



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation A91578

lodged by

the Australian Environmental Pest Managers
Association Limited (AEPMA)

in respect of

codes of practice for termite management

Date: 30 August 2017

Authorisation number: A91578

Commissioners: Sims
 Rickard
 Court
 Featherston

Summary

The ACCC proposes to grant authorisation to the Australian Environmental Pest Managers Association (AEPMA) to implement two new voluntary codes of practice relating to termite management.

The ACCC proposes to grant authorisation for 5 years.

The ACCC will seek submissions in relation to this draft determination before making its final decision.

The application for authorisation

1. On 27 April 2017, the Australian Environmental Pest Managers Association (AEPMA) (the **Applicant**) lodged an application for authorisation¹ A91578 with the Australian Competition and Consumer Commission (**ACCC**) under subsection 88(1A) of the *Competition and Consumer Act 2010* (the **CCA**).²
2. AEPMA is seeking authorisation for two proposed voluntary codes of practice for termite management. The two codes are:
 - AEPMA's Industry Code of Best Practice for Termite Management, and
 - AEPMA's Industry Code of Best Practice for Termite Management During Constructions (together, **the Codes** or the **proposed conduct**).
3. Authorisation has been sought for five years.

The Applicant

4. AEPMA is a not-for-profit industry association established in 1988, representing professional pest managers across Australia. In addition to the codes of practice concerning termite management, AEPMA has published industry codes of practice relating to bed bug infestations, pest management in the food industry and pre-purchase timber pest inspections. AEPMA also administers "PestCert" which is a scheme to certify that a pest management company meets particular accreditation standards. AEPMA has not sought authorisation for any of these codes or schemes.
5. AEPMA submits that around 80% of work undertaken in the Australian pest management industry is undertaken by AEPMA members.

¹ Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Competition and Consumer Act 2010 (the CCA). Applicants seek authorisation where they wish to engage in conduct which is at risk of breaching the CCA but nonetheless consider there is an offsetting public benefit from the conduct. Detailed information about the authorisation process is available in the ACCC's Authorisation Guidelines at www.accc.gov.au/publications/authorisation-guidelines-2013

² On 22 August 2017, the Applicants lodged amendments to their application for authorisation.

Background

The Australian pest management industry

6. Analysis commissioned by AEPMA in 2012 estimated that there were approximately 10,000 registered pest management technicians, and 3,000 pest management businesses, in Australia.
7. Of those firms, it was estimated that approximately 18.5% had turnover of less than \$50,000 per annum, 53% between \$50,000 and \$200,000, 26.5% between \$200,000 and \$2,000,000 and 2% more than \$2,000,000.
8. AEPMA estimates that the Australian pest management industry's turnover is around \$1.5 billion per annum.
9. AEPMA submits that termites are an increasing problem in Australia. Specifically, AEPMA submits that risk levels in housing are rising as construction of most homes since the 1960's has been of a higher risk type because of the use of concrete slabs with little clearance from the ground and the use of softwood timber for framing. AEPMA also submits that older homes are at increased risk due to the reducing residual effectiveness of (now long-banned) organochlorines.³
10. AEPMA submits that the cost of termite damage can be significant and cites by way of example:
 - A 2005 CSIRO study⁴ which noted that "of a total of 78 municipalities in Victoria, there are 30 in which homes, buildings and structures are not yet designated as being subject to termite infestation (undeclared and unprotected). Recent evidence suggests that termites are prevalent in these non-designated municipalities, many at alarming levels."
 - A 2005 Queensland Department of Works' study⁵ into the effects of termite damage on Queensland public housing which estimated that the cost of repairs ranges from \$18,000 to \$60,000 per property.
 - A 2012 industry study⁶ commissioned by AEPMA which estimated the average cost for treatment and repair of termite damage at approximately \$10,000 per house.
 - A 2003 study by Archicentre (the building advisory service branch of the Royal Institute of Architects) which estimated that "650,000 Australian homes have become infested with termites over the last five years. The cost of treatment and repair of the resultant damage cause by the termite infestations has been estimated at \$3.9 billion."

³ Organochlorines are a type of pesticide, one use for which is termite management.

⁴ *Call for the immediate declaration of all municipalities (metropolitan Melbourne & regional Victoria) as regions where homes, building and structures are subject to termite infestation*, J.W. Creffield, CSIRO, 2005.

⁵ Queensland Department of Public Works' Build Environment Research Unit 2005.

⁶ *The Contribution of the Environmental Pest Management Industry to the Australian Economy*, Report for AEPMA, 2013.

