



Australian
Competition &
Consumer
Commission

Notice

in respect of a notification lodged by

Eastern Suburbs Newspapers

Date: 29 May 2008

Notification no. N90330

Commissioners:

**Samuel
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Public Register no. C2007/26

Summary

The ACCC has decided to issue a notice under section 93(3) of the *Trade Practices Act 1974* revoking exclusive dealing notification N90330 lodged by Eastern Suburbs Newspapers (ESN) on 12 November 1993.

The notification process

The Australian Competition and Consumer Commission (ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act).

Section 47 of the Act describes conduct known as exclusive dealing. Broadly, exclusive dealing involves one trader imposing restrictions on another person's freedom to choose with whom, in what or where they deal.

A form of exclusive dealing is the supply of goods or services on condition that the buyer will not acquire, or will limit the acquisition of, goods or services from a competitor of the supplier. Such exclusive dealing is prohibited where it would substantially lessen competition.

Businesses may obtain immunity for conduct that might risk breaching the exclusive dealing provisions of the Act by lodging a 'notification' with the ACCC.

The ACCC may revoke a notification for exclusive dealing at any time if it is satisfied that the conduct has the purpose, effect or likely effect of substantially lessening competition and the likely benefit to the public will not outweigh the detriment to the public from the lessening of competition.

The notification

The notification was lodged by ESN on 12 November 1993. At that time, the notified conduct involved 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.

To obtain discounted advertising rates, real estate agents must enter contracts that require them to place 75 per cent of their total advertising centimetre volume, in respect of real estate print display advertising for property located in the eastern suburbs of Sydney, with the *Wentworth Courier* (the 'Advertising Contracts').

Since notification N90330 was lodged in 1993, ownership of the *Wentworth Courier* has changed to News Limited.

In late 2006, John Fairfax Holdings Limited requested the ACCC to review the notification on the basis that a significant period has elapsed and the market has changed since the notification was lodged.

Background

The ACCC is advised that the Advertising Contracts were originally introduced in order to secure sufficient advertising volume to support investment in new colour printing technology.

News Limited advises that the Advertising Contracts continue to represent its competitive approach for attracting consistent business for the Wentworth Courier.

Some of the key features of the Wentworth Courier Advertising Contracts include:

- All real estate agents within the Wentworth Courier's circulation area (or 'footprint') are offered the opportunity to advertise with the 75 per cent requirement regardless of the magnitude of their advertising expenditure.
- All real estate agents are also offered the opportunity to advertise in the Wentworth Courier without being subject to the 75 per cent requirement at casual or, more commonly, discounted casual rates. However, contracted real estate agents receive advertising rates that are lower than those offered to agents who place advertising in the Wentworth Courier on a casual basis.
- Real estate agents who enter into an Advertising Contract are also entitled to annual volume rebates.
- Properties that are not located within the Wentworth Courier's footprint are not included in the 75 per cent requirement.
- If a vendor specifically requests for display advertising to be placed in a publication other than the Wentworth Courier, this is not counted toward the 75 per cent requirement.
- Real estate agents are prevented from recommending or inducing a vendor to place any real estate display advertising in any another publication.

ACCC assessment

The 75 per cent requirement within the Advertising Contracts is more restrictive than a volume discount. That is, the notified conduct requires real estate agents to agree to place a stipulated percentage of their total centimetre volume of print display advertising with the Wentworth Courier, and therefore, limit the volume of print display advertising they place in other publications.

The ACCC considers the 'must have' status of the Wentworth Courier and the larger discounts and annual rebate offered to real estate agents under the Advertising Contracts, means that non-contracted agents will be significantly disadvantaged in competing for vendors' business. Therefore, not agreeing to the 75 per cent requirement is unlikely to be a practical alternative for most eastern Sydney real estate agents.

The ACCC is of the view that the Advertising Contracts significantly restrict the ability of other providers of real estate print display advertising services to compete to supply these services to eastern Sydney real estate agents. The volume of business competing publications can 'grow' is capped to approximately 25 per cent of contracted real estate agents' print display advertising, plus a small volume of advertising from non-contracted agents.

The Advertising Contracts do not restrict real estate agents from advertising through other mediums, such as via real estate websites. However, submissions received by the ACCC indicate that other mediums are generally not considered by real estate agents as close substitutes for print display advertising.

The ACCC also considers that little, if any, public benefit results from the requirement that real estate agents place 75 per cent of their total advertising centimetre volume with the Wentworth Courier. In any event, the ACCC notes that the Wentworth Courier could offer other incentives to real estate agents, for example, volume based discounts, in order to attract a higher volume of their advertising business. Indeed, this currently occurs in other publications within the industry.

Further, the ACCC considers the current advertising discounts offered by the Wentworth Courier are not necessarily lower than those that would be offered in a more competitive environment

Overall, the ACCC is satisfied that the Advertising Contracts have the purpose or effect, or are likely to have the effect, of substantially lessening competition for the supply of advertising services to real estate agents in the eastern suburbs of Sydney and that the benefit to the public that has resulted, or is likely to result from the Advertising Contracts, would not outweigh the detriment to the public constituted by any lessening of competition.

Notice

Accordingly, the ACCC issues a notice under section 93(3) of the Act in respect of notification N90330. The immunity provided by this notification ceases to be in force on 29 June 2008.

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List of abbreviations

ESL HomesGuide	Easternsuburbsliving HomesGuide
ESN	Eastern Suburbs Newspapers
Fairfax	John Fairfax Holdings Limited
The Act	<i>Trade Practices Act 1974</i>

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 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 On 10 December 2007 the ACCC issued a draft notice under section 93A of the Act proposing to revoke notification N90330 lodged by General Newspapers Pty Limited, Double Bay Newspapers Pty Limited and Brehmer Fairfax Pty Limited (trading as Eastern Suburbs Newspapers) on 12 November 1993. This document is a notice under section 93(3) of the Act, revoking the immunity provided by this notification.

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 per cent of their total advertising centimetre volume, in respect of real estate print display advertising for property located in the eastern suburbs of Sydney, with the Wentworth Courier (the 'Advertising Contracts').
- 2.6 Since notification N90330 was lodged, ownership of the Wentworth Courier has changed to News Limited. News Limited completed its acquisition of the Federal Publishing Company (FPC) Community Media Group on 3 April 2007. Among other publications, News Limited is now the owner of the Wentworth Courier.
- 2.7 Around the time the ACCC commenced its review of notification N90330, ESN advised that it continued to enter into advertising contracts on substantially the same terms as notified in 1993. News Limited continues to rely on the protection afforded by the notification. The current contracts run between three and five years.

Review of the notification

- 2.8 In late 2006, John Fairfax Holdings Limited (Fairfax) requested the ACCC to review the notification on the basis that a significant period has elapsed, and the market has changed, since the notification was lodged in 1993.
- 2.9 Having considered the concerns raised, the ACCC decided to review the notification.

