



Australian
Competition &
Consumer
Commission

Draft Notice

in respect of a notification lodged by

Eastern Suburbs Newspapers

Date: 10 December 2007

Notification no. N90330

Commissioners:

**Sylvan
Martin
King
Willett**

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1. Introduction

- 1.1 The Australian Competition and Consumer Commission (the 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 arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.2 Section 47 of the Act prohibits conduct known as exclusive dealing where it has the purpose or effect of substantially lessening competition. Generally speaking, exclusive dealing involves one business trading with another person, imposing restrictions on their freedom to choose with whom, or in what, it deals.
- 1.3 Businesses may obtain immunity in relation to conduct that might be at risk of breaching the exclusive dealing provisions of the Act by lodging a 'notification' with the ACCC. Once lodged, immunity for the notified conduct commences automatically, except in the case of third-line forcing conduct.
- 1.4 The ACCC may proceed to revoke a notification (other than in the case of third-line forcing conduct) where it is satisfied that the conduct has the purpose, effect or likely effect of substantially lessening competition within the meaning of section 47 and it has not resulted or is not likely to result in a benefit to the public, or any benefit to the public that has resulted or is likely to result from the proposed conduct would not outweigh the detriment to the public constituted by any lessening of competition that has resulted from or is likely to result from the conduct.
- 1.5 In effect, revoking a notification removes the immunity conferred by the lodging of the notification. The ACCC conducts a comprehensive public consultation process before making a decision to revoke a notification.
- 1.6 Prior to issuing a notice to revoke a notification, the ACCC must first issue a draft notice setting out its reasons and providing an opportunity for interested parties to request a conference.
- 1.7 This document is a draft notice to revoke in relation to notification N90330 lodged by General Newspapers Pty Limited, Double Bay Newspapers Pty Limited and Brehmer Fairfax Pty Limited (trading as **Eastern Suburbs Newspapers**) with the ACCC on 12 November 1993 in relation to conduct that may otherwise raise concerns under section 47 of the Act.
- 1.8 Once a draft notice is released, the notifying party or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft notice. The ACCC will also invite the notifying party and interested parties to lodge written submissions commenting on the draft notice.

- 1.9 The ACCC then reconsiders the notification taking into account the comments made at the conference (if one is requested) and any further submissions received.

2. Background

The notified conduct

- 2.1 Notification N90330 was lodged by Eastern Suburbs Newspapers (ESN) on 12 November 1993.
- 2.2 The notified conduct involves real estate agents contracting with ESN for the provision of real estate print display advertising in the Wentworth Courier, in respect of property located in the eastern suburbs of Sydney.
- 2.3 The notification describes the conduct as:
- The entering into and performance of advertising contracts in relation to the persons identified in Schedule A hereto. A copy of each contract is annexed hereto.
- 2.4 The Advertising Contracts annexed to the notification were with 17 eastern suburban Sydney real estate agent advertisers. ESN also noted its intention to enter into Advertising Contracts with other real estate agent advertisers on substantially identical terms.
- 2.5 The contracts require that real estate agents place 75% of their total advertising centimetre volume, in respect of real estate print display advertising for property located in the eastern suburbs of Sydney (within the Wentworth Courier's circulation area/footprint), with the Wentworth Courier (**the 75% requirement**) for a period of three years (**the Advertising Contracts**).
- 2.6 ESN advises that it continues to enter into advertising contracts on substantially the same terms as notified in 1993 and continues to rely on the protection afforded by the notification in doing so. ESN also advises that the current contracts run between three and five years.

Real estate advertising

- 2.7 Print display advertising is a type of advertising that, in addition to text, contains graphic information such as images, real estate agent's logos, pictures, location maps and so on, commonly used for advertising the sale of real estate.
- 2.8 It can be distinguished from classified advertising which consists only of text. Classified advertising only appears in the classified section of the newspaper under a specific heading/category while display advertising contains images plus text and can be placed throughout a newspaper.
- 2.9 Real estate print display advertising is generally found in local community newspapers and metropolitan newspapers such as, for example, Domain which is an

insert in the Sydney Morning Herald. Some real estate agents also produce their own print display advertising publications and most advertise on real estate websites.

Sydney local community newspapers

Eastern Sydney

- 2.10 The Wentworth Courier is a weekly community newspaper, delivered free to households and businesses in the eastern suburbs of Sydney.¹
- 2.11 The Wentworth Courier is part of the Federal Publishing Company Community Media Group, now called the Courier Newspaper Group, (**FPC**) which was a division of the ESN Partnership, a partnership of a number of subsidiaries of F Hannan Pty Ltd. The FPC was recently acquired by News Limited.
- 2.12 FPC states that the Wentworth Courier has a circulation of 47,543 and a readership of 96,000.² In 2004 the Wentworth Courier generated an estimated \$25 million in revenue.³
- 2.13 The ACCC understands that a major source of the Wentworth Courier's revenue is the provision of print display advertising to real estate agents.
- 2.14 FPC states the Wentworth Courier is affectionately known as the Bible of the Eastern Suburbs and its property section is recognised internationally.⁴
- 2.15 The Domain East is a real estate magazine inserted into copies of the Sydney Morning Herald sold in Sydney's eastern suburbs each Wednesday. In addition, Saturday's edition of the Sydney Morning Herald contains the Domain real estate magazine insert. Saturday's Domain insert contains real estate advertising for all parts of Sydney and is inserted into all Saturday copies of the Sydney Morning Herald.
- 2.16 The Beast is a monthly lifestyle magazine delivered free of charge to 50,000 homes and 10,000 shops in the eastern suburbs of Sydney.
- 2.17 The Bondi View is a community newspaper published every two months with a distribution of 20,000 copies, delivered to homes in Bondi Beach.
- 2.18 Easternsuburbsliving HomesGuide (**ESL HomesGuide**) is a new publication (first print run October 2007) with a focus on lifestyle and real estate relevant to the eastern suburbs of Sydney. It is a glossy magazine published weekly and delivered free to approximately 55,000 homes and businesses in the same circulation area as

¹ Suburbs to which the Wentworth Courier is delivered include Bellevue Hill, Bondi Beach, Bondi Junction, Bronte, Centennial Park, Darlinghurst, Darling Point, Double Bay, Dover Heights, Edgecliff, Elizabeth Bay, Kings Cross, North Bondi, Paddington, Point Piper, Potts Point, Rose Bay, Rushcutters Bay, Queens Park, Tamarama, Vaucluse, Watsons Bay, Waverly, Woollahra.

