section 38A by incumbent solus commercial television operators for the allocation of an additional licence in their licence area. In order to identify whether there is another person who would be interested in operating another licence in that licence area, the ABA may commence the price-based allocation process under sections 36 and 38 and trigger a public auction. This would effectively freeze the incumbent's application until after the 'auction' process has been exhausted (section 38A(5)). If this 'auction' process leads to the allocation of the second licence, the incumbent's application will be taken to have been withdrawn (section 38A(6)).

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Application for Review of a Determination of the Australian Competition and Consumer Commission revoking Authorisation No. A3005

Annabel Archer provides a Case Note on the Australian Competition Tribunal's decision to revoke authorisation for the Media Council of Australia's Accreditation System.

Background

In 1978 the Accreditation System of the Media Council of Australia ('**MCA**') was granted authorisation by the Trade Practices Commission ('**TPC**'). In order to grant an authorisation, the TPC must be satisfied that in the circumstances, the conduct sought to be authorised would be likely to result in a benefit to the public that outweighed the detriment to the public from the authorised anti-competitive behaviour.

The MCA's System continued in substantially the same form as was authorised in 1978, until 12 January 1995, when the Australian Competition and Consumer Commission ('**ACCC**') (formerly the TPC) issued a notice to the MCA pursuant to section 91(4)(a) of the *Trade Practices Act 1974 (C'th)* ('**TPA**') stating that it considered that:

(a) there had been a material change of circumstances since the authorisation of the System in 1978; and

(b) inviting submissions as to whether the authorisation should be revoked in accordance with section 91(4) or upheld on analysis of the public benefit and anti-competitive detriment flowing from the authorised conduct.

The MCA System and its operation

The System originally began as an informal industry arrangement, implemented by the MCA from 1968. Its underlying purpose was to provide accreditation to advertising agents as businesses of such financial standing and trustworthiness that they should be entitled to receive unlimited credit from the members of the MCA. These members consisted of most media organisations in Australia, as well as almost all the private proprietors of mass media in Australia, either as constituent or affiliated bodies. As constituent or affiliated members of the MCA, media proprietors were therefore bound by the MCA's objects and rules, including the rules governing the application, implementation and enforcement of the System.

There were discretionary criteria for accreditation however the primary criterion was that the applicant advertising agency demonstrate that it was capable of conducting a viable business and that it was therefore appropriate for the media to extend it unlimited credit when it placed advertisements, rather than requiring it to pay for the advertising space at the time an advertisement was booked, that is rather than requiring 'cash with copy'.

In return for the System's endorsement of an agency as a business worthy of receiving unlimited credit, an accredited agency agreed to assume responsibility for the content of the advertisements it placed with any MCA member media proprietors.

The System also provided a mechanism whereby the media paid commission to accredited advertising agents, in relation to the value of the advertising space bought by that agent, in return for:

(a) the agent's acceptance of the del credere risk for the amount of advertising placed and for any liability arising out of the contents of the advertisements;

(b) acceptance by the agent of responsibility for compliance with the relevant advertising codes and standards; and

(c) the agent's agreement to pay for the advertising on certain payment terms specified by the System.

MCA members were prohibited from paying commission to unaccredited agencies, or to agencies other than those responsible for lodging and taking responsibility for the relevant copy, and an accredited agent could not accept a higher rate of commission than the maximum rate prescribed.

The commission paid by the media to accredited agencies was factored into the amount charged by the agent to the advertiser and was usually deducted by the agent from the total amount due to the media proprietor when the accounts were paid.

The maximum rates of commission were prescribed by the constituent and affiliated associations of the MCA and ranged from 10%, the ordinary rate allowed by proprietors of metropolitan newspapers, country daily newspapers and television stations, to 12%, the ordinary rate allowed by proprietors of commercial radio stations, to 15% or 20%, which was the rate allowed by proprietors of non-metropolitan, non-daily newspapers.

The ACCC's power under section 91(4)

Section 91(4) empowers the ACCC to revoke an authorisation if at any time after the grant of an authorisation, it considers that:

- the authorisation was granted on the basis of materially false or misleading information;
- there was a condition attached to the grant of the authorisation and that condition had not been complied with; or
- there has been a material change in circumstances since the time the authorisation was granted.

As a matter of law, it was submitted by the MCA that the ACCC, or the Australian Competition Tribunal ('ACT'), can only act to revoke an authorisation if it is satisfied that one of the above grounds exist. The starting point for this process must therefore be the original authorisation decision and analysis of the information or circumstances, which should be presumed to be correct.

Within the meaning of section 91(4), 'change in circumstances' should be interpreted as a change in the external world which has occurred, and which was not impliedly or expressly envisaged at that the time of the authorisation as circumstances in which the authorisation would operate. Changes due only to the passage of time should not usually be considered 'material changes' as such changes would presumably have been intended at the time of the authorisation.

The relevant 'material changes' should be further limited for the purposes of section 91(4) to those changes which could have a significant and adverse impact upon the net benefit analysis accepted at the time the authorisation was granted.

Revocation of the System's authorisation

The ACCC received a number of submissions in response to its notice of determination. In support of revocation, submissions were received from the Australian Association of National Advertisers (the 'AANA') and the Association of Australian Advertising Agencies and Marketing Consultants (the 'AAAMC'). In support of continuation of the System's authorisation, submissions were received from the Advertising Federation of Australia Limited (the 'AFA') and the MCA. A number of other submissions were also received from interested parties, both in support of, and in opposition to, the revocation of the authorisation.

After reviewing these submissions, on 5 October 1995 the Commission gave its determination revoking the authorisation. The MCA and the AFAA then applied to the ACT to review the Commission's revocation determination.