Real estate advertising

- 2.10 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 and maps.
- 2.11 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.
- 2.12 Real estate print display advertising is generally found in local community newspapers and metropolitan newspapers such as 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

- 2.13 The **Wentworth Courier** is a weekly community newspaper, delivered free to households and businesses in the eastern suburbs of Sydney.¹
- 2.14 As previously discussed, the Wentworth Courier was part of the FPC Community Media Group, now called the Courier Newspaper Group, which was a division of the ESN Partnership - a partnership of a number of subsidiaries of F Hannan Pty Ltd. The sale of the ESN's newspapers and magazine interests to News Limited was completed on 3 April 2007.
- 2.15 In September 2006, the Wentworth Courier had 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

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*

- 2.16 The ACCC understands that a major source of the Wentworth Courier's revenue is the provision of print display advertising to real estate agents.
- 2.17 FPC states the Wentworth Courier is affectionately known as the bible of the Eastern Suburbs and its property section is recognised internationally.⁴
- 2.18 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.
- 2.19 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.
- 2.20 The **Bondi View** is a community newspaper published every two months with a distribution of 20,000 copies, delivered to homes in Bondi Beach.
- 2.21 **Easternsuburbsliving HomesGuide** (ESL HomesGuide) is a relatively new publication. The first print run was in 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 the Wentworth Courier's, as well as delivered to additional areas and general consumer outlets.
- 2.22 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.
- 2.23 RedHouse and its associated companies have been publishing real estate magazines for over five years, currently publishing three titles.
- 2.24 Table 2.1 summarises the differences in size, production and regularity of publication of the above mentioned eastern suburbs publications.

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

Table 2.1: Eastern suburbs publications⁵

	Wentworth Courier	Domain East	ESL HomesGuide	The Beast	Bondi View
Size (mm)	310x275	410x290	297x230	211x148	350x288
Production	Gloss magazine	Newsprint	Gloss magazine	Gloss booklet	Low grade newsprint
	Perfect bound		Perfect bound	Stapled	
	Hard cover				
Regularity	Weekly	Weekly	Weekly	Monthly	Monthly

Other areas of Sydney

- 2.25 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.
- 2.26 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.
- 2.27 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.⁶ Wednesday's edition of the North Shore Times has a circulation of 71 416, while Friday's edition has a circulation of 73 855.
- 2.28 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.
- 2.29 The Inner West Weekly is published each Thursday and has a circulation of 52 129.
- 2.30 Southern Sydney is serviced by the Southern Courier and St George & Sutherland Shire Leader.
- 2.31 Table 2.2 lists the main community and daily newspapers that carry substantial real estate display advertising in metropolitan Sydney.

⁵ Source: News Limited's submission in response to the draft notice, 12 February 2008, p 7.

⁶ www.northshoretimes.com.au/about_us.html

Table 2.2: Predominant Sydney community and daily newspapers for real estate print display advertising

Northern Sydney	North Side Courier Domain North Mosman Daily/North Shore Times 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

- 2.32 Only real estate agents who operate within the Wentworth Courier’s circulation area (footprint) are offered the opportunity to advertise with the 75 per cent requirement, which is the subject of this notification. All real estate agents within the footprint are offered the opportunity to advertise with the 75 per cent requirement regardless of the magnitude of their advertising expenditure.
- 2.33 All real estate agents are also offered the opportunity to advertise in the Wentworth Courier without being subject to the 75 per cent requirement. However, real estate agents who agree to the 75 per cent requirement receive advertising rates that are lower than those offered to agents who place advertising in the Wentworth Courier on a casual basis.
- 2.34 In addition, real estate agents who enter into contracts including the 75 per cent 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.
- 2.35 Agents that do not agree to the 75 per cent 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.

- 2.36 Real estate display advertising of properties that are not located within the Wentworth Courier's footprint is not included in the 75 per cent requirement. If a vendor specifically requests for display advertising to be placed in a publication other than the Wentworth Courier this is not counted toward the 75 per cent requirement.
- 2.37 However, the current version of the Advertising Contract also 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
 - 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 per cent requirement.
- 2.38 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 per cent requirement, in effect agents must also agree to the 75 per cent 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.
- 2.39 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 per cent requirement, nor are developers. However, they may still advertise in the Wentworth Courier.

Minimum proportion discounting

- 2.40 In its draft notice, the ACCC noted that while advertising contracts providing for volume rebates are not uncommon, to its 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 total advertising centimetre volume with the publication.
- 2.41 Following the draft notice, News Limited advised the ACCC that other publications also use proportional discounting for real estate advertising contracts. For instance, News Limited submits that other newspapers within the Courier Group – namely, the Inner Western Suburbs Courier and Southern Courier – use 75 per cent requirement contracts.⁷

⁷ News Limited's submission in response to the draft notice, 12 February 2008, p 13.

- 2.42 In addition, News Limited submits that Fairfax Community Newspapers has also used a volume requirement in its contracts for real estate advertising in the St George and Sutherland Shire Leader. News Limited claims that between August 2005 and 30 June 2007, a discount rate was offered to agents on condition that they placed 80 per cent of their total suburban real estate with Fairfax Community Newspapers Pty Ltd. News Limited believes that certain agents continue to operate under such contract terms.⁸
- 2.43 In response, Fairfax submits that it has offered discounted advertising to real estate agents via a range of methods. It explained that in 2005, following the launch of a glossy real estate section in the St George and Southern Shire Leader (the Leader), the Leader offered discounted advertising to real estate agents if they agreed to spend an annual dollar amount of advertising or a percentage dollar spend (of the agents total advertising dollar spend) with the Leader over a 12 month period. In some cases, the Leader offered discounts to real estate agents if they agreed to place a minimum number of pages of advertising with it over the year. Fairfax submits that all of these contracts were entered into in 2005 and terminated in or before 2007.⁹
- 2.44 In addition, Fairfax submits there are important differences between the Leader contracts and the current Wentworth Courier Advertising Contracts:¹⁰
- The Leader contracts did not require agents to commit to a minimum percentage volume of advertising (that is, for example, 75 per cent of all column centimetres of advertising placed by a vendor). If the requirement was a minimum percentage of total dollar spend then, depending on the advertising rate a competing publication offered, there was no restriction on the page volume of advertising which could be placed with a competitor.
 - The Leader contracts measured the minimum commitment over a year, as well as the aggregate of all real estate advertising placed by the agent, rather than per individual vendor client.
 - The Wentworth Courier Advertising Contracts prohibit the agent from recommending or inducing a vendor to take real estate advertising in other publications. There was no such prohibition in the Leader contracts.
 - The Courier Contracts seek not only to make the real estate business liable for performance of the Advertising Contracts, but also to make the directors of the relevant agencies personally liable. In contrast, if real estate businesses failed to deliver their contracted commitment to the Leader, the discount offered would simply be adjusted the following year.

⁸ Ibid, pp 13-14.

⁹ Submission from Fairfax, 1 May 2008, p 1.

¹⁰ Ibid, pp 1-2.

2.45 Fairfax submits that across its community newspapers there are currently volume discount contracts with real estate agents where real estate agents receive discounted advertising if they commit to placing a minimum amount of advertising with the relevant publication. However, these contracts do not place a restriction on real estate agents placing advertising in other publications.¹¹

3. Statutory provisions

3.1. Section 47(1) of the Act provides that a corporation shall not engage in the practice of exclusive dealing. Section 47(2) 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 (section 47(10)).

