

Our ref: PH:14/290
Your ref: 56316

28 May 2015

Dr. Richard Chadwick
General Manager, Adjudication
Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

By Email: adjudication@accc.gov.au

Dear Dr Chadwick

MPA – Application for Authorisation A91472

Thank you for your letter of 21 May 2015.

Pre Decision Conference (PDC)

I have been instructed to express my client's deep concern regarding misleading aspects of some of the submissions being made to the ACCC. In particular newsXpress has actively portrayed the authorisation process as variously:

- An investigation of anti-competitive conduct instituted by the ACCC;
- An opportunity for the ACCC to impose a substantially revised form of Pilot upon my client and the industry generally; or
- An opportunity for the ACCC to unilaterally determine how magazines are to be distributed going forward, irrespective of the channel or existing commercial arrangements.

This characterisation has unfortunately obscured the facts that:

- my client's authorisation application has been made voluntarily and without any compulsion; and
- the Commission is required to assess the application as made in accordance with provisions of Part VII of the *Competition & Consumer Act 2010 (Act)* and does not have the power to unilaterally regulate magazine distribution in Australia in the manner proposed by newsXpress.

I also reiterate that newsXpress is not representative of the majority of newsagents. As the Commission is aware, my client's application is supported by the ANF, which does represent a majority of newsagents.

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We further note that the Commission applies the 'future with and without test' to the conduct sought to be authorised. That being that the Commission must assess the position that would, or would be likely to exist if the authorisation were granted, with the position if the authorisation was not granted. If it considers the public benefit resulting outweighs any anti-competitive detriment, then it should grant the authorisation sought.

We reiterate our view that no detriments arise from the conduct of the Pilot and, to the extent that it allows development of a Code of Conduct as proposed, potentiality significant public benefit will accrue. None of the submissions the Commission has received appear to contest this central point.

Mr Fletcher for newsXpress has ignored the required test and instead urged a review of the total distribution model across all channels. As the newsXpress submissions ignore the legal test, my client submits that the Commission has no option but to ignore those submissions in their entirety.

Transparency of Pilot Outcomes

I acknowledge the summary you provide of the discussions at the PDC on the question of transparency and your statement that the ACCC 'may consider whether to impose a condition in relation to transparency, to ensure sufficient public benefit results from the arrangements...'.

My client is concerned that the Commission is linking the degree of transparency of the Pilot data to the public benefit of the Pilot. In particular I note that the claimed public benefit of the Pilot is that the '...proposed Code of Conduct can only be realised if the Pilot is first conducted.' This is because the Pilot is merely that and does not, in isolation, result in any broader changes to the newsagency distribution model. This is the case whether or not the results are made public and irrespective of the degree to which they are made public.

My client fully expects that it will need to provide full disclosure to the ACCC of the results of the Pilot in the context of an expected subsequent authorisation application for the yet to be formulated Code of Conduct. However my client has serious concerns with public disclosure of the raw data from the Pilot at this early stage, as this will inevitably invite use and misuse of that data to further the various agendas of third parties. This is a debate that should be held in the context of any subsequent Code of Conduct submitted for authorisation and not around the preliminary step of a limited scope Pilot.

I am therefore instructed to repeat the transparency mechanisms outlined in my letter of 5 May 2015 and confirm that my client does not intend to make public all raw data obtained from the Pilot at the conclusion of the Pilot. I reiterate that this information will be made available to the Commission, subject to the data being de-identified or with approval of the store, with any subsequent application for authorisation of an industry wide Code of Conduct.

Please note that my instructions remain that Pilot newsagencies will have input to the range they receive, in the context of the application of the category management principles previously referenced. It is not intended that this degree of input differ for each newsagent. I also confirm that participating newsagents are aware that historical sales are only one input to this decision making process and have agreed to this being the case.

My client intends that the distribution restrictions (per Annexure B) to be applied during the Pilot will be uniform, albeit that the outcome for each participating newsagency location will vary. To the extent that this does not eventuate, or there are changes to the minimum sales efficiencies applied, my client agrees to disclose this to the Commission with the report analysing the results of the Pilot.

Subject to it first obtaining consent from the Pilot participants, my client will also undertake to identify Pilot participating newsagents to the Commission with any future authorisation application for an industry wide Code of Conduct.

My client and its members remain committed to undertaking the Pilot. However if even this preliminary step proves too challenging to implement, my client may have no choice but to abandon this process.

Please do not hesitate to contact me if you require anything further.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Paul Holm', with a stylized flourish at the end.

Paul Holm
Director

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