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Our ref CAP:
Your ref C2007/75-03



31 / 08

LAWYERS

31 January 2008

By fax | 6 pages

To Gina D'Ettorre / Gavin Jones

Australian Competition and Consumer Commission

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Dear Sirs

Eastern Suburbs Newspapers Notification 90330 - Draft Notice to Revoke

Please see attached letter as sent to Mr Scott Gregson today.

Yours faithfully
Gilbert + Tobin

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FILE No
DOC:
MARS/PRISM

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LAWYERS

31 January 2008

By mail

Mr Scott Gregson
General Manager
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Dear Sir

Eastern Suburbs Newspapers Notification 90330 - Draft Notice to Revoke

We act for the Independent Print Media Group Pty Limited (IPMG) and its owners, the Hannan family.

We refer to our letter dated 21 December 2007 in relation to the Draft Notice which was published on the ACCC's public register number C2007/26 in respect of Notification Number 90330.

As set out in previous correspondence, our clients are concerned that the ACCC has sought to publish findings (albeit in draft form), where those findings were not sent to our clients and in circumstances where the Draft Notice was accompanied by a detailed press release by the Chairman of the ACCC.

Our clients are also extremely concerned that the ACCC has seen fit to draw an inference concerning our clients' "purpose" which is entirely false, in circumstances where on no occasion has the ACCC ever sought this information from our clients.

In particular, our clients are concerned about the statements made by the ACCC in paragraphs 6.19 and 6.20 of the Draft Notice. In our view, the ACCC has unfairly sought to infer a purpose attributable to our clients which is quite extraordinary in the circumstances.

As you would be aware, on 27 June 2007, the ACCC requested that our clients answer specific questions in relation to Notification 90330. At no time did the ACCC ever ask our clients their purpose in implementing the 75% requirement. Notwithstanding this fact, the ACCC has viewed it as appropriate to infer a purpose to our clients in circumstances where it has not even asked our clients for this information. This is highly prejudicial to our clients especially where the ACCC has drawn an inference that our clients had a purpose to restrict or limit competition. Fairness dictates that the



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ACCC would not seek to draw an inference detrimental to our clients, without first asking our clients for that information.

Our clients are of the view that they have been denied natural justice and fairness by the ACCC, and that the statements contained in the Draft Notice which were published to the public are highly defamatory of our clients and false.

It is correct that the ACCC sought internal documents from the Wentworth Courier contemporary to the period which discussed the development, amendment to or maintenance of the requirement for real estate agents to place 75% of their advertising centimetre volume with the Wentworth Courier. The Wentworth Courier responded to the question indicating that the requirement was first drafted in 1993 and that as the Wentworth Courier had no reason to seek to change the 75% requirement or remove it, it did not (after using its best endeavours to conduct an extensive search) have any internal documents which were responsive. Our clients are of the view that it is quite extraordinary for the ACCC to draw an inference from the fact that our client did not have any internal documents to produce that our clients had an anticompetitive purpose.

In our view it is not surprising that our clients did not have any internal documents to produce. The reasons would include:

- (a) that the introduction of the 75% requirement was introduced in 1993 (fourteen years before any request for documents was made by the ACCC). In our view, it is not unusual for clients not to retain documents created fourteen years previously, especially in circumstances where there would be no reason for the documents to be retained and the ACCC has never requested any information previously;
- (b) a decision to implement the 75% requirement was made in consultation with the Trade Practices Commission and at the Trade Practices Commission in Canberra. In these circumstances there was no need for our clients to create any document internally; and
- (c) as our clients have received very little complaint about the 75% requirement in the past fourteen years, our clients have not seen the need to modify or remove it. In these circumstances there would simply be no need to create any internal documentation about the requirement or any modification.