² The Federal Publishing Company, Readership Profile, October 2004 to September 2006.

³ *Newspaper Printing or Publishing in Australia: C2421, IBISWorld Industry Report, 18 October 2007 at p.25*

⁴ www.fpc.com.au/page/couriersite.php?pageid=1, 13 June 2007

the Wentworth Courier's, as well as delivered to additional areas and general consumer outlets.

- 2.19 ESL HomesGuide is published by RedHouse Media Group Pty Limited (**RedHouse**). RedHouse is a marketing company presenting Real Estate Agents and their properties to the real estate consumer market. Redhouse currently provides advertising and marketing support to over 1200 agents.
- 2.20 RedHouse and its associated companies has been publishing real estate magazines for over five years, currently publishing three titles.

Other areas of Sydney

- 2.21 Other areas of Sydney, such as northern Sydney and the inner west are serviced by a minimum of two free community papers. For example, northern Sydney is serviced by, amongst others, the North Shore Times and the Northside Courier, both of which are owned by News Limited.
- 2.22 The North Side Courier and North Shore Times have similar distribution areas, while the Mosman Daily, Hornsby and Upper North Shore Advocate, and the Northern District Times overlap to a much smaller degree, with the North Side Courier and North Shore times.
- 2.23 The North Shore Times is published bi-weekly on Wednesdays and Fridays. The North Shore Times also lays claim to being regarded as the North Shore's real estate bible.⁵ Wednesday's edition of the North Shore Times has a circulation of 71,416, while Friday's edition has a circulation of 73,855.
- 2.24 The inner west is serviced by the Inner West Courier, the Glebe and the Inner West Weekly, all of which are owned by News Limited.
- 2.25 The Inner West Weekly is published each Thursday and has a circulation of 52,129.
- 2.26 Southern Sydney is serviced by the Southern Courier and St George & Sutherland Shire Leader.
- 2.27 The following table lists the main community and daily newspapers that carry substantial real estate display advertising in metropolitan Sydney.

Northern Sydney

North Side Courier
Domain North
Mosman Daily/North Shore Times

⁵ www.northshoretimes.com.au/about_us.html

Northern News
Hornsby Advocate
Manly Daily (Tues – Sat)
Northern Beaches Weekender
Northern Districts Times

Inner West

Inner Western Suburbs Courier
Domain Inner West
The Glebe
Inner West Weekly

Eastern Suburbs

Wentworth Courier
Domain East

Southern Sydney

Southern Courier
Domain East
St George & Sutherland Shire Leader

The Wentworth Courier's advertising contracts

- 2.28 Only real estate agents who operate within the Wentworth Courier's circulation area (**footprint**) are offered the opportunity to advertise with the 75% requirement. All real estate agents within the footprint are offered the opportunity to advertise with the 75% requirement regardless of their advertising spend.
- 2.29 All real estate agents are also offered the opportunity to advertise in the Wentworth Courier without being subject to the 75% requirement. However, real estate agents

who agree to the 75% requirement receive advertising rates that are lower than those offered to agents who place advertising in the Wentworth Courier on a casual basis.

- 2.30 In addition, real estate agents who enter into contracts including the 75% requirement are also entitled to volume rebates. These rebates are paid annually based on the net dollar value of paid print media advertising placed by the agent in the Wentworth Courier.
- 2.31 Agents that do not agree to the 75% commitment do not have a contract with the Wentworth Courier. Rather, they advertise with the Wentworth Courier at the casual rate, or at discounted casual rates.
- 2.32 Real estate display advertising of properties that are not located within the Wentworth Courier's footprint are not included in the 75% requirement. Nor is real estate display advertising in publications other than the Wentworth Courier counted toward the 75% requirement where advertising in another publication is placed at the specific request of the vendor.
- 2.33 However, the current version of the Advertising Contract provides that the real estate advertiser will not recommend, or induce a vendor/client to place any real estate display advertising in any newspaper and/or magazine other than the Wentworth Courier and will not engage or introduce any vendor/client to any third party for the purpose of marketing or advertising the vendor's property except in very limited circumstances, if as a consequence the real estate advertiser would be likely to breach the 75% requirement.
- 2.34 While advertising contracts providing for volume rebates are not uncommon, to the ACCC's knowledge the Wentworth Courier is the only publication in metropolitan Sydney which offers lower advertising rates to real estate agents on condition that they agree to place a minimum percentage of their advertising with the publication.
- 2.35 Further, given that real estate agents must enter into a contract with the Wentworth Courier in order to receive volume rebates, and the Wentworth Courier only offers contracts to agents who agree to the 75% requirement, in effect agents must also agree to the 75% requirement to receive these volume rebates. Although the Wentworth Courier does on occasion offer other, separate, volume based rebates to real estate agents that advertise with it on a casual basis.
- 2.36 Real estate agents that operate their offices outside of the local footprint of the Wentworth Courier are not offered an Advertising Contract including the 75% requirement, nor are developers. However, they may still advertise in the Wentworth Courier.

Review of the notification

- 2.37 John Fairfax Holdings Limited (**Fairfax**) requested the ACCC review the notification on the basis that a significant period has elapsed, and the market has changed, since the notification was lodged in 1993.

