement of Reasons

Notification CB10000482-1

lodged by

Capital Brewing Co Pty Ltd and Bentspoke Brewing
Company Pty Ltd

in respect of

collective negotiation for pourage rights at GIO Stadium
Canberra

Notification number: CB10000482-1

Date: 9 September 2021

Commissioners:

Ridgeway

Keogh

Rickard

Brakey

Summary

The Australian Competition and Consumer Commission (**ACCC**) does not object to the notification lodged by Capital Brewing Co Pty Ltd (**Capital Brewing**) and Bentspoke Brewing Company Pty Ltd (**Bentspoke**) on 5 August 2021 to jointly bid for, and collectively negotiate, agreements with Hospitality Management Australia Pty Ltd relating to pourage rights at GIO Stadium Canberra. Pourage rights refer to the ability to exclusively supply beer and cider at the venue.

The ACCC is satisfied that the notified joint bid and collective negotiations are likely to result in public benefits due to improved competition for pourage rights at GIO Stadium Canberra, and minimal, if any, public detriment due to restrictions on Capital Brewing and Bentspoke sharing competitively sensitive information as part of the joint bid and collective negotiations. The ACCC is satisfied that the likely public benefits will outweigh the likely public detriments.

The ACCC has decided to allow the notification to remain in force for a period of five years, as requested by Capital Brewing and Bentspoke. The notification was lodged on 5 August 2021 and the legal protection commenced on 19 August 2021. It will remain in force until 19 August 2026, unless or until the ACCC ends the protection provided by revoking the notification or the notification is withdrawn by Capital Brewing and Bentspoke.

The ACCC may revisit this assessment at any time and take steps to remove the protection provided by the notification.

1. The notification

- 1.1 On 5 August 2021, Capital Brewing and Bentspoke lodged a collective bargaining notification to enable them to collectively bid for, and negotiate agreements with Hospitality Management Australia Pty Ltd (**GIO Stadium Canberra**) (the **Notified Conduct**).
- 1.2 Specifically, Capital Brewing and Bentspoke are seeking to collectively bid for the right to together be the exclusive supplier of beer and cider products at the GIO Stadium Canberra (known as **pourage rights**). If the bid is successful, Capital Brewing and Bentspoke are seeking to collectively negotiate agreements relating to pourage rights with GIO Stadium Canberra.
- 1.3 Capital Brewing and Bentspoke submit that neither of them has the full product range necessary to satisfy the requirements to bid independently.
- 1.4 The Notified Conduct does not include a collective boycott, and both Capital Brewing and Bentspoke will be free to also negotiate separate contracts with GIO Stadium Canberra. However, as noted, neither Capital Brewing nor Bentspoke is likely to bid individually.
- 1.5 Capital Brewing and Bentspoke each brew and supply beer and cider in Australia. Capital Brewing and Bentspoke were both established in the Australian Capital Territory, and have a significant 'local' brand presence in Canberra.
- 1.6 Hospitality Management Australia Pty Ltd manages the GIO Stadium Canberra. The GIO Stadium Canberra hosts significant sporting and cultural events. The

GIO Stadium Canberra issues requests for proposals from potential suppliers to bid to supply products and services to the GIO Stadium Canberra, including for pourage rights.

- 1.7 Capital Brewing and Bentspoke have requested that the notification remain in force for five years to provide protection if the bid is successful, in the instance where they seek to extend the contract with GIO Stadium Canberra.
- 1.8 Businesses which meet certain criteria may lodge a collective bargaining notification to gain protection from legal action under the competition provisions in Part IV of the *Competition and Consumer Act 2010* (the **Act**) for arrangements that may otherwise risk breaching those provisions in the Act, but are not harmful to competition and/or are likely to result in overall public benefits.¹
- 1.9 By lodging a notification with the ACCC, Capital Brewing and Bentspoke seek legal protection to participate in collective bargaining that may otherwise breach competition laws because it involves joint action by competitors.

2. Consultation

- 3.1 The ACCC invited submissions on the notification from significant beer and cider suppliers in Australia with known capacity to meet the GIO Stadium Canberra bid requirements, Lion and Asahi, as well as the manager of the GIO Stadium Canberra. The ACCC also published the consultation request on its public register.²
- 3.2 The ACCC received no submissions in relation to the notification.

3. ACCC's Assessment

- 4.1 Capital Brewing and Bentspoke submit that the Notified Conduct would or might constitute collective bargaining within the meaning of Division 1 of Part IV of the *Competition and Consumer Act 2010* (Cth) (the **CCA**). The ACCC has considered the Notified Conduct in accordance with the test in section 93AC of the CCA.

Relevant areas of Competition

- 4.2 To assess the likely effect of Notified Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.
- 4.3 While Capital Brewing and Bentspoke submit that there are markets for the production and supply of beer and cider in all states and territories in Australia. The ACCC does not consider it necessary for the purpose of this assessment to consider either national or state based markets for the production and supply of beer and cider. The ACCC considers that the relevant area of competition for the purpose of this assessment is likely to be the supply of beer and cider to the GIO Stadium Canberra.

