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# Adjudication

## Authorisations

*The Commission has the function, through the authorisation process, of adjudicating on proposed mergers and certain anti-competitive practices that would otherwise breach the Trade Practices Act.*

*Authorisation provides immunity from court action and is granted where the Commission is satisfied that the practice delivers offsetting public benefits.*

## Final determination

### **National Electricity Code Administrator and the National Electricity Market Management Company Ltd**

*Amendments to the national electricity code (A90652-54)*

- Draft determination issued 5 August 1998.
- Final determination issued 19 October 1998.

On 19 February 1998 the Commission received joint applications for authorisation from NECA and NEMMCO, in relation to proposed changes to the national electricity code. Amendments to the applications were received on 28 April and 11 May 1998.

On 5 August 1998 the Commission released a draft determination outlining its analysis and views on the key competition issues. A pre-determination conference was requested and held, and the matters raised were taken into consideration in the final determination.

The Commission considered the changes were essential for an orderly commencement of the national electricity market in late 1998. The changes included further transitional

arrangements and amendments to clarify the interpretation and application of the code.

The development of the national electricity market is the culmination of electricity industry reforms stemming from COAG decisions taken in July 1991.

The authorisation of the code clears the way for the establishment of the national electricity market to operate in the south-eastern States of Australia.

Authorisation was dependent on a number of conditions that amended the proposed changes and dealt mainly with:

- the transitional arrangements;
- some elements of the market rules; and
- registration requirements and administrative provisions.

The applicants made the amendments and were advised by the Commission on 9 October that the changes satisfied the conditions of authorisation.

Authorisation was granted on 19 October 1998 until 31 December 2010, the time set down in the 10 December 1997 determination for authorisation of the existing code.

This determination complements the Commission's earlier determination of 10 December 1997.

Background information on competition policy, the importance of electricity industry reform and the extent of reform in the industry can be found in the Commission's 10 December 1997 determination and previous issues of this journal.

## Draft determination

### Australian Direct Marketing Association

*In relation to a direct marketing code of conduct (A40077)*

- Draft determination proposing to grant authorisation issued 7 October 1998.

On 2 September 1998 the Australian Direct Marketing Association (ADMA) lodged an application with the Commission under sub-s. 88(1) of the Trade Practices Act concerning anti-competitive conduct in relation to a contract, arrangement or understanding — being ADMA's arrangements to adopt a direct marketing code of practice and to enforce its provisions.

#### *Background*

In November 1997 the Ministerial Council on Consumer Affairs approved the release of a Model Code of Practice for the Direct Marketing Industry.

The ADMA code is based on the model except for its dispute handling procedures and additions concerning fair conduct relevant to electronic commerce and consumer data protection.

Given that the model code was the subject of extensive public consultation, the Commission dispensed with seeking submissions on the ADMA application until after issuing a draft determination. Submissions are now being sought.

#### *The code*

The code sets out specific standards of conduct for participants in the industry in relation to their customers and the public. It serves as a benchmark in settling disputes between industry participants and their customers.

All ADMA members and their employees, agents and subcontractors are bound by it.

#### *Commission considerations*

The code contains a number of core rules which deal with standards of fair conduct generally and standards relevant to telemarketing, electronic comments, and consumer data protection.

The Commission believes these core rules have the potential to give rise to public benefit by providing better information to consumers about their rights and their purchases, by protecting them from unreasonably intrusive forms of direct marketing and their right to privacy, and by improving the quality and consistency of services which consumers receive.

However, the Commission's view is that the extent of public benefit will depend on the level of compliance.

It is also of the view that any increased compliance may have the potential to standardise the way in which participants in the industry conduct their business — ultimately decreasing competition. This is because the core provisions restrict the conduct in which ADMA members can engage.

To address these concerns the Commission suggested seven amendments which would satisfy it that the public benefits would outweigh any anti-competitive detriments.

- Where a complaint which may involve an alleged breach of the code is not resolved at the business level, members are required to refer the complaint to ADMA to be dealt with via the procedures laid down in the code of practice.
- Independence of the Chair of the Code Authority is guaranteed.
- The exact composition of the authority is defined and equality of representation is provided for. For example it comprises an independent chair, one consumer representative and one industry representative.
- All parties to a complaint are provided with equal opportunity to participate fully in the enforcement process and are given reasons for decisions which are made affecting their case. Complainants have the right to request the authority to review any decision by the compliance officer that the code has not been breached.