The regulatory framework

11. The National Construction Code (NCC)⁷ sets out technical requirements and minimum standards governing termite management by reference to the following mandatory Standards published by Standards Australia:
 - AS 3660 Termite Management
 - AS 3660.1 Part 1: New Building Work (2014)
 - AS 3660.2 Part 2: In and around existing buildings and structures – Guidelines, and
 - AS 3660.3 Part 3: Assessment criteria for termite management systems (2014).
12. The NCC is given legal effect by relevant legislation in each State and Territory. This legislation relies on the NCC to fulfil any technical requirements that are required to be satisfied when undertaking building work including with respect to termite management. Each State and Territory's legislation consists of an Act of Parliament and subordinate legislation which empowers the regulation of certain aspects of building work and contains the administrative provisions necessary to give effect to the legislation.
13. Pest management technicians are licenced in each state and territory with licensing fees varying from \$40 (NSW) to \$566 (Victoria).
14. Compliance with the AEPMA Codes does not replace compliance with the regulatory framework, although AEPMA submits that its Codes contain higher standards than those contained in the regulatory framework.

The AEPMA Codes

15. *AEPMA's Industry Code of Best Practice for Termite Management During Constructions* is designed to inform and instruct relevant industry stakeholders about whole of building termite management during new constructions. It is aimed at pest management companies that employ persons to install technologies to prevent the concealed entry of termites into buildings.
16. *AEPMA's Industry Code of Best Practice for Termite Management* is designed to manage subterranean termites in and around existing buildings and structures. It is aimed at pest management companies that employ licensed persons to undertake pest management services/treatments.
17. To become a signatory to *AEPMA's Industry Code of Best Practice for Termite Management* pest managers must have a thorough understanding of termite management. They must:
 - agree to be bound by the Code
 - have attained required national pest management units of competency for termite management as stipulated in the AEPMA Code of Practice for

⁷ Encompassing the Building Code of Australia (BCA) and the Plumbing Code of Australia (PCA).

Training in the Pest Management Industry (a two day face to face or eight week online course)

- have 200 hours of combined study and practical experience including participation in:
 - at least 40 timber pest or termite inspections under direct supervision, and
 - at least 20 complete post construction termite treatments (baiting and/or chemical) consisting of a combination of preventative and active treatment sites
- be licensed to use pesticides by their relevant State or Territory government
- hold relevant professional indemnity and public liability insurance, and
- have a minimum of two years' experience in pest management, including management of active termites.

18. To become a signatory to *AEPMA's Industry Code of Best Practice for Termite Management During Constructions* termite management system installers must:

- agree to be bound by the Code
- undergo appropriate construction site safety induction training (ASCC 2007)
- have qualifications in:
 - CPP30911 – Certificate III in Pest Management, and
 - CPPMT3042A – Install Physical Termite Barriers
- hold relevant professional indemnity and public liability insurance
- have completed the AEPMA Code of Practice Training Course, and
- undertake other training as stipulated by AEPMA'S Code Training Committee.

19. Both Codes include sections stipulating standards including in relation to areas such as (as relevant) planning to build, risk assessment, health and safety, ongoing termite management, life cycle management, site assessment, construction considerations, termite management recording, termite treatment processes, environmental hazards and inspections.

20. The Codes also outline roles and responsibilities for other stakeholders in the termite management industry, particularly in relation to new constructions. For example, building owners and managers, architects, builders and building contractors. However, these roles and responsibilities are suggested standards as these stakeholders are not signatories to the Codes. The relevant sections of the Codes include statements that these stakeholders are not signatories to the Codes.

Dispute resolution

21. Signatories to the Codes must agree to be bound by the dispute resolution processes set out in the Codes. Code signatories must have a documented customer complaints handling procedure which complies with the Australian Standards Guidelines for complaints handling in organisations (AS ISO 10002-2006). The dispute resolution process provides that disputes that cannot be settled through the Code signatories' customer complaints handling process within 30 days can be referred to the AEPMA Code Compliance Manager. Complaints that cannot be resolved by the Code Compliance Manager are escalated to a Code Disciplinary Committee.
22. The Disciplinary Committee may:
 - order corrective action in respect of work undertaken
 - order restitution of any damages caused as a result of work undertaken
 - suspend use of the Code until the party in question can demonstrate ongoing ability to comply with the Code
 - order appropriate retraining.
23. Failure to comply with orders of the Disciplinary Committee may result in disqualification, suspension and publication of the breach on the AEPMA website.
24. Code signatories are able to appeal any penalty imposed by the Disciplinary Committee to the Code Administrative Committee. More generally, decisions of the Disciplinary Committee are reviewed annually by the Administrative Committee.
25. As an alternative to the dispute resolution processes, or if a customer is dissatisfied with the manner in which a complaint is resolved, they may lodge the complaint with the relevant consumer protection agency, court or tribunal.