¹ Businesses can obtain protection from legal action under the Act for collective bargaining, which can include associated collective boycotts, by lodging a collective bargaining notification with the ACCC. Protection for collective bargaining which does not involve a collective boycott will generally commence 14 days after the collective bargaining notification is lodged.”

² A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

- 4.4 Since GIO Stadium Canberra appoints a single supplier of beer and cider, competition occurs for the right to be that supplier, rather than ongoing competition between suppliers at the stadium. That is, competition occurs through competitive bids between suppliers for pourage rights at GIO Stadium Canberra.

Future with and without the Notified Conduct

- 4.5 In applying the notification test, the ACCC compares the likely future with the Notified Conduct to the likely future in which the Notified Conduct does not occur.
- 4.6 Capital Brewing and Bentspoke submit that in the future with the Notified Conduct, Capital Brewing and Bentspoke will jointly bid for pourage rights at the GIO Stadium Canberra, in addition to other multinational suppliers who ordinarily have the capacity to respond to requests for proposal.
- 4.7 Capital Brewing and Bentspoke submit that in the future without the Notified Conduct, neither Capital Brewing nor Bentspoke would individually bid for pourage rights as individually they are unlikely to have the range or budget to satisfy the bid requirements of GIO Canberra Stadium.
- 4.8 The ACCC accepts Capital Brewing and Bentspoke's submission.
- 4.9 Accordingly, the ACCC considers it likely that that in the future with the Notified Conduct a greater number of suppliers will bid for pourage rights at the GIO Stadium Canberra than in the future without the Notified Conduct.

Public benefits likely to arise

- 4.10 The ACCC considers that the Notified Conduct is likely to result in public benefit from improved competition for pourage rights at the GIO Stadium Canberra. The ACCC accepts that in the future without the Notified Conduct neither Capital Brewing nor Bentspoke would be able to bid independently. Accordingly the ACCC accepts that the Notified Conduct is likely to result in a greater number of bids for pourage rights at the GIO Stadium Canberra. As competition is 'for the market', and is expressed in the number and quality of bids for pourage rights, this means that it is likely that the Notified Conduct will result in improved competition for the market.

Minimal public detriment

- 4.11 The ACCC considers that Notified Conduct is likely to result in minimal, if any, public detriment from a reduction in competition because:
- In relation to the supply of beer and cider to GIO Stadium Canberra, participation in the Notified Conduct is voluntary, and if Capital Brewing and Bentspoke wish to independently bid they remain free to do so (although the ACCC accepts that this is unlikely for the reasons set out above).
 - GIO Stadium Canberra will only appoint a single supplier. Competition occurs during the bidding process to be that supplier. The Notified Conduct does not affect the ability of other suppliers to compete in the competitive bidding process, and therefore does not reduce competition for pourage rights at the GIO Stadium Canberra.

- The Notified Conduct does not permit the exchange of competitively sensitive information, such as pricing or rebates, between Capital Brewing and Bentspoke. Capital Brewing and Bentspoke will continue to compete to supply beer and cider outside of the joint bid to supply GIO Stadium Canberra.

Period for which the notification will be in force

- 4.12 A collective bargaining notification (and therefore the protection it confers) will be in force for a period of three years from the date it is lodged unless the ACCC determines that another period is appropriate or the notification is withdrawn or revoked.
- 4.13 In this case, Capital Brewing and Bentspoke have requested that the notification remain in force for five years to provide protection if the bid is successful, and they seek to extend the contract with GIO Canberra Stadium.
- 4.14 The ACCC considers that it is appropriate for the notification to remain in force until 19 August 2026 for the following reasons:
- The likely public benefits are expected to continue for the duration of that period.
 - A five year period is unlikely to increase the minimal public detriment which is likely to result from the Notified Conduct.
 - The ACCC may act to remove the protection afforded by the notification at a later stage if it is satisfied that the public benefit does not outweigh the public detriment.³

4. Decision

- 5.1 The ACCC considers that the Notified Conduct is likely to result in public benefit due to improved competition for the supply of beer and cider to the GIO Stadium Canberra, that will outweigh the minimal, if any, public detriment likely to result including from any lessening of competition.
- 5.2 With respect to the period for which the notification will remain in force, for the reasons set out in paragraph 4.14, in accordance with s 93AD(5), the ACCC is satisfied that a five year notification period is appropriate in all the circumstances, being the period ending on 19 August 2026.
- 5.3 Accordingly, the ACCC does not object to the notification at this time. The protection provided by notification CB10000482-1 commenced on 19 August 2021 and will continue until 19 August 2026. However, the ACCC may revoke the notification at any time if it forms the view that the public benefits do not outweigh the public detriments.
- 5.4 This Statement of Reasons serves as the written notice and written statement of reasons for giving that notice required by section 93AD(6) of the CCA.

³ Section 93AC of the CCA.