After a hearing in March 1996, on 26 July 1996 the ACT affirmed the determination of the Commission and revoked the authorisation of the MCA's System.

The ACT's decision

Material changes in circumstances

For the purposes of its decision, the ACT identified two relevant markets. These were:

1. the market for advertising space and time; and
2. the market for advertising agency services.

Of the lengthy submissions made to it by the MCA, the AFA, the AANA and the ACCC, the ACT then identified four possible material changes of circumstances. These were that:

1. the MCA had departed from the conduct authorised, due to changes in the System's rules and in the financial criteria for accreditation;
2. the administration of the advertising Codes had deteriorated in that procedures for the adjudication of complaints were now unsatisfactory, certain product codes had been superseded, sanctions for breaches of the Codes were relatively ineffective, and media embargoes on advertisements found to have breached the Codes were harsh and inflexible;
3. there had been changes in the structure of the relevant markets. In relation to the advertising agency services market, these changes included:
   (a) the increased specialisation of agencies, including the rise of media buying houses with concentrated planning and buying functions;
   (b) the unbundling of agency functions with agencies increasingly performing only limited numbers of these functions;
   (c) the effect of technology in fostering the emergence of smaller agencies; and
   (d) the effect of technology in supporting discrete media planning and media buying agencies.

   In relation to the market for advertising space and time, these were:
   (a) the rise of direct marketing and new forms of media; and
   (b) the resulting changes in the range of potential arrangements and relationships within the industry; and
4. there had been changes in market conduct in response to the structural changes above.

The ACT found that, of the possible material changes, the structural changes in the market and the effect of these changes on market conduct were relevant material changes within the meaning of section 91(4).

It held that conduct throughout the industry was directed to circumventing the underlying intention of the System as authorised, and included the sharing of commission with unaccredited agencies

on a widespread scale, and the sharing of commission from unaccredited agencies to advertiser principals. In addition, media proprietors provided discounts to direct advertisers in lieu of commission, which was also conduct inconsistent with the intention of the System.

The ACT concluded that there were now numerous alternative commercial arrangements in the advertising services market, which were substantially different to those considered by the TPC in 1978 and which had led to changes in market conduct such that the application of the System, and the conduct of the System's participants, was substantially different to that envisaged at the time of authorisation.

Net benefit analysis

Once it determined that there had been a material change in circumstances, the ACT was then required to assess the public benefits or anticompetitive detriments arising from the system in light of these changes.

The relevant components of the System to this stage of the ACT's analysis were considered separately.

(a) Credit issues

It was acknowledged that the System's credit provisions assisted in the achievement of cost efficiencies on an industry-wide scale, and minimised bad debts on behalf of the media. However, the ACT did not accept that media was so different from other sections of the economy that it required a centralised system of credit assessment, particularly as in many other jurisdictions, media does not rely on such a centralised system. The ACT was not convinced that the media could not use standard credit control techniques such as credit insurance, reference agencies and bank guarantees, as in other industries.

The ACT also found that the System's credit provisions had prevented competition in risk bearing and credit terms as an incident of general competition in the industry and that without the System, other credit arrangements might develop with more efficient risk bearing as, in an efficient market, the party to bear the risk should be determined by the market.

On balance, the ACT found that the credit provisions of the System were anticompetitive as they reduced economic efficiency in relation to credit provision and restricted the development of alternative forms of credit provision and risk bearing, with no consequent offsetting public benefit.

(b) Commission issues

The ACT held that without the System there could be greater flexibility in relation to the remuneration structures existing in the industry. The System was said to increase the largely inherent conflict of interest between agents and their advertiser principals by:

- entrenching media commission as a method of remuneration to agencies;
- inhibiting the growth of a fully competitive market in which alternative remuneration structures would be more common;
- creating a spillover effect where the rate of commission tended to be fixed or at least where it was difficult to negotiate alternative rates of commission; and
- artificially preventing rebates of commission.

The ACT found that the benefits of commission were largely associated with the credit provisions, and as the credit provisions carried no substantial public benefit, the commission provisions were similarly on the whole anticompetitive.

(c) Code issues

The Codes were found to represent a net public benefit, however the ACT noted that the major sanction for breaching the Codes was the media embargo on publication or broadcasting of an infringing advertisement, not the penalty imposed on advertising agents by the MCA. The ACT also held that the Codes could effectively be bypassed by direct advertisers through the use of media placement agencies. However, as the Codes are the subject of seperate authorisation except for the manner of their enforcement through the System, the ACT did not feel it necessary to consider this aspect of the System further. It also left open the question of an alternative enforcement mechanism in relation to the Codes in the absence of the System and the MCA.

Conclusion

The ACT held that the System had two major anticompetitive detriments:

1. economic inefficiency in that credit and risk bearing functions were not efficiently allocated as they would be in a more open market; and
2. functionless market power, in that the rigid structure of the System inhibited alternative methods of carrying on business in the industry.

The ACT also found that these anticompetitive detriments did not have any consequent public benefit, except in relation to the Codes, which were the subject of a different and separate authorisation, and thus not directly relevant to the public benefit-anticompetitive matrix at issue in these proceedings.

As the relevant material changes since the time of authorisation in 1978 had fundamentally altered the net public benefit analysis within which the System and the MCA had been intended to operate, the ACT therefore concluded that the public benefits flowing from the System no longer offset the public detriment arising from the lessening of competition which resulted from the authorised conduct.

Accordingly, the ACT revoked the authorisation with effect from 3 February 1997, allowing approximately six months for the MCA to wind down its existing arrangements. The MCA was to retain its authority to administer and implement the Codes, however in September 1996, the MCA determined to relinquish this control from December 1996. It is expected that the AFA, the AANA and the various media proprietors will determine a self-regulatory system, however the scope and operation of such a system is yet to be decided.

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