- 2.38 Having considered the concerns raised, the ACCC decided to review the notification.

3. Statutory test

- 3.1. Section 47(1) of the Act provides that a corporation shall not engage in the practice of exclusive dealing. Section 47 then states that the practice of exclusive dealing includes the supply of goods or services on condition that the purchaser will not acquire, or will limit the acquisition of goods or services from a competitor of the supplier, where the condition has the purpose, effect or likely effect of substantially lessening competition.
- 3.2. Section 93 of the Act provides that a corporation that engages or proposes to engage in conduct of a kind referred to in section 47 may give to the ACCC notice, as prescribed, setting out particulars of the conduct or proposed conduct. The effect of lodging such a notification is to afford protection to the corporation for engaging in the said conduct from legal proceedings under the Act.
- 3.3. Under section 93(3), if a corporation has notified the ACCC of conduct or proposed conduct of the type described in section 47 and the ACCC is satisfied that the conduct described in the notification has the purpose or has or is likely to have, the effect of substantially lessening competition within the meaning of section 47 and in all the circumstances:
- (a) the conduct has not resulted or is not likely to result in a benefit to the public; or
 - (b) any benefit to the public that has resulted or is likely to result from the conduct would not outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from the conduct

the ACCC may give a notice in writing stating that it is so satisfied and setting out its reasons in this respect. The effect of giving such a notice is to revoke the immunity afforded by lodging the notification.

- 3.4. Before revoking the immunity obtained by a notification, the ACCC must issue a draft notice of its intention (section 93A(1)) and give the applicant and interested parties the opportunity to respond and to call a conference (section 93A(2)) in relation to the draft notice.

4. Applicant's submission

Effect on competition

- 4.1. Eastern Suburbs Newspapers (ESN), owners of the Wentworth Courier prior to its recent acquisition by News Limited, submits that the Advertising Contracts do not

have the purpose, effect or likely effect of substantially lessening competition in any market as:

- The Advertising Contracts provide a form of volume based discount which is common industry practice in publishing and other industries.
- Real estate agents are able to advertise in the Wentworth Courier and/or negotiate their own advertising rates without entering into an Advertising Contract.
- The requirement to place a proportion of print display advertising with the Wentworth Courier does not limit agents in advertising properties that are not within the Wentworth Courier's footprint.
- The Advertising Contracts place no restriction on any agents' ability to place classified advertising with any other publication.
- The Advertising Contracts do not restrain real estate agents from advertising in other forms of media, such as through the internet or direct mailings.
- The Advertising Contracts provide that where a real estate agent's client requests that advertising be placed with another publication the advertisement is not subject to the 75% requirement.
- Developments over time have enhanced sources of advertising and the markets in which the Wentworth Courier operates are competitive with viable alternatives for advertisers.

4.2. ESN also submits that since the Advertising Contracts were first introduced, other competitors such as Domain have been able to enter the market.

4.3. News Limited also made a submission in respect of the notified arrangements which was excluded from the public register at News Limited's requests.

4.4. News Limited's submission with respect to the effect on competition of the notified conduct is broadly similar to ESN's.

Public benefit

4.5. ESN submits that the Advertising Contracts provide a simple mechanism by which the Wentworth Courier and contracting real estate agents can benefit from the placement of advertisements in the Wentworth Courier and is a form of volume based discount which is a prevalent and commercially accepted practice in the publishing and other industries.

4.6. ESN submits that the Advertising Contracts are a benefit to the public because they make lower advertising prices available to real estate agents. Further, ESN submits that the Advertising Contracts provide certainty to real estate agents as advertising rates are locked in each year. Further ESN submits that the Advertising Contracts

provide certainty in relation to any increase in advertising rates over the period of the contract. ESN contends that this allows real estate agents to pass on the benefits of lower advertising rates to vendors who wish to place their advertising in the Wentworth Courier.

- 4.7. ESN submits that the reason the Advertising Contracts facilitate the making available of lower advertising prices is that they provide a degree of support for the Wentworth Courier which reduces the variability of its business and facilitates investment in the business.
- 4.8. News Limited's submission, excluded from the public register, raises broadly similar public benefit arguments to ESN, contending that the arrangements provide lower advertising costs for real estate agents and vendors. News Limited also submits that the arrangements may prompt competitive responses from other suppliers of advertising space.

Public detriment

- 4.9. In addition to the arguments noted above in respect of the effect on competition of the notified arrangements, ESN submits that the Advertising Contracts do not give rise to any relevant public detriment as, if vendors specifically request to place advertising in publications other than the Wentworth Courier, such advertising is not subject to the 75% requirement.

5. Interested party submissions

- 5.1. The ACCC consulted with a variety of interested parties in relation to the notification, including:
 - potential competitors;
 - other industry participants; and
 - real estate agents.
- 5.2. The ACCC received five public submissions from interested parties. The ACCC also received a number of submissions which were excluded from the public register at the request of the parties.
- 5.3. The ACCC also held discussions with a number of real estate agents regarding the notified conduct. Records of these discussions were not placed on the public register.
- 5.4. The comments made by interested parties in relation to the notified arrangements are summarised below. Copies of all public submissions received by the ACCC are available on the public register.