3.2. Section 93(1) 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. The ACCC assesses notifications involving exclusive dealing under section 47(2) by applying the test in section 93(3) of the Act. This test states that if 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:

- the conduct 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 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.

3.4. The effect of the ACCC giving a notice is to revoke the immunity afforded by lodging the notification.

3.5. Before revoking the immunity obtained by a notification, the ACCC must issue a draft notice of its intention and give the applicant and interested parties the opportunity to respond and to call a conference in relation to the draft notice.¹²

¹¹ Ibid, p 2.

¹² Section 93A(1) and section 93A(2) of the *Trade Practices Act 1974*.

4. Submissions received prior to the draft notice

Applicant's submission

Effect on competition

- 4.1. Eastern Suburbs Newspapers (ESN), the then owners of the Wentworth Courier prior to its recent acquisition by News Limited, submitted that the Advertising Contracts did 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 per cent 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 request.
- 4.4. News Limited's submission with respect to the effect on competition of the notified conduct is broadly similar to ESN's submission.

Public detriment

- 4.5. In addition to the arguments noted above in respect of the effect on competition of the notified arrangements, ESN submitted that the Advertising Contracts did 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 per cent requirement.

Public benefits

- 4.6. ESN submitted 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.
- 4.7. ESN submitted that the Advertising Contracts are a benefit to the public because they make lower advertising prices available to real estate agents. Further, ESN submitted that the Advertising Contracts provide certainty to real estate agents as advertising rates are locked in each year. ESN claimed that the Advertising Contracts provide certainty in relation to any increase in advertising rates over the period of the contract. ESN also contended 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.
- 4.8. ESN submitted 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.
- 4.9. News Limited's submission, which was excluded from the public register, raised broadly similar public benefit arguments to ESN, contending that the arrangements provide lower advertising costs for real estate agents and vendors. News Limited also submitted that the arrangements may prompt competitive responses from other suppliers of advertising space.

Submissions from interested parties

- 4.10. The ACCC consulted with a variety of interested parties in relation to the notification, including:
- potential competitors
 - other industry participants and
 - real estate agents.
- 4.11. The ACCC received five submissions from interested parties which were placed on the public register. The ACCC also received a number of submissions which were excluded from the public register at the request of the parties.
- 4.12. 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.
- 4.13. The comments received from interested parties in relation to the notified arrangements prior to the draft notice are summarised below.
- 4.14. **Fairfax** submitted the Wentworth Courier is an essential advertising platform for real estate agents, vendors and potential purchasers in its circulation area. Fairfax submitted that vendors and agents have indicated that other forms of advertising such as the internet are not substitutes for the Wentworth Courier.
- 4.15. Fairfax further submitted 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.
- 4.16. Fairfax stated 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 claimed 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.
- 4.17. 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 per cent 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.

- 4.18. Of the real estate agents who have not signed an Advertising Contract, Fairfax outlined 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.
- 4.19. Fairfax referred 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 noted 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 stated that the information indicated the Wentworth Courier's 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.
- 4.20. Fairfax further submitted 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 has 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.
- 4.21. Fairfax submitted 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 per cent of all advertising to be placed with a publication where the relevant publication is a 'must have.'
- 4.22. Fairfax submitted that the Advertising Contracts have proven over time to be a very effective barrier to entry, regardless of the price offered by competitors.
- 4.23. **Pelican Publications**, publisher of the Beast, stated 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 stated that most of the advertising that is placed with the Beast by real estate agents is in the form of branding advertisements, as agents are prevented from placing much print display advertising of properties with it. In this respect, Pelican Publications stated that the Wentworth Courier's contractual arrangements are a significant constraint on its ability to compete to carry real estate display advertising.
- 4.24. Pelican Publications submitted 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.

- 4.25. Pelican Publications stated 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 contended 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*.
- 4.26. Similarly, the **Alternative Media Group**, publisher of a number of community newspapers in central and eastern Sydney, including the *Bondi View*, submitted 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.
- 4.27. The Alternative Media Group submitted 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.
- 4.28. **RedHouse** submitted 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 submitted 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 per cent requirement.
- 4.29. RedHouse outlined that 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.
- 4.30. 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.
- 4.31. RedHouse submitted 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.
- 4.32. RedHouse submitted that the 75 per cent 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*.
- 4.33. RedHouse claimed 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.

- 4.34. RedHouse submitted 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 submitted 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.
- 4.35. RedHouse outlined 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.
- 4.36. 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 the 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.
- 4.37. The ACCC's market enquiries indicated 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.
- 4.38. 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 \$3300 - \$4000.

- 4.39. 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.
- 4.40. 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.

5. Submissions received following the draft notice

- 5.1. On 10 December 2007 the ACCC issued a draft notice proposing to revoke notification N90330 lodged by ESN on 12 November 1993.
- 5.2. The ACCC received three public submissions in response to the draft notice. In January 2008 the Independent Print Media Group Pty Limited lodged a submission which expressed concerns with the ACCC's views about the likely purpose of the notified conduct. News Limited lodged a submission in February 2008 which disagreed with the ACCC's draft notice. In May 2008, the ACCC received a submission from Fairfax which primarily responded to issues raised by News Limited. No interested parties requested a conference to discuss the draft notice.
- 5.3. The views received from News Limited and interested parties following the draft notice are outlined where relevant in the ACCC's evaluation of the notified conduct in chapter 6 of this Notice. Copies of all public submissions received from interested parties during the ACCC's review of the notification are available from the ACCC's website (www.accc.gov.au) by following the 'Public registers' and 'Authorisations and notifications' links.

6. ACCC evaluation

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.

ACCC's view in the draft notice

- 6.2. In its draft notice the ACCC 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
 - competition for readers of community newspapers in eastern Sydney.
- 6.3. 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.
- 6.4. 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.
- 6.5. 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.
- 6.6. 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.
- 6.7. The ACCC's market enquiries prior to the draft notice, and in respect of its previous consideration of proposed acquisitions in the newspaper publishing industry in Sydney, indicated 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.
- 6.8. 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 community newspaper.

- 6.9. Market enquiries in respect of the review of this notification indicated 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.
- 6.10. Moreover, market enquiries indicated 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. Indeed, the Wentworth Courier 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. In its draft notice, the ACCC did not form a concluded view on the extent to which other advertising platforms are substitutes for real estate display advertising in community newspapers. However, the ACCC noted it is clear 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 noted that the Wentworth Courier is the primary free weekly newspaper distributed throughout the eastern suburbs of Sydney, although ESL HomesGuide commenced publication in late 2007.
- 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 effect of the notified conduct on competition.

