



Australian
Competition &
Consumer
Commission

Determination

Review of authorisation A14165

granted to

the **Retail Grocers and Storekeepers Association of
Western Australia**

Date: 29 November 2006

Authorisation No: A14165

Commissioners:

Samuel
Sylvan
King
Martin
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Executive summary

On 12 July 1979 the Retail Grocers and Storekeepers Association of Western Australia (RGSA) was granted authorisation A14165 to publish and circulate a price list (the Price Guide) to its members as published each month in the *Grocers' and Storekeepers' Journal*.

The ACCC has reviewed the RGSA authorisation as part of a broader review into fee guide authorisations that have not been reviewed since the authorisations were granted.

The ACCC notes that the authorised entity has been de-registered and no longer exists and the authorised conduct no longer appears to be engaged in.

Therefore the ACCC considers that the public benefits of the authorised conduct do not outweigh the public detriments and has decided to revoke the authorisation.

1. Introduction

- 1.1 The Australian Competition and Consumer Commission (ACCC) is the independent Australian government agency responsible for administering the *Trade Practices Act* 1974 (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2 The Act, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One method to obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.
- 1.3 The ACCC may grant an authorisation to businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.4 After granting an authorisation, the ACCC may revoke it at any time if, amongst other things, it appears to the ACCC that there has been a material change of circumstances since the authorisation was granted.
- 1.5 When considering the revocation of an authorisation, the ACCC issues a Notice in writing to persons who appear to be interested in the status of the authorisation. The ACCC details its reasons for issuing the Notice and invites submissions on the proposed revocation.
- 1.6 After considering any submissions received, the ACCC may make a determination in writing either revoking the authorisation, or deciding not to revoke the authorisation.
- 1.7 If an objection to the revocation is received, the ACCC must not revoke the authorisation if it is demonstrated that the conduct results in such a benefit to the public that the conduct should be allowed to continue to take place.
- 1.8 This document is the result of a review into authorisation A14165 which was granted to the Retail Grocers and Storekeepers Association of Western Australia in 1979.

2. Background

The Retail Grocers and Storekeepers Association of Western Australia

2.1 At the time authorisation was granted in 1979 the Retail Grocers and Storekeepers Association (RGSA) represented the interests of delicatessens (milk bars) and local convenience/grocery stores in Western Australia. The RGSA had approximately 375 members representing over 600 retail grocery stores.

Authorisation A14165

2.2 On 23 January 1974, Gordon Matheson Pty Ltd lodged an application for authorisation, on behalf of the RGSA, with the ACCC's predecessor, the Trade Practices Commission (TPC). Authorisation was sought to enable the RGSA to publish and circulate a recommended Price Guide for members as published each month in the *Grocers' and Storekeepers' Journal*. Interim authorisation was granted for the conduct on 12 August 1975 and the final determination was granted by the TPC on 12 July 1979.

Authorised Conduct

2.3 The TPC authorisation enabled RGSA to publish and circulate a price list (the Price Guide) to its members as published each month in the *Grocers' and Storekeepers' Journal*. The Price Guide provided recommended prices for a wide range of goods such as groceries and smallgoods; cakes; tobacco products; confectionery; stationery; ice-cream; soft drinks; pies; sandwiches and rolls.

2.4 The TPC noted that in addition to the monthly Price Guide the RGSA also communicates price changes to members on a weekly basis.

TPC reasoning for granting authorisation

2.5 In granting authorisation to the RGSA, the TPC noted similar applications for authorisation lodged by:

- Retail Confectionery and Mixed Business Association of Victoria (RCMBA)¹
- Queensland Retail Traders and Shopkeepers Association (QRTSA)² and
- South Australian Mixed Business Association (SAMBA)³

2.6 The TPC did not view these associations' recommended price arrangements as substantially lessening competition. The competitive position of RGSA members who use the RGSA's recommended prices was understood to be similar to that of members of these other associations in all material respects. It was considered that they only had a small share of the market, and competed more by way of convenience, service and after hours trading than on price.

2.7 In the RCMBA determination the TPC considered that:

¹ Authorisation A4006 granted to the RCMBA in 1979 was revoked following a request by the RCMBA in 2006

² Authorisation A2239 granted to the QRTSA in 1978 was revoked following a request by the QRTSA in 2006

³ Authorisation A6058 granted to the SAMBA in 1979 was revoked by the ACCC in 2006.