- 5.5. *Fairfax* submits the *Wentworth Courier* is an essential advertising platform for real estate agents, vendors and potential purchasers in its circulation area. *Fairfax* submits that vendors and agents have indicated that other forms of advertising such as the internet are not substitutes for the *Wentworth Courier*.
- 5.6. *Fairfax* further submits that the *Wentworth Courier*'s dominance in the eastern suburbs is such that neither real estate agents nor their vendors can afford not to advertise in it.
- 5.7. *Fairfax* submits that real estate agents have told it that agents in the *Wentworth Courier*'s core geographic area are virtually compelled to sign the Advertising Contracts to obtain access to the discounted advertising rates in order to be competitive with other real estate agents who have an Advertising Contract and therefore access to the discounted rates. *Fairfax* contends that real estate agents that do not agree to the Advertising Contracts risk losing clients to those who have, as the *Wentworth Courier*'s advertising costs make up a very significant portion of the total marketing costs for the vendor.
- 5.8. *Fairfax* submits that it understands the vast majority of real estate agents in the *Wentworth Courier*'s core publication area have contracted with the *Wentworth Courier* which guarantees it 75% of their advertising volume. Therefore, in *Fairfax*'s view it is virtually impossible for a rival publication to establish itself in the area as anything more than a supplement to the *Wentworth Courier*.
- 5.9. Of the real estate agents who have not signed an Advertising Contract, *Fairfax* submits that only part of their franchise is in the *Wentworth Courier*'s core circulation area and therefore they are less dependent on the *Wentworth Courier* for brand advertising and to attract clients with competitive rates for the *Wentworth Courier*.
- 5.10. *Fairfax* refers to its submission to the ACCC in relation to News Limited's acquisition of FPC provided in November 2006. That submission was excluded from the public register at the request of *Fairfax*. *Fairfax* notes that in that submission it provided information on advertising rates charged by community newspapers in demographically comparable areas to the eastern suburbs of Sydney. *Fairfax* states that the information indicated the *Wentworth Courier* advertising rates were significantly higher than for similar publications in other areas. In *Fairfax*'s view, the reason the *Wentworth Courier* can sustain such rates is because of its dominant market position and the inability of competitors to offer effective price competition because of the effect on the Advertising Contracts.
- 5.11. *Fairfax* further submits that while there have been significant changes in the newspaper market since the notification was lodged in 1993, the *Wentworth Courier* has retained its dominance as the 'must have' real estate advertising platform in the eastern suburbs, and the ability to set strict terms and high advertising prices. In *Fairfax*'s view, the *Wentworth Courier*'s success in retaining its dominance is significantly due to the Advertising Contracts.

- 5.12. Fairfax submits that while there may be efficiency based reasons to justify the offering of volume based discounts to advertisers these efficiencies do not justify contractual provisions which require 75% of all advertising to be placed with a publication where the relevant publication is a 'must have.'
- 5.13. Fairfax submits that the Advertising Contracts have proven over time to be a very effective barrier to entry regardless of the price offered by competitors.
- 5.14. ***Pelican Publications***, publisher of the Beast, states that real estate advertising is extremely important to the Beast but that they are having trouble securing real estate advertising because of the Wentworth Courier's contractual arrangements with real estate agents. Pelican Publications states that most of the advertising that is placed with the Beast by real estate agents is in the form of branding advertisements as agents cannot afford to spend much with it advertising properties for sale. In this respect, Pelican Publications contends that the Wentworth Courier's contractual arrangements are a significant constraint on its ability to compete to carry real estate display advertising.
- 5.15. Pelican Publications submits that advertisers would be able to effectively substitute other publications for advertising in the Wentworth Courier were it not for the contractual arrangements, but that because of these arrangements it is virtually impossible to establish a new real estate magazine in the area.
- 5.16. Pelican Publications states that a number of real estate agents have complained to it about the Advertising Contracts and that some agents have complained that they are unable to advertise in the Beast because of their contract with the Wentworth Courier. Pelican Publications contends that it has had some vendors wishing to place advertisements with it but they were prevented from doing so by agents because of their contracts with the Wentworth Courier.
- 5.17. Similarly, the ***Alternative Media Group***, publisher of a number of community newspapers in central and eastern Sydney, including the Bondi View, submits that real estate advertisers would advertise in its publications if they were not constrained in their ability to do so by the Wentworth Courier's Advertising Contracts.
- 5.18. The Alternative Media Group submits that some real estate agents have been bullied into entering into Advertising Contracts with the Wentworth Courier and are unhappy about having to do so.
- 5.19. Submissions to the ACCC by real estate agents which were excluded from the public register also raised concerns that the Advertising Contracts:

Prevent many agents placing advertisements in the Beast and Bondi View.

Reduce the advertising income of the Beast and Bondi View, affecting their competitiveness and resources available to them.

- Reduce the ability of new entrants to enter the local media market.

- Prevent agents allocating vendor advertising spends effectively.
- Place penalties on agents who do not sign the Advertising Contract undermining their ability to compete for business.

Create a monopoly over local real estate newspaper advertising which causes advertising prices to be much higher than they would be in a competitive market.

- Create major distortions in the local real estate advertising market.
- 5.20. **RedHouse** submits that its entry into the eastern Sydney market with its ESL HomesGuide has been substantially hindered due to the Wentworth Courier's Advertising Contracts. RedHouse submits that ESL HomesGuide was initially scheduled to be launched in June 2007, however this was delayed until October 2007 because agents were fearful of breaching the 75% requirement.
 - 5.21. RedHouse submits once it became aware of the Advertising Contracts it delayed publication of the ESL HomesGuide to assess the affect the contracts may have on its ability to build confidence in the market and obtain sufficient support from real estate advertisers.
 - 5.22. At the time of making its assessment of the Advertising Contracts RedHouse advises it was unaware of the immunity afforded to ESN by the notification and in its view it is this immunity which enables the Wentworth Courier to exercise continued market pressure unparalleled in any other market.
 - 5.23. RedHouse submits that it believed it had acquired adequate support from a sufficient number of real estate agents to sustain its publishing program and therefore commenced publishing the ESL HomesGuide on 10 October 2007.
 - 5.24. RedHouse submits that the 75% requirement has caused real estate agents to reject its offer of free advertising in the ESL HomesGuide so as to avoid any confrontation with the Wentworth Courier.
 - 5.25. RedHouse submits there are historical examples of the Wentworth Courier auditing advertising placed by real estate agents with another publisher, placing an embargo on that particular agent and therefore effectively preventing the introduction of competitive products.
 - 5.26. Redhouse submits that magazines and newspaper advertising is a significant component of the property marketing program for real estate agents and therefore a significant cost of marketing a property. It also submits that if the real estate agent did not have an Advertising Contract it would risk losing a vendor listing to a competitor agent who has signed the Advertising Contract and therefore has access to discounted rates.
 - 5.27. RedHouse submits that had it been aware that the Wentworth Courier's advertising contracts were afforded immunity from the relevant provisions of the Act by the

notification it may well have taken the decision not to publish in the eastern suburbs of Sydney and compete with the Wentworth Courier.