News Limited's response to the draft notice

- 6.17. News Limited disagrees with the markets identified by the ACCC in the draft notice. It submits that at the very least, the relevant market is 'the market for newspaper real estate advertising'.¹³
- 6.18. In addition, News Limited considers that even if the ACCC does not consider real estate websites, Domain and letterbox drops as competitors within the market, it should take them into account as real constraints on pricing.¹⁴
- 6.19. In summary, News Limited considers the areas of competition considered by the ACCC in the draft notice are:¹⁵
- not consistent with the approach recently taken by the ACCC in its Public Competition Assessment of the proposed acquisition of the Federal Publishing Media Group by News Limited
 - defined by reference to attributes which are shared by products outside those markets – that is, News Limited submits the zoned publication, Domain East, was launched to mirror the characteristics identified by the ACCC at paragraphs 6.4 - 6.5 above.
 - not supported by the conduct of industry participants
 - not consistent with the evidence that the Wentworth Courier is closely constrained in its pricing for advertising services.
- 6.20. Regarding the ACCC's consideration of the proposed acquisition of Federal Publishing Media Group, News Limited notes that the ACCC made the following statements:
- ...a range of advertising alternatives to free community newspapers exist for many advertisers in northern and inner western Sydney...
- ...almost all agencies advertised on a number of real estate websites...
- ...some real estate agents would consider reducing community newspaper advertising and increasing use of other types of advertising if community advertising rates were to rise.¹⁶

¹³ News Limited's submission in response to the draft notice, 12 February 2008, p 12.

¹⁴ Ibid.

¹⁵ Ibid, p 3.

¹⁶ Ibid, p 4.

6.21. In response to News Limited's claim, the ACCC believes its consideration of the likely markets affected by the notified arrangement is entirely consistent with its previous assessment of News Limited's acquisition of the Federal Publishing Media Group. In its assessment of that acquisition, the ACCC conducted market inquiries with a range of advertisers in northern and inner western Sydney - including larger businesses that attracted customers from a wide area, real estate agents, car dealerships and small locally-focused businesses. In its Public Competition Assessment, the ACCC concluded that:

Market inquiries indicated that a range of advertising alternatives to free community newspapers exist for many advertisers in northern and inner western Sydney, although individual advertisers may have different alternatives and some advertisers have fewer alternatives than others.¹⁷

6.22. Further, the ACCC notes that its Public Competition Assessment in relation to Fairfax Media Limited's proposed acquisition of Rural Press Limited concluded that:¹⁸

The product dimensions of advertising markets will often be narrower than the supply of advertising opportunities overall. For example, it may be limited to classified advertising in newspapers, or in newspapers and online media. Similarly, the facts of a particular case may lead to a conclusion that the relevant market encompasses newspaper display advertising and television advertising, or that these types of advertising are in separate markets.

...Local community newspapers and country newspapers, both of which generally circulate in defined local areas, tend to attract readers who are interested in news specific to that local area and in advertising by businesses located in that local area. Newspapers which do not specialise in providing this local content...may therefore not be close substitutes for readers of community newspapers that do specialise in providing local content.

...Market inquiries indicated that online advertising is increasingly effective for real estate. However, many real estate agents continue also to use print advertising to satisfy and attract vendors, and to attract buyers and renters who do not have internet access.

6.23. News Limited contends that real estate advertisers do advertise in print elsewhere and online as an alternative to the Wentworth Courier, not just as an add-on. Therefore, it believes the ACCC incorrectly concluded in its draft notice that advertising in Domain East is unlikely to be as close a substitute as a well established local community newspaper.¹⁹

¹⁷ ACCC Public Competition Assessment, *News Limited – proposed acquisition of Federal Publishing Company Community Media Group*, 20 February 2007, p 7.

¹⁸ ACCC Public Competition Assessment, *Fairfax Media Limited – proposed acquisition of Rural press Limited*, 27 April 2007, pp 4, 5 and 7.

¹⁹ News Limited's submission in response to the draft notice, 12 February 2008, p 4.

6.24. In this regard, News Limited submits that Fairfax clearly sees its Domain publication as competing with community papers in all areas of Sydney for real estate advertising. Therefore, it is clearly a competitor for real estate advertising in the eastern suburbs of Sydney. In support of this claim, News Limited provided examples of recent promotional material for Domain East. For instance, in a full page advertisement in the Sydney Morning Herald on 20 July 2006, Fairfax stated that:

Using the Domain East section in the Sydney Morning Herald will deliver 193 000 potential home hunters, while the Wentworth Courier delivers 99 000 and can cost four times as much.²⁰

6.25. News Limited also contends that there are a range of certain critical features which contribute to the level of advertising rates charged by different publications. These include:²¹

- Variations in production quality and size – publications vary in size (that is, large magazine versus miniature booklet), production quality (high gloss versus newsprint) and binding (perfect binding versus stapled). A perfect bound glossy magazine has a higher cost of production than a stapled newsprint publication for instance.
- Regularity of publication – weekly publications, as opposed to monthly ones, are more attractive to real estate agents due to the standard three week auction cycle. As a result, monthly publications are not generally favoured by agents or vendors.
- Perception of prestige – in the high value property market of the eastern suburbs, the look and feel of a publication is particularly important to vendors and agents. Advertisements placed in a lower quality publication could be perceived by vendors and potential buyers as cheapening the property.
- Different footprints – the footprints of publications differ. For instance, the Wentworth Courier is distributed exclusively in the eastern suburbs of Sydney. In contrast, the Domain East is distributed in the eastern suburbs and into certain southern districts such as Southerland Shire and around the airport. Agents in the eastern suburbs generally prefer a publication with a targeted footprint in the eastern suburbs.

ACCC's conclusion

6.26. Market definition is purposive, which means that a definition of a relevant market cannot be separated from the particular conduct being assessed. Market definition always depends on the specific facts and circumstances of the conduct, and current evidence from market participants will often be critical.

²⁰ Ibid, p 5.

²¹ Ibid, p 7.

- 6.27. As previously mentioned, the notified conduct requires real estate agents to place 75 per cent 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), with the Wentworth Courier. In other words, real estate agents are offered discounts not only based on the volume of advertising they place with the Wentworth Courier, but also based on the volume of display advertising the real estate agents place with other publications in the same circulation area.
- 6.28. The ACCC notes that the Advertising Contracts do not restrict an agents' ability to place classified advertising (as opposed to display advertising) with any other publication. Also, the Advertising Contracts do not restrain real estate agents from advertising in other forms of media, such as through the internet or direct mailings.
- 6.29. The ACCC notes the (confidential) submissions of many real estate agents that do not consider these other advertising platforms as close substitutes for advertising in the Wentworth Courier.
- 6.30. In addition, the Estate Agents Co-operative submits:
- Real estate agents see print as being essential for brandings and listings...Door drops and the internet are not viable competitors to the Wentworth Courier.²²
- 6.31. As highlighted by News Limited itself, the ACCC considers certain features of the Wentworth Courier – such as weekly publication, perfect binding, high gloss print quality and exclusive distribution in the eastern suburbs – support the 'must have' status of the Wentworth Courier for many real estate agents.
- 6.32. The ACCC maintains the relevant areas of competition impacted upon by the notified conduct are:
- competition for the supply of advertising services to real estate agents in eastern Sydney, through local community newspapers, or more broadly
 - competition for readers of community newspapers in eastern Sydney.