- The breadth of the remedial orders and sanctions which the authority is empowered to recommend are specified. Guidelines outlining the instances when particular types of remedies or sanctions will be recommended should also be included.
- Provide that there are no fees for lodging a compliant or defending an allegation under the code.
- Provide for a system which records and reports all complaints received by the compliance officer in relation to alleged breaches of the code and outlines action taken. The Commission considers including the information in the ADMA annual report would be satisfactory.

If ADMA includes the amendments in the code the Commission proposes to grant authorisation for four years from the date of final determination.

A number of interested parties called for a conference to discuss the draft determination. It was scheduled to be held in Sydney on 26 November 1998.

## Revocation

### South East Queensland Electricity Board

*In respect of the supply of electricity cable and other materials for real estate development (A50015)*

- Determination to revoke made 2 September 1998.
- Revocation came into effect 23 September 1998.

This revocation relates to an authorisation granted to the South East Queensland Electricity Board (SEQEB) on 24 November 1995 with respect to conduct that may have constituted exclusive dealing by restricting the choice of supply of materials for use in electricity reticulation by real estate developers.

When granting authorisation the Commission had recognised certain public benefits even though there were considerable anti-competitive detriments in allowing SEQEB to limit

purchasers' choice of materials to a panel of suppliers for periods of up to 4½ years (depending on the product).

The Commission decided to revoke the authorisation because SEQEB has not complied with the following conditions that were attached to the authorisation.

- Introduction of a process to consider admitting manufacturers/suppliers to the panel of acceptable suppliers.
- Development of a formal process for consulting with suppliers/manufacturers in developing specifications for significant materials.
- Formalising and documenting internal appeals procedures in respect of specifications for materials.
- Put in place external appeals processes for specifications for materials.

On 17 June 1998 the Commission issued s. 91(4)(a) Notices calling for submissions as to whether the authorisation should be revoked.

Several submissions were received.

In its submission Energex (formerly SEQEB) advised that in March 1997 — following changes in the electricity industry including significant moves to a national electricity market — it changed its subdivision supply agreement procedures to avoid any suggestion of breaches of the Act including exclusive dealing, and specifically to avoid the suggestion that its procedures required a developer to acquire material only from it.

Energex did not seek a further authorisation.

The revocation came into effect on 23 September 1998.

## Australian Competition Tribunal

### Review of ACCC determinations concerning distribution of newspapers and magazines in NSW/ACT, QLD and VIC

#### Summary of tribunal decision

On 18 November 1998 the Australian Competition Tribunal made a determination on its review of ACCC determinations relating to the arrangements for distribution of newspapers and magazines in NSW/ACT, Queensland and Victoria.

The Commission's determinations were made in December 1997.

Tribunal reviews are *de novo*, the Tribunal undertaking its own consideration of relevant issues based on information presented during formal hearings. Evidence is presented by parties who support the Commission's determination as well as those who do not. The Commission's role is to assist the Tribunal.

The Tribunal hearings were held in July and August 1998.

The Commission's determinations revoked authorisations granted to certain newspaper and magazine publishers/distributors' and newsagents' organisations in the 1980s, and grant substitute authorisations to allow the present arrangements to continue until February 2001.

The decision to revoke the authorisations was based on the assessment that the authorised arrangements no longer delivered public benefits sufficient to outweigh anti-competitive detriments arising from the arrangements.

The substitute authorisations were granted to allow relevant parties sufficient time to prepare for deregulated distribution arrangements.

No parties appearing before the Tribunal contested the Commission's findings relating to the basis for revoking the authorisations.

The Commission had found a material change of circumstances since the authorisations were

granted and also that the required level of public benefit to sustain authorisation no longer existed. The emphasis of submissions before the Tribunal during the public hearings related to the appropriate period of the substitute authorisation — the transition period.

#### Tribunal's determination

The Tribunal's determination was that there had been a material change of circumstances and that the authorisation should be revoked.

It also accepted argument in favour of a transition period — expressing misgivings that the simple continuation of the present authorisations for a further period could have the result that little or nothing might be achieved during the transition period.

The Tribunal gave some emphasis to its observation that there is currently no systematic, substantial, ongoing agenda for significant change toward a more competitive distribution system, despite the parties concerned having had over three years to plan for the operation of a free market since the Tribunal's (then the Trade Practices Tribunal) decision in 1994.

The Tribunal sought to identify mechanisms that might be applied during the transition period which would be conducive to achieving a deregulated market and assist change to yield the net public benefit required for authorisation.