- The members of the RCMBA are unlikely to compete on the basis of price; rather their main appeal derives from location, convenience and after hours trading.
- The prices list gives some assistance to the efficiency of these very small businesses, particularly given the constant turnover in ownership of mixed businesses, and thus produces for RCMBA members some public benefit.

- 2.8 The majority of RGSA members who used the recommended prices – consisted of delicatessens or mixed businesses which remain open for 12 to 16 hours per day and the prices were calculated for the operation of these types of stores.
- 2.9 The TPC noted that the Price Guide may make some contribution to the efficiency and viability of these very small businesses by providing them valuable time saving in costing and pricing calculations.
- 2.10 The TPC determination made specific reference to the utility of the Price Guide in regional areas because of the delays in mail, absence of product details and the practice of some suppliers on computerised accounting operations of attaching invoices to statements at the end of the month thus creating a time lag on cost price information.

3. Review of authorisation A14165

- 3.1 The ACCC has been conducting a review of a number of authorisations previously granted by the TPC. In particular the ACCC has identified authorisations for fee guide or price guide information and that have no review date.
- 3.2 The RGSA authorisation to publish its Price Guide was reviewed by the ACCC as part of this process.

Revocation Process in the Act

- 3.3 Section 91B(3) of the Act allows the ACCC to review an authorisation at anytime after it has been granted if it appears that, amongst other things, there has been a material change of circumstances since the authorisation was granted.
- 3.4 If it appears to the ACCC that there may have been a material change of circumstances since the authorisation was granted, the ACCC may issue a Notice in writing and send it to persons who appear to be interested in the status of the authorisation. The Notice:
- informs those persons that the ACCC is considering the revocation of the authorisation
 - indicates the basis on which the revocation is being proposed and
 - invites submissions to comment on the revocation within a period specified by the ACCC.
- 3.5 Section 91B(4) of the Act states that, after considering any submissions received within the specified period, the ACCC may make a determination in writing either revoking the authorisation, or deciding not to revoke the authorisation.
- 3.6 Section 91B(5) provides that if an objection to the revocation is included in any submission the ACCC may only revoke the authorisation if it is satisfied that the authorised conduct no longer satisfies the relevant public benefit test (see chapter 4).

Notice pursuant to section 91B(3) of the Act

- 3.7 On 6 September 2006, the ACCC issued a Notice pursuant to section 91B(3) of the Act (the Notice). The Notice informed interested parties that the ACCC had decided that there was a material change of circumstances since authorisation was granted. The material changes identified by the ACCC are outlined below.

The RGSA no longer exists

- 3.8 The Department of Consumer and Employment Protection (DOCEP) informed the ACCC that the RGSA changed its name on 29 May 1981 to the Independent Retailers Association of WA. DOCEP also informed the ACCC that this Association was deregistered on 14 April 1999.

The authorised conduct is no longer being engaged in

- 3.9 The ACCC sought to determine whether the Price Guide is still being published and circulated to members in the *Grocers' and Storekeepers' Journal* as authorised by the TPC.
- 3.10 Records indicate that all of the RGSA's publications, including the *Grocers' and Storekeepers' Journal* have ceased circulation.

Submission received in response to the Notice

- 3.11 Consistent with the requirements of section 91B(3) of the Act, the ACCC sought submissions in response to the Notice from a number of interested parties.
- 3.12 One submission from the WA Retailers Association (WARA) was received in response to the Notice. The WARA did not comment on the material changes identified by the ACCC nor did it address the public benefits or detriments flowing from the authorised conduct. However, the WARA indicated that it did not wish the ACCC to revoke the authorisation granted to the RGSA.
- 3.13 WARA indicated that it proposes to engage in conduct and rely on the benefit of the immunity granted by the TPC to the RGSA. The WARA advised that it is in negotiations with independent retailing and small business organisations within and outside Western Australia to publish a recommended price guide for certain products which were formally published in the *Grocers' and Storekeepers' Journal*. The WARA advised that negotiations are at an advanced stage.