The counterfactual

- 6.33. To identify and measure the effects of the notified conduct, the ACCC applies the 'future with and without test'. Under this test, the ACCC compares the situation in the relevant markets in the future with the notified conduct in place with the situation in the relevant markets without the notified conduct. This requires the ACCC to predict how the relevant markets will react if the notifying parties do not engage in the notified conduct. This prediction is referred to as 'the counterfactual'.

²² Submission received from Estate Agents Co-operative Ltd, 5 December 2008, p 2.

ACCC's view in the draft notice

- 6.34. The ACCC considered 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 per cent of such advertising within the Wentworth Courier's footprint with it.
- 6.35. However, the ACCC highlighted that absent the notified conduct, the Wentworth Courier could offer other incentives, for example, volume based discounts, to real estate agents.

Submissions received in response to the draft notice

- 6.36. News Limited submits that 'there is a practical difficulty in administering volume discounts based on actual volume, not a proportion of agents business, and effectively redistributing them to vendors.'²³ It submits the reason for this is that:

...the discount cannot be given upfront as agents are unable to predict the amount of advertising they will need, nor the total amount of advertising spend they will invest. Consequently, at the time they deal with many vendors they will not know whether they are entitled to a discount or not and, consequently, at a minimum will be reluctant to give discounts to vendors.²⁴

- 6.37. In contrast, Fairfax submits that across the Fairfax group of community newspapers there are some current examples of 'volume discount contracts'. In particular, the terms of these contracts provide that:

...the agent gets a discount rate in return for committing to placing a minimum amount of advertising with these publications but these arrangements do not restrict advertisers from advertising in other publications.²⁵

- 6.38. Further, Fairfax notes that in the past where it has offered discounted advertising rates to real estate agents that commit to either a minimum volume (for example, number for pages) or, more usually, dollar spend (for example \$200 000 per annum), and the agent has failed to meet the contracted commitment, the discount was simply adjusted by Fairfax for the following year.²⁶

ACCC's conclusion

- 6.39. The ACCC considers the appropriate counterfactual is the situation where the Wentworth Courier does not offer discounted print display advertising to real estate agents on condition that they agree to place 75 per cent of their total advertising centimetre volume (for properties within its circulation area) with the Wentworth Courier.

²³ News Limited's submission in response to the draft notice, 12 February 2008, p 19.

²⁴ Ibid.

²⁵ Fairfax Media submission, 1 May 2008, p 2.

²⁶ Ibid.

- 6.40. On the basis of available information, the ACCC is of the view that any practical difficulties associated with publications offering volume based advertising discounts to real estate agents are not insurmountable. Indeed, the ACCC notes this is reflected in current market practice.

Public detriments

Purpose of the notified conduct

- 6.41. 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.
- 6.42. A corporation will have the purpose of substantially lessening competition if that is its actual purpose for engaging in the conduct.²⁷ This will be ascertained from direct and indirect evidence as to the actual intentions and purposes of the corporation.²⁸ The Act provides that the relevant purpose must be a substantial purpose but not necessarily the sole purpose.²⁹
- 6.43. 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 per cent 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.

ACCC's view in the draft notice

- 6.44. In the draft notice, the ACCC considered inferences could be drawn from the nature of the conduct as to the likely purpose of the Wentworth Courier Advertising Contracts. The 75 per cent requirement offers significant savings to advertisers who agree to advertise 75 per cent of their total print display advertising centimetre volume with the Wentworth Courier. It is not a volume based discount. An advertiser can have very small numbers of advertisements but provided they agree to place 75 per cent or more of their print display advertising with the Wentworth Courier, they can access the savings. The 75 per cent 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 per cent of their total print display advertising centimetre volume with a competing publication. The ACCC noted this would seem to be a purpose to restrict or limit competition.

²⁷ *Universal Music Pty Ltd V Australian Competition and Consumer Commission* (2003) 201 ALR 636, at 693.

²⁸ *Ibid.*

²⁹ *Section 4F of the Act*

Submissions received in response to the draft notice

- 6.45. The original notifying party (that is, the Hannan Group – former owners of ESN) and News Limited strongly reject the ACCC’s inference in its draft notice concerning the purpose of the notified conduct.
- 6.46. In particular, the Hannan Group expressed concern that the ACCC inferred an anti-competitive purpose from the fact that it did not have any internal documents to provide to the ACCC in response to the above mentioned information request. In particular, it believes it is not surprising that it did not have any internal documents to produce given that:³⁰
- the 75 per cent requirement was introduced in 1993
 - a decision to implement the 75 per cent requirement was made in consultation with the then Trade Practices Commission and
 - they have received very few complaints about the 75 per cent requirement in the past 14 years. As such, there are no internal documentation about the requirement or any modification to the requirement.
- 6.47. In discussions with the ACCC, the Hannan Group advised that the notified conduct was originally introduced in 1993 in order to secure sufficient advertising volume to support investment in new colour printing technology.
- 6.48. Further, the Hannan Group notes that:
- ...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.³¹
- 6.49. Similarly, News Limited submits that given the passage of time, it is not surprising that there were no internal strategy documents to provide to the ACCC in response to its information request. It also submits that, in the absence of such documents, it is unreasonable for the ACCC to infer an anti-competitive purpose.³²
- 6.50. In addition, News Limited claims the arrangement continues to have its original purpose, namely:

It represents the Courier’s competitive approach to attracting consistent business.³³

³⁰ Submission from Independent Print Media Group in response to the draft notice, 31 January 2008, p 2.

³¹ Ibid, p 3.

³² News Limited’s submission in response to the draft notice, 12 February 2008, p 14.

³³ Ibid.

ACCC's conclusion

- 6.51. The ACCC's view in the draft notice concerning the likely purpose of the notified conduct was not based on the fact that no internal documents were provided to it. As stated in the draft notice, the ACCC's view was inferred from the nature of the conduct itself. Further, the ACCC notes its assessment of the notified conduct does not turn on its comments regarding purpose.
- 6.52. The ACCC notes the original notifying party's submission that the conduct was introduced 14 years ago to secure sufficient business in order to support investment in new colour printing technology. Similarly, News Limited believes the conduct continues to have its original purpose – namely, to 'attract consistent business'. However, in this instance, this involves the Wentworth Courier obtaining agreement from real estate agents not to place any more than 25 per cent of their print display advertising with a competing publication.
- 6.53. Indeed, News Limited itself provides examples of other mechanisms used by community newspapers which are aimed at securing high volume advertising, namely:³⁴
- The Canterbury Torch, published by Torch Publishing Company (and 50 per cent owned by Fairfax) adjusts its rate down for every year that an advertiser stays with the publication.
 - The Central Coast Express Advocate uses a 'market leadership strategy' whereby discounted pricing, bonus pages and complementary holiday packages are offered to the two leading agents in the central coast of New South Wales in order to secure their business. The assumption is that all other agents in the area will follow where the perceived market leaders are advertising.
- 6.54. The ACCC notes that the above mentioned strategies aim to provide advertisers with cost and other incentives to place a higher volume of advertising in the relevant publication. However, this is distinguished from placing a 'ceiling' on the volume of advertising that advertisers can place with competing publications.
- 6.55. The notified conduct goes beyond merely seeking to 'lock in' a certain revenue stream from advertisers so as to provide sufficient certainty to underwrite investment. The 75 per cent requirement directly limits the volume of advertising agents can place with competitors of the Wentworth Courier and is inherently ant-competitive.