- 5.28. The ACCC's market enquiries indicate that a number of smaller real estate agents operating within the Wentworth Courier's footprint felt pressured into signing the Advertising Contracts. One agent stated they were told by the Wentworth Courier that if they did not sign an Advertising Contract they would not be able to compete with other agents who had signed the contract, and the viability of their business would be jeopardised.
- 5.29. While these smaller real estate agents indicated that they were concerned about not advertising in the Wentworth Courier, they were also of the view that their clients would obtain better value by advertising in the Domain East. One agent stated that advertising in the Domain East (which includes classified advertising in the Saturday Domain) is approximately \$1800 per page compared to the Wentworth Courier 'discounted rate' of between \$3,300 - \$4,000.
- 5.30. Market enquiries also indicated that for larger real estate agents operating in the Wentworth Courier's core area, advertising in the Domain East is supplementary to advertising in the Wentworth Courier rather than a substitute for it. In particular, real estate agents advised that the greater the value of the property the more likely that it will be advertised in a number of newspapers in addition to the Wentworth Courier.
- 5.31. Other real estate agents made it clear that they would not consider advertising in the ESL HomesGuide, even if it was offered for free, until such time that it attained the quality, stature and results of the Wentworth Courier.

6. ACCC Assessment

The relevant markets

- 6.1. To assist with the necessary assessment of the purpose, effect or likely effect of the notified conduct on competition, it is helpful to identify relevant markets affected. For the purposes of assessing this notification, the ACCC has considered the following areas of competition:
- competition for the supply of advertising services to real estate agents in eastern Sydney, through local community newspapers, or more broadly; and
 - competition for readers of community newspapers in eastern Sydney.
- 6.2. Having regard to competition for the supply of advertising services, a key consideration is the extent to which advertising through other mediums, such as via real estate websites and Sydney daily newspapers are sufficiently close substitutes for advertising in local community newspapers.

- 6.3. Compared to other advertising platforms, local newspaper advertising allows real estate agents to access:
- potential buyers in the local area;
 - consumers who are not actively looking to purchase property; and
 - consumers who do not have access to the internet.
- 6.4. Compared to, for example, advertising in broadly published daily newspapers, targeted advertising through local newspapers also avoids advertisers having to pay for advertising for readers outside of their target group.
- 6.5. In addition, when it comes to local issues consumers may have a preference for community newspapers because they provide locally focused news and information, and locally relevant advertising.
- 6.6. The ACCC's market enquiries in respect of this matter, and in respect of its previous consideration of proposed acquisitions in the newspaper publishing industry in Sydney, indicate that where one local newspaper within a local area dominates real estate advertising many real estate agents will consider the newspaper to be a 'must have' in their advertising package.
- 6.7. While real estate agents indicated that they use a range of advertising methods, most did not consider other forms of advertising to be a substitute for advertising in their local paper.
- 6.8. Market enquiries in respect of the current matter indicated that that for many real estate agents operating in the eastern suburbs of Sydney, advertising in newspapers or magazines other than the Wentworth Courier is usually only undertaken in addition to advertising in the Wentworth Courier.
- 6.9. Moreover, market enquiries indicate that many real estate agents see different advertising platforms, such as real estate websites, as complements rather than substitutes to advertising in the Wentworth Courier.
- 6.10. Indeed, the Wentworth Courier itself markets itself as the bible of the eastern suburbs.
- 6.11. However, it is possible that some real estate agents consider other forms of advertising, and in particular, print display advertising in other publications such as the Domain/Domain East inserts in the Sydney Morning Herald (collectively referred to for convenience as Domain East), as viable substitutes to advertising in the Wentworth Courier.
- 6.12. In its statement of issues in respect of News Limited's proposed acquisition of the Federal Publishing Media Group, the ACCC noted that while many real estate agents indicated that other advertising options were used in addition to advertising in community newspapers, some indicated that they would consider reducing

community newspaper advertising and increasing their use of other types of advertising if community newspaper advertising rates were to rise.

- 6.13. The ACCC has not formed a concluded view on the extent to which other advertising platforms are substitutes for real estate display advertising in community newspapers. What is clear is that many real estate agents do not consider other advertising platforms as a close substitute for advertising in the Wentworth Courier.
- 6.14. With respect to competition for readers of community newspapers, the ACCC notes that the Wentworth Courier is the only free weekly newspaper distributed throughout the eastern suburbs of Sydney.
- 6.15. Market enquiries in respect of News Limited's proposed acquisition of the Federal Publishing Media Group suggested that, in northern Sydney, loyalty to existing community newspapers may limit consumer demand for a new entrant to the market.
- 6.16. Market enquiries also suggested that an ability to attract at least some real estate advertising is crucial to a decision to enter a market on a significant scale. This is discussed in greater detail in the ACCC's assessment of the purpose, effect or likely effect of the notified conduct on competition.