4. Statutory test

- 4.1 Section 91B(5) of the Act states that if an objection to the revocation is included in any submission the ACCC must not make a determination revoking the authorisation unless the ACCC is satisfied that it would, if the authorisation had not already been granted, be prevented under subsection 90(7) from making a determination granting the authorisation in respect of which the revocation is sought.
- 4.2 The test under section 90(7) of the Act states that the ACCC may grant authorisation to a contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
- the contract, arrangement or understanding has resulted, or is likely to result, in a benefit to the public and
 - that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.

The public benefit test

- 4.3 In deciding whether it should grant authorisation, the ACCC must examine the detriments of the arrangements or conduct, particularly those arising from any lessening of competition, and the public benefits arising from the arrangements or conduct and weigh the two to determine which is greater. This is referred to as the ‘public benefit test’.
- 4.4 Should the public benefits or expected public benefits outweigh the detriments, the ACCC may grant authorisation. If this is not the case, the ACCC may refuse authorisation.
- 4.5 Public benefit is not defined by the Act. However, the Australian Competition Tribunal (the Tribunal) has stated that the term should be given its widest possible meaning. In particular, the Tribunal has stated that ‘public benefit’ may include:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.⁴
- 4.6 Similarly, ‘public detriment’ is not defined in the Act, but the Tribunal has defined the concept to include:
- ...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 *Re 7-Eleven Stores; Australian Association of Convenience Stores Incorporated and Queensland Newsagents Federation* (1994) ATPR ¶ 41-357 at 42677. The Tribunal recently followed this approach in *Qantas Airways Limited* [2004] ACompT 9, 16 May 2005

⁵ *Re 7-Eleven Stores; Australian Association of Convenience Stores Incorporated and Queensland Newsagents Federation* (1994) ATPR ¶ 41-357 at 42683.

5. ACCC assessment

- 5.1 The ACCC notes that the authorised entity (the RGSA) has been de-registered and no longer exists. Further, the authorised conduct – the publication and circulation to RGSA members of the Price Guide in the *Grocers' and Storekeepers' Journal* – is no longer being engaged in.
- 5.2 As such the ACCC considers there to be no public benefits flowing from the authorised conduct.
- 5.3 Overall, given the authorised entity no longer exists and is not engaging in the authorised conduct the ACCC considers the public benefits of the authorisation do not outweigh the public detriments.
- 5.4 The ACCC notes that when assessing the benefits and detriments it must identify something more than a negligible benefit before authorisation may be granted. Therefore, if the particular arrangement only gives rise to a negligible public benefit the arrangement may not be authorised.⁶
- 5.5 Therefore the ACCC considers that the public benefits of the authorised conduct do not outweigh the public detriments and has decided to revoke the authorisation granted to the RGSA.
- 5.6 The ACCC notes the advice of the WARA that it is proposing to publish a price guide for small independent retailers. The authorisation granted to the RGSA in respect of the publication of the Price Guide in the *Grocers' and Storekeepers' Journal* can not provide immunity to any proposal by the WARA. Should the WARA consider that its proposed conduct may give rise to a breach of the Act it may choose to lodge an application for authorisation with the ACCC seeking immunity for that conduct. In doing so the RAWA would need to demonstrate that the public benefits of its proposed price guide will outweigh the public detriments.

⁶ *Taxi Drivers Association* [2006] A CompT 5 at 8

6. Determination

- 6.1 On 12 July 1979, the Retail Grocers and Storekeepers Association of Western Australia (RGSA) was granted authorisation A14165 by the Trade Practices Commission (TPC) to publish and circulate a Price Guide for its members in the *Grocers' and Storekeepers' Journal*.

Statutory Test

- 6.2 Pursuant to section 91B(5) of the Act and for the reasons outlined in this determination, the ACCC is satisfied that it would, if authorisation A14165 had not already been granted, be prevented from making a determination granting the authorisation as authorisation A14165 is unlikely to result in public benefits that would outweigh the anti-competitive detriments from the arrangement.
- 6.3 Accordingly the ACCC revokes authorisation A14165.

Effective date of Determination

- 6.4 This determination is made on 29 November 2006 and is subject to any application to the Australian Competition Tribunal (Tribunal) for review. An application to the Tribunal for review may be lodged within 21 days of the date of this determination.