³⁴

News Limited's submission in response to the draft notice, 12 February 2008, p 14.

Effect on competition

- 6.56. Generally speaking, exclusive dealing conduct will be more likely to have a substantial effect if it is engaged in by a significant market player across a wide section of the market, if there are limited substitute products available or if customers are forced to buy a product or acquire a second product. It can also have a more detrimental impact on competition of the business engaging in the conduct has significant leverage in other markets or where the conduct impedes entry into a market.
- 6.57. In the draft notice, the ACCC concluded that the Advertising Contracts are likely to substantially lessen competition for the supply of advertising services to real estate agents in the eastern suburbs of Sydney. The ACCC concluded that while print display advertising in the Domain East appears, to some extent, to be substitutable with advertising in the Wentworth Courier, it is unlikely to be as close a substitute as a well established alternative community newspaper. In any event, the ACCC concluded that the 75 per cent requirement severely restricts real estate agents from being able to advertise in Domain East.
- 6.58. The ACCC also concluded that the 75 per cent requirement significantly reduces competition for readers of community newspapers in the eastern suburbs of Sydney. The ACCC considered that such a reduction in competition has the potential to result in a reduction in the quality of content and layout provided to readers of eastern Sydney community newspapers.

Supply of advertising services

Submissions received

- 6.59. 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.
- 6.60. In addition, ESN submits the Advertising Contracts do not result in a substantial lessening of competition because:
- 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 per cent 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.
- 6.61. Similarly, following the draft notice, News Limited submits the above mentioned 'carve out' provisions in the Advertising Contracts mean that even real estate agents under contract are not subject to an absolute 75 per cent commitment.
- 6.62. News Limited contends that it is not necessary for real estate agents in the eastern suburbs to have an Advertising Contract with the Wentworth Courier in order to be competitive. In particular, there are three tiers of advertising rates offered by the Wentworth Courier – namely, the 'rack rate', discounted casual rate and contract rate. News Limited submits that very few 'non-contract' agents pay the full advertising rate or 'rack rate'. Given this, News Limited contends that advertising at the discounted casual rate is a real alternative for real estate agents that do not want to sign an Advertising Contract with Wentworth Courier.
- 6.63. Regarding competing community newspapers, News Limited submits that more than 25 per cent of the market is contestable. This is because a proportion of real estate agents are not under contract. News Limited further notes that, with contracts expiring from time to time, vendor-directed advertising and outside-of-footprint advertising being excluded from the 75 per cent requirement, a competitor could effectively grow its business by:³⁵
- taking the remaining 25 per cent of contracted agents' advertising business
 - taking a larger share of non-contract agents and
 - approaching contracted agents at the end of their contract period.

³⁵

Ibid, p 17.

- 6.64. With particular regard to Domain East and ESL HomesGuide, News Limited believes that neither publication is currently utilising the full potential of the 25 per cent of contracted agents' advertising that is available to them.³⁶ It submits therefore, that for the majority of these contract agents, the Wentworth Courier's Advertising Contracts do not stop agents putting more pages with competing publications, they simply choose not to.³⁷
- 6.65. News Limited believes the Advertising Contracts do not impose a barrier for new community newspapers establishing themselves in the eastern suburbs. In particular, News Limited believes the newest entrant, ESL HomesGuide, shares many of the Wentworth Courier's attributes (that is, it is free, has a high gloss print quality and has local content) and has the potential to act as a competitive constraint on the Wentworth Courier.³⁸
- 6.66. In this regard, News Limited notes that despite delaying the launch of the ESL HomesGuide, it was nevertheless launched in 2007 and produced 10 issues prior to Christmas. However, News Limited believes there are several reasons why ESL HomesGuide is not currently a competitive product, namely:³⁹
- as at February 2008, it is currently only in its third month of publication
 - it is still an unknown publication with, as yet, no established reputation in the community or among real estate agents
 - it faces strong competition from other quality publications
 - it is not utilising the full potential of the available 25 per cent volume of advertising from Wentworth Courier-contracted real estate agents.
- 6.67. In contrast, Fairfax submits that:
- While those [the Courier] Contracts exist we believe no other publication will be able to establish itself as a substitute to the Courier.⁴⁰
- 6.68. In particular, Fairfax submits that a real estate agent in the Wentworth Courier's core geographic area is virtually compelled to enter into an Advertising Contract in order to obtain access to the discounted advertising rates. If a real estate agent fails to enter into an Advertising Contract it:

...risks losing the vendor to the other agent especially as the Courier advertising costs make up a very significant proportion of the total marketing costs of vendors.⁴¹

³⁶ Ibid.
³⁷ Ibid.
³⁸ Ibid, p 18.
³⁹ Ibid.
⁴⁰ Submission from Fairfax, 1 May 2008, p 2.
⁴¹ Submission from Fairfax, 25 October 2007, p 1.

6.69. Fairfax also understands that the vast majority of real estate agents in the eastern suburbs have a contract with the Wentworth Courier. It notes that while there are some agents that have not signed Advertising Contracts, these agents only have part of their business in the core Wentworth Courier area, and as such:

...are therefore less dependent on the Courier for their own brand advertising and to attract vendor clients...⁴²

6.70. As previously discussed, RedHouse Media Group (RedHouse) also submits that magazine 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.⁴³

6.71. RedHouse charges agents \$2240 for advertising in the ESL HomesGuide.⁴⁴ RedHouse understands that many agents in the Wentworth Courier's footprint felt compelled to sign the Advertising Contracts in order to obtain discounted advertising rates. It understands that:

The current 'rack rate' of \$5160 is discounted to approximately \$3960 including GST.⁴⁵

6.72. News Limited submits that it is incorrect to do a simple price comparison of the advertising rate for a full page in the Wentworth Courier, compared with Domain East, for instance. The industry practice is to compare the cost per 1000 copies circulated. It submits the cost difference between the Wentworth Courier and Domain East, is not as significant when the different circulation figures of these publications is taken into account.⁴⁶

6.73. RedHouse submits that it has been constrained in receiving support for its ESL HomesGuide 'due to the pressure applied to agents in respect to their contractual arrangements with the Courier'.⁴⁷ By way of example, RedHouse submits that it:

...offered FREE advertising to over fifteen Agents only to be rejected in order to avoid confrontation with the Courier.⁴⁸

6.74. In response, News Limited submits that the rejection of free advertising in the ESL HomesGuide by fifteen agents does not provide evidence that the Wentworth Courier's Advertising Contracts prevent another community newspaper from building scale in the eastern suburbs. In particular, it notes that fifteen agents represents only 8.3 per cent of the total number of real estate agents in the eastern suburbs, there being a total number of 181 agents.

⁴² Ibid.

⁴³ Submission from RedHouse Media Group, 29 October 2007, p 2.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ News Limited's submission in response to the draft notice, 12 February 2008, p 9.