Purpose, effect or likely effect of the notified conduct

- 6.17. Under section 93 of the Act, the ACCC may revoke a notification where the ACCC is satisfied that the conduct described in the notification has the purpose or has or is likely to have, the effect of substantially lessening competition within the meaning of section 47 of the Act and where it considers that the conduct is otherwise not in the public interest.
- 6.18. A corporation will have the purpose of substantially lessening competition if that is its actual purpose for engaging in the conduct.⁶ This will be ascertained from direct and indirect evidence as to the actual intentions and purposes of the corporation.⁷ The Act provides that the relevant purpose must be a substantial purpose but not necessarily the sole purpose.⁸
- 6.19. In this case, the ACCC sought internal documents from the Wentworth Courier contemporary to the period in which decisions were made to implement the 75% requirement. In the ACCC's experience, strategy or documents prepared for the making of decisions in relation to proposed conduct often reveal the purpose of a business in the proposed conduct. In this case, the Wentworth Courier advised that it did not have any such documents.
- 6.20. Nevertheless, the ACCC considers inferences can be drawn from the nature of the conduct as to the likely purpose of the Wentworth Courier. The 75% requirement offers significant savings to advertisers who agree to advertise 75% of their print display advertising with it. It is not a volume based discount. An advertiser can

⁶ *Universal Music Pty Ltd V Australian Competition and Consumer Commission* (2003) 201 ALR 636, at 693

⁷ *Ibid.*

⁸ *Section 4F of the Act*

have very small numbers of advertisements but provided they agree to place 75% or more of their print display advertising with the Wentworth Courier, they can access the savings. The requirement therefore does not appear to be supported by an economy of scale type purpose. Rather, it can be inferred that the purpose is to obtain the agreement of and thereafter prevent real estate agents from placing any more than 25% of their classifieds with a competing newspaper. This would seem to be a purpose to restrict or limit competition.

- 6.21. To assess the effect or likely effect of conduct on a market, it is necessary to look at the relevant market or markets, ask how and to what extent there would have been competition in the market but for the conduct, assess what is left and determine whether what has been lost in relation to what would have been if the conduct had not occurred, is a substantial lessening of competition.⁹
- 6.22. This requires the formulation of a counterfactual which can be compared with the state of competition in the market with the conduct. In the current matter, the ACCC considers the appropriate counterfactual against which to assess the notified arrangements is the situation where the Wentworth Courier does not offer discounted print display advertising to real estate agents on condition that the agent agrees to place 75% of such advertising within the Wentworth Courier's footprint with it.
- 6.23. This is not to say that, absent the notified conduct, the Wentworth Courier could not offer other incentives, for example, volume based discounts, to real estate agents.
- 6.24. ESN submits that the Advertising Contracts do not have the effect of substantially lessening competition. Rather, it submits, they facilitate the offering of lower advertising rates to real estate agents. ESN submits that this is because the contracts provide a degree of support for the ESN business which reduces the variability of its business and facilitates investment in the business.
- 6.25. As noted, the 75% requirement is more than a volume discount. The notified conduct requires real estate agents to agree to place a stipulated percentage of their print display advertising with the Wentworth Courier, and thereby necessarily, to limit their print display advertising in other publications, in consideration for a reduced advertising rate.
- 6.26. Indeed, the notified arrangements prevent real estate agents who have agreed to the Advertising Contracts from advertising in other print media publications except in accordance with the 75% requirement.
- 6.27. While agents are offered the opportunity to advertise in the Wentworth Courier without the 75% requirement, at casual or discounted casual rates, and also have the option of not advertising in the Wentworth Courier, the ACCC does not consider these to be practical alternatives for most agents.
- 6.28. As submitted in interested party submissions, and suggested by the ACCC's market enquiries, advertising in the Wentworth Courier is considered a 'must have' for

⁹ *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 64 FLR 238, at 259 - 260

eastern Sydney real estate agents. In this respect, real estate advertising in a given area tends to be concentrated in one community newspaper because real estate agents wish to advertise where other agents advertise and where readers, from previous experience, are likely to find a substantial amount of real estate advertising.

- 6.29. Real estate agents who do not agree to the 75% requirement are in effect financially penalised in that they are charged more to advertise in the Wentworth Courier than real estate agents with whom they compete. Given that advertising costs, and indeed in the case of vendors in eastern Sydney, the costs of advertising in the Wentworth Courier, are a significant portion of a vendor's marketing costs, the consequence of not agreeing to the 75% requirement is the likely loss of business by the real estate agent to agents that have. In this respect, the ACCC notes not only the significant discounts provided to real estate agents who agree to the 75% requirement, but also the additional volume based rebates offered to agents who agree to the requirement.
- 6.30. Consequently, other suppliers of advertising services, and particularly other suppliers of print display advertising, are restricted by the 75% requirement in their ability to compete to supply these services to eastern Sydney real estate agents.
- 6.31. In this respect the ACCC notes that print display advertising with the Wentworth Courier's main competitor, the Domain East, is substantially less expensive than advertising with the Wentworth Courier, suggesting that the Domain East is only a limited constraint on advertising prices in the Wentworth Courier.
- 6.32. Further, the Wentworth Courier's real estate advertising rates per copy circulated are significantly higher than those charged by dominant local community newspapers in other areas of Sydney where the 75% requirement does not apply.
- 6.33. In addition, confidential information provided to the ACCC indicates that the Wentworth Courier's share of the market for print display advertising in the eastern suburbs is greater than in other areas of Sydney where there is a dominant incumbent community newspaper but the newspaper does not offer discounted advertising in consideration for a set percentage of relevant advertising being placed with it.
- 6.34. The ACCC does note that these differences in prices and market shares may be partially explained by differences in the relative quality of publications and the value of houses being sold in different areas of Sydney.
- 6.35. The ACCC also notes the submission by RedHouse that it has been unable to attract advertising from eastern suburbs real estate agents in its ESL HomesGuide even when it has offered such advertising free of charge.
- 6.36. More generally, as noted, the ACCC's market enquiries in respect of the notified conduct, and during its consideration of proposed acquisitions in the newspaper publishing industry in Sydney, indicate that many real estate agents consider other advertising options as an additional form of advertising rather than a substitute for advertising in community newspapers. Although, conversely some real estate agents, in other areas of Sydney, indicated that they would consider reducing

community newspaper advertising in response to increases in community newspaper advertising rates.