It concluded that certain elements of the previous authorisations require separate treatment:

- the wholesale distribution of magazines;
- the wholesale distribution of newspapers to look-alikes;
- the wholesale distribution of newsagents by newsagents to sub-agents generally; and
- the home delivery distribution of newspapers.

#### The wholesale distribution of magazines

The Tribunal observed that magazine distribution arrangements are no longer uniform, and increasingly diverge from the norms of the authorised conduct followed by the newspaper publishers. It also commented on the general

separation of newspaper ownership from magazine ownership.

The Tribunal found that magazine publishers have, through their own non-cooperative strategic behaviour, already commenced self-deregulation. By their actions they have shown they do not need the protection of authorisation and can operate independently of the historical distribution systems of newspapers.

It was considered that only a short transition period was required for distribution arrangements of magazines. The Tribunal determined that the rules of the newsagency councils, insofar as they relate to magazines, should be authorised until 1 July 1999, but not beyond that date.

#### *The wholesale distribution of newspapers to look-alikes*

The Tribunal found that the evolution of look-alike newsagencies to their current market position had not been anticipated under the rules. It commented that they exist contrary to the intention of the authorised system.

In the Tribunal's opinion, the anti-competitive detriment to the public flowing from the present restraints on look-alikes is so severe that there can be no net public benefit in allowing the restraints to continue, other than for a short time.

The Tribunal determined that the rules of the newsagency councils and the contracts made under them that restrict the freedom of each publisher to supply look-alikes should not continue beyond 1 July 1999.

#### *The wholesale distribution of newsagents by newsagents to sub-agents generally*

The Tribunal took into account the little power newsagents have in their relationship with newspaper publishers. It found that it would be possible for publishers quickly to find alternative secondary distributors or to supply direct to larger sub-agents.

The Tribunal found that there was a need, in the wider public interest, for forward planning in the distribution of newspapers to sub-agents.

It found also that it must give weight to the severe anti-competitive detriment to the public interest which arises from the present system.

The Tribunal determined that the restrictions in the rules mandating that sub-agents shall only be supplied by the authorised newsagent for the designated territory should cease to be authorised from 1 February 2000.

#### *The home delivery distribution of newspapers*

The Tribunal found that, for strong commercial reasons, it is unlikely that home delivery of newspapers will cease. It observed that rapid change for home delivery of newspapers would carry a high risk of confusion in the market, leading to inefficient and costly decisions that could threaten, at least in the short term, low-cost efficient home delivery.

The Tribunal felt that a longer period to plan for deregulation of home deliveries was desirable than was necessary in relation to the authorisations for wholesale supply of newspapers to sub-agents.

One reason for this was there may be aspects of a changed home delivery distribution system that will require further authorisations, and time should be allowed for that process.

The Tribunal determined that 1 February 2001 is an appropriate date on which authorisations for home deliveries under the present system should end.

#### **Summary**

The Tribunal determined that the relevant authorisations be revoked and that further authorisations be granted in substitution as follows:

- until 1 July 1999 in all respects to the present authorised arrangements;
- until 1 February 2000 in respect of the arrangements hitherto authorised, except:
  - in respect of the distribution of magazines; and
  - in respect of any prohibition or restriction on supplying publications to outlets other than authorised newsagents;
- until 1 February 2001 in respect of the home delivery of newspapers.

# Notifications

## Notifications considered

### **John Dercy Drake (N90507) (Allowed to stand)**

Offer of discount fuel linked to grocery sales (third line forcing).

### **Zurich Australian Insurance Ltd (N90508) (Allowed to stand)**

Supply of home contents insurance at a discount on condition the customer acquires a security system from Signature Security System Group.

### **ING Mercantile Mutual Bank Ltd (N90610) (Allowed to stand)**

Offer of discount on fixed and variable interest rates home loans for members of API. (third line forcing).

### **Commercial Projects Pty Ltd (N70073) (Allowed to stand)**

Sale of land on condition purchasers contract with a nominated builder, Pindan (third line forcing).

### **NRMA Building Society Ltd (N90613) (Allowed to stand)**

Section 47 application for exclusive dealing offering discounts to customers of NRMA who acquire goods directly/indirectly from NRMA affinity partner.

### **NRMA Building Society Ltd (N90614) (Allowed to stand)**

Section 47 application for exclusive dealing offering discounts to customers of NRMA who acquire goods directly/indirectly from NRMA affinity partner.