⁴⁷ Ibid.

⁴⁸ Ibid.

6.75. News Limited submits that:

The apparently slow take-up of real estate advertising in ESL can be explained by the natural reticence of agents to commit their business to a brand new publication. It is a commercial consequence for agents to prefer to be certain of a publication's reputation and profile in the community before they complicate their business by entering into an additional advertising relationship.⁴⁹

ACCC's conclusion

- 6.76. The 75 per cent requirement within the Advertising Contracts is more restrictive than a volume discount. That is, the notified conduct requires real estate agents to agree to place a stipulated percentage of their total centimetre volume of print display advertising with the Wentworth Courier, and therefore, limit the volume of print display advertising they place in other publications.
- 6.77. 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 per cent requirement.
- 6.78. 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 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.
- 6.79. The ACCC acknowledges that agents can advertise in the Wentworth Courier without entering into an Advertising Contract at the casual 'rack rate' or more commonly, negotiated discounted casual rates. Real estate agents also have the option of not advertising in the Wentworth Courier at all. Despite this, the ACCC considers that the larger size of the discount offered under the Advertising Contract, together with the additional rebate and special one-off promotional deals offered to agents under contract, means that casual advertising arrangements or not advertising in the Wentworth Courier are unlikely to be practical alternatives for most agents in the eastern suburbs of Sydney.
- 6.80. Real estate agents who do not agree to the 75 per cent 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. Submissions received from interested parties note that advertising costs are a significant portion of a vendor's marketing costs, and as such, the consequence of not agreeing to the 75 per cent requirement is the likely loss of business by the real estate agent to agents that have.

⁴⁹ News Limited's submission in response to the draft notice, 12 February 2008, p 18.

- 6.81. Consequently, the ACCC is of the view that other suppliers of advertising services, and particularly other suppliers of real estate print display advertising, are restricted by the 75 per cent requirement in their ability to compete to supply these services to eastern Sydney real estate agents. In other words, all other competing publications are limited to attempting to attract the remaining 25 per cent of contracted agents' business and securing more advertising volume from non-contracted real estate agents.
- 6.82. In this regard, 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. While the ACCC notes that other factors, such as print quality and circulation, affect the advertising rates charged, this suggests that the Domain East is only a limited constraint on the terms and conditions, including advertising prices, offered by the Wentworth Courier.
- 6.83. 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. Contrary to News Limited's assertions, the ACCC considers that in the absence of the notified conduct, real estate agents have an incentive to accept an offer of free advertising in order to increase the volume of advertising of a vendor's property, even from a relatively new publication. Under the notified arrangement, even free advertising falls within an agent's total print display advertising centimetre volume and is therefore counted in the 75 per cent requirement.
- 6.84. Moreover, the ACCC considers that accepting a free offer of advertising from a relatively new publication is unlikely to 'complicate' a real estate agents business, as submitted by News Limited.
- 6.85. The ACCC understands that 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 per cent requirement does not apply.
- 6.86. 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. The ACCC accepts 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.

- 6.87. As previously discussed, the ACCC's market enquiries in its review of the notification, 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. 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.
- 6.88. 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.
- 6.89. 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.
- 6.90. 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).
- 6.91. 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'.
- 6.92. 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 per cent requirement. In the eastern suburbs of Sydney, however, the ACCC believes the 75 per cent requirement within the Wentworth Courier Advertising Contracts imposes a significant additional barrier for community newspapers to compete 'for the market' of local real estate display advertising.
- 6.93. 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 – to the point real estate agents could see it as the 'must have' for local real estate display advertising. The scope for this to occur applies a competitive tension to the dominant incumbent newspaper.

- 6.94. However, the 75 per cent requirement in the Wentworth Courier's Advertising Contracts 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 per cent requirement. In effect, the 75 per cent requirement prevents competition 'for the market' in the first place.
- 6.95. The ACCC considers the experience of RedHouse in introducing its ESL HomesGuide appears to support this contention. As previously discussed, RedHouse submits that over fifteen real estate agents even rejected its offer of free advertising in the ESL HomesGuide.
- 6.96. 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.
- 6.97. In this regard, the ACCC considers 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 per cent requirement.
- 6.98. The ACCC notes that most real estate agents employ other forms of advertising beyond print display advertising in newspapers. Most notably, advertising on real estate websites. The ACCC's market enquiries have indicated that many real estate agents see these forms of advertising as important compliments to print display advertising, rather than substitutes for it.
- 6.99. The Wentworth Courier's 75 per cent 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.
- 6.100. 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.
- 6.101. For the reasons outlined above, the ACCC considers that the 75 per cent requirement has or is likely to have the effect of substantially lessening competition for the supply of advertising services to real estate agents in the eastern suburbs of Sydney.

Competition for readers of community newspapers in eastern Sydney

Submissions received

- 6.102. News Limited submits the barriers to new entry for community newspapers are not high. It is of the view that the right type of publication with suitably attractive features will be able to enter. News Limited contends that the recent entry of ESL HomesGuide is evidence of this. It also submits the fact that ESL HomesGuide ‘has not succeeded in what the ACCC would see as a contest for the market in the very short time it has been in operation illustrates nothing.’⁵⁰
- 6.103. In this regard, RedHouse submits that had it been aware that a notification had been lodged with the ACCC in relation to the 75 per cent requirement, it may well have taken the decision not to publish the ESL HomesGuide in the eastern suburbs of Sydney.⁵¹ Further, it submits that its position was:
- ...we felt that the contracts were in principle a breach under the Trade Practices Act...and that we should not be bullied into withdrawing from a market where we can deliver advantages to both consumers and Agents alike.⁵²
- 6.104. Regarding the quality of the Wentworth Courier, News Limited submits that there has been no reduction in quality over the course of the 14 year notification period. During this time, the Wentworth Courier has diversified its content and added new sections. It believes that consistent improvements in the quality of the Wentworth Courier demonstrates that it operates in a competitive market.⁵³
- 6.105. Further, News Limited claims the number of editorial pages in the Wentworth Courier is consistent with the general position in competitive markets elsewhere in Sydney. For example, in the year to date ending week 29 of the 2008 financial year, the Wentworth Courier had an average of 31.5 pages of editorial. In competitive markets the News Limited owned Liverpool Leader had 27.3 pages, the Fairfax owned Liverpool Champion had 16.6 pages and the News Limited owned Hill Shire Times had 37.3 pages.⁵⁴

ACCC’s conclusion

- 6.106. 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.

⁵⁰ Ibid, p 19.

⁵¹ Submission from RedHouse Media Group, 29 October 2007, p 2.

⁵² Ibid.

⁵³ News Limited’s submission in response to the draft notice, 12 February 2008, p 12.

⁵⁴ Ibid.