- 6.37. As noted, it is usually the case that one local newspaper within a local area dominates real estate advertising. Readers interested in buying property tend to seek out the local newspaper with the most real estate advertisements, which in turn makes it more important for real estate agents to advertise in that newspaper, which in turn attracts more readers interested in property.
- 6.38. This is the case not just in eastern Sydney, but also other areas of Sydney where incumbent community newspapers do not impose a requirement that effectively restricts real estate agents' capacity to place advertising with their rivals.
- 6.39. In its assessment of News Limited's proposed acquisition of the Federal Publishing Company's Community Media Group the ACCC considered (in relation to northern Sydney and the inner west where more than one community newspaper is published) that this network effect meant that other community newspapers were not likely to be significant competitors in respect of real estate advertising, with the dominant incumbents, (the North Shore Times and Inner West Courier).
- 6.40. These network effects make it difficult for a second local newspaper to compete for real estate advertising at the margin. Rather, the nature of competition (or potential competition) between local newspapers for real estate advertising is to be the major real estate advertiser in the area. In some sense the nature of competition is competition for the 'market' rather than competition within the 'market'.
- 6.41. Other areas of Sydney are characterised by a dominant incumbent community newspaper, even though they do not impose a condition on real estate agents similar to the 75% requirement. However, the 75% requirement is likely to make it more difficult for a local newspaper to compete for the 'market' of local real estate newspaper advertising in eastern Sydney than in other areas.
- 6.42. The most likely way for a local newspaper to compete for real estate print display advertising would be to build up scale through low pricing. Prices would need to be low enough that a significant number of real estate agents would be willing to advertise in both local newspapers. Once the competing local newspaper built scale, it would become more attractive to readers interested in buying property, enabling the newspaper to attract more real estate advertising and so on – to the point real estate agents could see it as the 'must have' for local newspaper advertising. The scope for this to occur applies a competitive tension to the dominant incumbent newspaper.
- 6.43. The 75% requirement prevents such a strategy, or at the very least, makes it less effective. During the period the competing local newspaper builds up scale, real estate agents would want to advertise in both the Wentworth Courier and the competing local newspaper. However, this is likely to violate the 75% requirement. In effect, the 75% requirement prevents competition for the 'market' in the first place.

- 6.44. The experience of RedHouse in introducing its ESL HomesGuide appears to support this contention. As noted, RedHouse submitted that over 15 real estate agents rejected its offer of free advertising in the ESL HomesGuide.
- 6.45. Further, some major real estate agents contacted by the ACCC in the course of its market enquiries indicated that, notwithstanding the offer of free advertising in the ESL HomesGuide they would not consider advertising in it unless or until the ESL HomesGuide reaches the quality/reputation and reach of the Wentworth Courier.
- 6.46. It would be virtually impossible for a new publication to generate sufficient volume of real estate display advertising to be considered as of comparable standard to the Wentworth Courier, or to build up any significant volume of business, whilst the Wentworth Courier continues to enforce the 75% requirement.
- 6.47. Similarly, as noted, beyond community newspapers, the 75% requirement restricts existing suppliers of advertising services, and particularly other suppliers of print display advertising, in their ability to compete to supply these services to eastern Sydney real estate agents.
- 6.48. Most real estate agents employ other forms of advertising beyond print display advertising in newspapers. Most notably, advertising on real estate websites.
- 6.49. The ACCC's market enquiries have indicated that many real estate agents see these forms of advertising as important compliments to print display advertising.
- 6.50. The Wentworth Courier's 75% requirement does not constrain real estate agents' capacity to advertise through these mediums. However, few considered these advertising mediums as substitutes for print display advertising. Most agents considered print display advertising, and in the case of eastern suburbs agents, print display advertising in the Wentworth Courier, as a 'must have' component of their advertising strategy.
- 6.51. As such, the ACCC does not consider that real estate agents' ability to advertise in these mediums places a significant competitive constraint on the terms and conditions of supply of print display advertising by the Wentworth Courier.
- 6.52. The ACCC is satisfied that the 75% requirement substantially lessens competition for the supply of advertising services to real estate agents in eastern Sydney within the meaning of section 47 of the Act.
- 6.53. The 75% requirement all but forecloses the possibility of another local community newspaper competing with the Wentworth Courier to supply print display advertising services to eastern Sydney real estate agents.
- 6.54. While real estate agents are not required to accept the 75% requirement, the must have status of the Wentworth Courier and the discounts provided to agents who agree to the 75% requirement, mean that agents who do not agree to the requirement will be significantly disadvantaged in competing for vendors' business. Not agreeing to the 75% requirement is therefore not a practical alternative for most eastern Sydney real estate agents.

- 6.55. Other areas of suburban Sydney are, with respect to the supply of print display advertising to real estate agents, also characterised by a dominant incumbent newspaper. However, the potential for a second local newspaper to compete to supply these services, and the competitive tension this provides, is not foreclosed in these areas in the same manner as the 75% requirement forecloses such a possibility in eastern Sydney.
- 6.56. While the 75% requirement does not restrict real estate agents in advertising through other mediums, these other mediums are not generally close substitutes for print display advertising.
- 6.57. Print display advertising in the Domain East is more directly substitutable with advertising in the Wentworth Courier than would be other forms of advertising. However it is unlikely to be as close a substitute as a well established alternative local community paper.
- 6.58. In any event, the 75% requirement severely restricts real estate agents ability to advertise in the Domain East. In order to place more than 25% of their advertising in the Domain East (and/or other alternative publications) an agent would have to either choose between the Domain East and the Wentworth Courier or accept the higher advertising rates offered by the Wentworth Courier to agents who do not agree to the 75% requirement. As discussed, neither is a practical alternative for most eastern Sydney real estate agents.
- 6.59. Given that the 75% requirement severely restricts how much advertising real estate agents can place in the Domain East, the Domain East is unlikely to act as a significant competitive constraint on the terms and conditions offered to real estate agents by the Wentworth Courier.
- 6.60. Such a lack of competitive pressure on the Wentworth Courier is likely to be reflected in prices, choice and quality of service offered by it.