As the ACCC would be aware, our clients have always been entirely open and forthright about the 75% requirement. Indeed the draft advertising agreements and the proposal for the 75% requirement was sent to and openly discussed with Mr Hank Spiers of the Trade Practices Commission in a meeting in October 1993 which took place in Canberra at the offices of the Trade Practices



LAWYERS

Commission. The purpose for the requirement was also directly discussed with Mr Spiers at that meeting, and our clients' purpose is well known to the Commission. In our view this is hardly the conduct of persons who possess an anticompetitive purpose.

Indeed, when the matter was discussed with the Trade Practices Commission, the overwhelming concern of the Trade Practices Commission was that the proposed contract (with its 75% requirement) be available to all real estate agents who wanted to enter into such contracts and not just the original 17 real estate agents proposed by the Wentworth Courier.

Our clients are happy to discuss their purpose for the advertising agreements, their terms and the circumstances leading up to the advertising agreements in a meeting with the ACCC.

As set out above, the draft Advertising Deed (with the 75% requirement) was given to the Trade Practices Commission in October 1993. At the meeting with the Trade Practices Commission in October 1993, they did not indicate any concern with the 75% requirement and were only concerned to ensure that the contract be available to all real estate agents. As can be seen from a letter received from the Trade Practices Commission on 19 October 1993 (copy attached) the Commission indicated that a relevant and important factor for the Trade Practices Commission was that our clients enter into similar arrangements with other agents should they request the desire to do so.

Our clients are extremely disappointed that the ACCC has seen fit to draw an adverse inference against our clients in the circumstances. They believe they have been treated unfairly. Our clients would like to have a meeting with Mr Samuel and a representative of the ACCC to discuss this matter further prior to any final determination being made by the ACCC. This request has been made given that Mr Samuel has made a public press release in respect of the Draft Notice.

Unfortunately our clients find themselves in the position where they need to reserve all of their rights in respect of this matter.

Would you please contact the writer to discuss a convenient time for a meeting.

Yours faithfully
Gilbert + Tobin

A handwritten signature in cursive script, appearing to read "Colleen Platford".

Colleen Platford
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IPC GANBERRA

TEL :

19.Oct.93 13:23 No.001 P.02



Trade
Practices
Commission

Telephone (06) 264 1166
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(06) 251 5093

In reply please quote

PC:PC
Our Ref: CR23/128
Your Ref: CAP

Ms Colleen Platford
Gilbert & Tobin
GPO Box 3810
Sydney NSW 2001

Dear Ms Platford

Wentworth Courier and Eastern Express

I refer to our recent conference relating to the implications under the *Trade Practices Act* of firstly, the acquisition of the Eastern Express masthead by Eastern Suburbs Newspapers, and secondly, the draft Deed of Agreement. You requested an informal response from the Commission as to what action the Commission intended to take in relation to the abovementioned matters.

With respect to the acquisition, based on the information before it the Commission does not propose to intervene in Eastern Suburbs Newspapers' acquisition of the Eastern Express masthead. However, you will appreciate that as the matter was confidential the Commission has not been able to make marketplace enquiries and hence reserves the right to do so once the matter becomes public.

With respect to the draft Deed of Agreement, Eastern Suburbs Newspapers gains statutory protection in relation to exclusive dealing conduct which may otherwise breach section 47 upon receipt of the notification by this Office. The Commission does not intend to withdraw the protection at this time by exercising its powers under section 93(3). However, the Commission reserves the right to reconsider its position should any complaints be received or other information come to the Commission's attention that may cause it to reconsider. In its decision the Commission took into account the fact that agents other than those covered by the Deed would be able to enter into similar arrangements. Can you please confirm that this is the case.

IPC CANBERRA

TEL:

19.Oct.93 13:23 No.001 P.03

Should you wish to discuss this further, please do not hesitate to contact myself or Peter Chesworth of this office.

Yours sincerely



H.A. SPIER
General Manager

19 October 1993

cc. Mr Douglas Hamilton
Dunhill Madden Butler
GPO Box 427
Sydney 2001

Mr Jeffrey Hilton
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174 Phillip Street
Sydney 2000

Eastern Express Pty Ltd
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