- 6.107. As previously discussed, the ACCC considers that the Wentworth Courier's 75 per cent 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. The volume of business other community newspapers can 'grow' in the eastern suburbs is capped to approximately 25 per cent of contracted real estate agents' business and a small volume of advertising from non-contracted agents.
- 6.108. 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 significantly constrained from the outset by the 75 per cent requirement.
- 6.109. Consequently, the ACCC considers the 75 per cent 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.
- 6.110. While the ACCC is satisfied that the 75 per cent 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.
- 6.111. The ACCC generally considers that the absence of competitive tension in any market reduces the incentive to innovate, which can result in lower quality of goods or services. To the extent this occurred, this would constitute a public detriment.

Public benefits

- 6.112. 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.
- 6.113. 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.

- 6.114. As noted in the ACCC's discussion of the effect on competition of the notified conduct, the Wentworth Courier's 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 centimetre volume with the Wentworth Courier, and thereby necessarily, limit their print display advertising in other publications, in consideration for a reduced advertising rate.
- 6.115. 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 be able to offer such discounts absent the notified arrangements. Indeed, the ACCC notes that it already offers volume discounts to non-contracted real estate agents.
- 6.116. Based on available information, the ACCC does not accept that the 75 per cent requirement results in lower advertising rates for real estate agents, and ultimately, vendors. As discussed earlier in this chapter, the ACCC considers the 75 per cent requirement substantially forecloses competition to provide print display advertising to eastern Sydney real estate agents. This lack of competitive tension is likely to be reflected in the price and quality of service offered by the Wentworth Courier.
- 6.117. While real estate agents agreeing to the 75 per cent requirement are offered lower advertising rates than those who do not, these rates are not necessarily lower than those which would otherwise prevail absent the restriction that the 75 per cent requirement places on others competing for real estate agents' business.
- 6.118. 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.
- 6.119. The ACCC considers that 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 agents without requiring them to agree to the 75 per cent requirement. Accordingly the ACCC does not consider this certainty is 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 per cent requirement.
- 6.120. News Limited submitted that the Advertising Contracts may promote competitive responses from other suppliers of advertising space. As previously discussed, the ACCC considers that the Wentworth Courier's Advertising Contracts actually inhibit such competitive responses.

Issues raised in response to the draft notice

- 6.121. In its submission following the draft notice, News Limited asserts that the notified conduct results in two public benefits:
- it enables agents to pass the discounts they receive on to vendors
 - the discount is available to all agents, irrespective of their size and total spend.⁵⁵
- 6.122. News Limited claims that because real estate agents cannot know with certainty what their total advertising volume over a year or contract period will be, that without the requirement, they would not know what discount they may qualify for on a volume basis, and will not be able to pass through discounted advertising prices to vendors.
- 6.123. The ACCC considers this issue of uncertainty is faced by many businesses and is not simply restricted to the real estate advertising industry. Frequently, businesses will weigh up the benefits of a lower price from contractually committing to a particular volume against the costs that result if, for whatever reason, that volume is subsequently not required.
- 6.124. The practical difficulties of agents being unable to accurately predict the exact volume of advertising they will use in a contract period can be addressed in a variety of ways and are not insurmountable.
- 6.125. Indeed Fairfax notes that where it has offered discounts to real estate agents that commit to a particular minimum volume of advertising for one of its publications, and the agent subsequently fails to meet that volume, the magnitude of the discount is simply adjusted in the following year.⁵⁶
- 6.126. As a result, the ACCC does not consider that enabling agents to pass the discounts they receive on to vendors is a public benefit that results from the notified conduct.
- 6.127. The second public benefit claimed by News Limited is that its discount is available to all agents, irrespective of their size and total advertising spend. In contrast, it considers that volume discounting favours the larger agents because it is only by spending over a threshold amount that a beneficial advertising rate is received. As a result, News Limited submits that:
- ...proportional discounting practices promote competition in the real estate market by allowing smaller agents to compete on an even footing with their larger competitors.⁵⁷
- 6.128. In other words, News Limited claims that proportional discounting promotes competition in another market, namely the market for the provision of real estate agent services.

⁵⁵ News Limited's submission in response to the draft notice, 12 February 2008, p 19.

⁵⁶ Submission from Fairfax Media, 1 May 2008, p 2.

⁵⁷ News Limited's submission in response to the draft notice, 12 February 2008, p 19.

- 6.129. The ACCC considers that offering the same discount to all agents under the Advertising Contracts, irrespective of their total advertising spends, is likely to create allocative inefficiency, to the extent that agents which generate lower costs due to higher advertising volume cannot capture that benefit.
- 6.130. The Wentworth Courier claims that offering the same discount to real estate agents, regardless of their advertising spend, is a public benefit. For this to be the case, the ACCC considers the price being charged to all real estate agents for print display advertising would need to be at the lowest sustainable level that would otherwise be offered to a high volume advertiser. Otherwise, without the notified conduct, high volume advertising agents would be able to negotiate lower rates and competition in the market for the provision of real estate agent services would result in lower prices being passed through to vendors.
- 6.131. For the reasons set out above, the ACCC does not consider this to be likely and hence does not consider this to be a public benefit.

Balance of public detriments and benefits

- 6.132. As previously mentioned, the ACCC is required to assess whether any benefit to the public that has resulted or is likely to result from the conduct will outweigh the detriment to the public constituted by an lessening of competition that has resulted or is likely to result from the conduct.
- 6.133. For the reasons set out above, the ACCC is satisfied that the 75 per cent requirement substantially lessens competition for the supply of advertising services to real estate agents in the eastern suburbs of Sydney within the meaning of section 47 of the Act.
- 6.134. The ACCC considers there is little, if any, public benefit generated by the requirement that real estate agents place 75 per cent of their total print display advertising centimetre volume with the Wentworth Courier.
- 6.135. Therefore, the ACCC concludes that the substantial anti-competitive detriments outweigh the little, if any, public benefit resulting from the notified conduct.

7. Notice

- 7.1. Notification N90330 was lodged by General Newspapers Pty Limited, Double Bay Newspapers Pty Limited and Brehmer Fairfax Pty Limited (trading as Eastern Suburbs Newspapers) on 12 November 1993 for conduct that potentially constitutes exclusive dealing under section 47 of the *Trade Practices Act 1974* (the Act).
- 7.2. In particular, the conduct is described in notification N90330 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.
- 7.3. The contracts require that real estate agents place 75 per cent of their total advertising centimetre volume, in respect of real estate print display advertising for property located in the eastern suburbs of Sydney, with the Wentworth Courier.
- 7.4. Since notification N90330 was lodged in 1993, ownership of the Wentworth Courier has changed to News Limited.
- 7.5. For the reasons identified in chapter 6 of this notice, the ACCC considers the notified conduct is likely to result in significant public detriment resulting from a substantial lessening of competition for the supply of advertising services to real estate agents in the eastern suburbs of Sydney.
- 7.6. The ACCC considers there is little, if any, public benefit generated by the requirement that real estate agents place 75 per cent of their total advertising centimetre volume with the Wentworth Courier.
- 7.7. As a result, the ACCC is satisfied that the conduct described in the notification has the purpose or effect, or is likely to have the effect, of substantially lessening competition and that the 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 notified conduct.
- 7.8. Accordingly, the ACCC issues a notice under section 93(3) of the Act in respect of notification N90330. This notice removes the immunity provided by the notification on 29 June 2008.