Competition for readers of community newspapers in eastern Sydney

- 6.61. The ACCC also considers that the 75% requirement lessens competition for readers of community newspapers in eastern Sydney.
- 6.62. While the ACCC has previously found barriers to entry can be low in the market for free suburban newspapers, this may not be the case in every matter. In particular, the ACCC is not aware of any examples of significant recent new entry in northern, inner-western or southern Sydney that would substantiate an argument that barriers to entry are low.
- 6.63. Market enquiries in respect of News Limited's proposed acquisition of the Federal Publishing Company's Community Media Group suggested that an ability to attract a level of real estate advertising is crucial to a decision to enter a market on a significant scale. Attracting a level of real estate advertising is important both for the advertising revenue it generates and in attracting readers.

- 6.64. As discussed, the Wentworth Courier's 75% requirement all but forecloses the possibility of another local community newspaper attracting a significant level of print display advertising from eastern Sydney real estate agents.
- 6.65. The ACCC is aware that community newspapers in other areas of suburban Sydney have been, and remain, viable without carrying significant real estate advertising. However, it would be much more difficult for any prospective new entrant to establish a rival community newspaper in the eastern suburbs of Sydney with the knowledge that its capacity to attract the revenue and readership provided by real estate display advertising is severely constrained from the outset by the 75% requirement.
- 6.66. Consequently, the ACCC considers the 75% requirement, in itself, is a significant barrier to a rival community newspaper establishing itself in eastern Sydney. The experience of the ESL HomesGuide is instructive in this regard.
- 6.67. While the ACCC is satisfied that the 75% requirement significantly reduces competition for readers of community newspapers in eastern Sydney, it has not reached a concluded view on whether the requirement has the purpose, effect or likely effect of substantially lessening competition for these readers within the meaning of section 47 of the Act.
- 6.68. However, the ACCC is satisfied that the potential effect of such a reduction in competition is a reduction in the quality of content (such as quality and breadth of local news and information) and layout (such as the proportion of advertising to content) provided to readers of eastern Sydney community newspapers.
- 6.69. Such a reduction in competition, as with the substantial lessening of competition identified in respect of supply of advertising services to real estate agents in eastern Sydney, constitutes a public detriment.

Public benefits

- 6.70. ESN submits that the Advertising Contracts are a form of volume based discount which is a prevalent and commercially accepted practice in publishing and other industries. ESN submits that the Advertising Contracts are of benefit to the public as they make lower advertising rates available to real estate agents which in turn are able to be passed on to vendors.
- 6.71. ESN submits that the reason that the contracts provide for lower advertising rates is that they provide a degree of support for the Wentworth Courier which reduces the variability of its business and facilitates investment in the business.
- 6.72. As noted in the ACCC's discussion of the effect on competition of the notified conduct, the Advertising Contracts offer more than volume discounts. The essence of the contracts, and the provision of the contracts that would raise concerns under section 47 the Act, is the requirement that real estate agents agree to place a stipulated percentage of their print display advertising spend with the Wentworth

Courier, and thereby necessarily, limit their print display advertising in other publications, in consideration for a reduced advertising rate.

- 6.73. The Wentworth Courier offering volume based discounts to real estate agents would be less likely to raise concerns under section 47 of the Act. Accordingly, the Wentworth Courier may well be able to offer such discounts absent the notified arrangements.
- 6.74. The ACCC does not accept that the conduct the subject of the notification, the 75% requirement, results in lower advertising rates for real estate agents, and ultimately, vendors.
- 6.75. As discussed in the ACCC's consideration of the effect on competition of the proposed arrangements, the 75% requirement substantially forecloses competition to provide print display advertising to eastern Sydney real estate agents. This lack of competitive tension is likely to reflect in the price and quality of service offered by the Wentworth Courier.
- 6.76. While real estate agents agreeing to the 75% requirement are offered lower advertising rates than those who do not, these rates are not necessarily lower than those which would prevail absent the restriction that the 75% requirement places on others competing for real estate agents' business.
- 6.77. ESN also submits that the Advertising Contracts provide certainty to real estate agents as advertising rates are locked in each year. Further, ESN submits that the Advertising Contracts provide certainty in relation to any increases in advertising rates over the period of the contract.
- 6.78. Such provisions are a standard feature of many commercial contracts. The Wentworth Courier could easily, if it chose, offer contracts, and the certainty of advertising rates that goes with them, to real estate agent without requiring them to agree to the 75% requirement.
- 6.79. Accordingly the ACCC does not consider this certainty as a public benefit of the notified conduct. On the contrary, the effect of the notified arrangements is to remove this certainty for any real estate agent that does not agree to the 75% requirement.
- 6.80. News Limited submitted that the Advertising Contracts may promote competitive responses from other suppliers of advertising space. As discussed, the ACCC considers that the Advertising Contracts in fact inhibit such competitive responses.
- 6.81. The ACCC concludes that the notified conduct generates little if any public benefits.

7. Draft Notice

- 7.1. For the reasons identified the ACCC considers that the conduct has the purpose, effect or likely effect of substantially lessening competition and the benefits do not outweigh the detriments.
- 7.2. Accordingly, the ACCC proposes to issue a notice to revoke notification N90330, lodged by Eastern Suburbs Newspapers on 12 November 1993.