Fees

26. Code signatories who are not AEPMA members are required to pay an annual Code participation fee, currently \$500 (per Code) with an additional \$150 fee applying for each additional business location. Code signatories who are AEPMA members do not pay these fees.
27. AEPMA will maintain a register of Code compliant pest managers and termite management system installers.

Administration of the Codes

28. Each code will be administered by an Administrative Committee made up of the Executive Director of AEPMA, representatives of the insurance industry, the building industry (Housing Industry Association)⁸, a system manufacturer, an Australian

⁸ The building industry representative will only be part of the AEPMA's Industry Code of Best Practice for Termite Management During Constructions Administrative Committee.

Pesticides and Veterinary Medicines Authority representative and member representatives of AEPMA.⁹

29. The AEPMA's Industry Code of Best Practice for Termite Management Administrative Committee will also include a consumer representative nominated from either Fair Trading Government Agencies or the Australian Consumers' Association.
30. The Administrative Committees will conduct reviews of the operation and effectiveness of the Codes. The AEPMA Industry Code of Best Practice for Termite Management will be reviewed every six months and the AEPMA Industry Code of Best Practice for Termite Management During Constructions will be reviewed every 12 months. Reviews will also consider requests to make changes to the Codes.
31. The Administrative Committees will also produce annual reports for Code signatories and regulatory agencies summarising details and complaints, action taken, the Committee's views on overall levels of compliance with the Codes, disclosure of Code signatories that were found in breach of the Codes and Code signatories whose accreditation of participation has been removed.

Rationale for the Codes

32. AEPMA submits that its Codes demonstrate best practice in termite management. In this respect, AEPMA argues that the current mandatory standards are minimum professional standards as they reflect a consensus of various working groups and as such they do not reflect best practice and are inadequate.
33. AEPMA argues that a further difficulty with the current mandatory standards is difficulty in accessing them unless the user is prepared to pay the cost of purchasing them. AEPMA states that its Codes will be publicly available on its website.
34. AEPMA further states that there are no consistent training and licensing requirements across Australia for pest managers or termite management system installers and that no State or Territory requires further training or development once a licence is granted. AEPMA argues that these licensing requirements are inadequate because in most cases they are chemical handling courses and do not fully cover the range and scope of activities undertaken by pest management companies.
35. AEPMA submits that the proposed Codes fill these regulatory gaps by setting best practice standards in termite management.

Consultation

36. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process.
37. The ACCC invited submissions from a range of potentially interested parties including relevant industry associations, pest management companies, consumer groups and relevant state government authorities.¹⁰

⁹ AEPMA's Industry Code of Best Practice for Termite Management During Constructions Administrative Committee will include three AEPMA representatives, the AEPMA Industry Code of Best Practice for Termite Management Administrative Committee will include two.

38. No submissions were received.

ACCC assessment

39. The ACCC's assessment of the proposed conduct is carried out in accordance with the relevant net public benefit tests¹¹ contained in the CCA. In broad terms, the ACCC may grant authorisation if it is satisfied that the likely benefit to the public from the proposed conduct would outweigh the likely detriment to the public, including from any lessening of competition.

Relevant areas of competition

40. For the purpose of assessing this application, the ACCC considers the relevant areas of competition are:

- the supply of termite management services in existing buildings, and
- the installation of termite management systems in new buildings

in each state and territory except Tasmania where AEPMA submits that there are no subterranean termites and the Codes are not intended to apply.

Future with and without

41. To assist in its assessment of the proposed conduct against the authorisation tests, the ACCC compares the benefits and detriments likely to arise in the future with the conduct for which authorisation is sought against those in the future without the conduct the subject of the authorisation.

42. The ACCC considers that the future without the proposed conduct is likely to closely resemble the status quo. Pest managers and termite management system installers would still be required to comply with the technical requirements and standards governing termite management set out in the NCC and be licensed in the jurisdiction(s) in which they operate. However, as AEPMA has sought authorisation because the voluntary Codes contain provisions that may risk breaching the cartel provisions of the CCA, it is unlikely the Codes would be adopted and implemented in their current form.

Public benefit

43. The CCA does not define what constitutes a public benefit and the ACCC adopts a broad approach. This is consistent with the Tribunal which has stated that the term should be given its widest possible meaning, and includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.¹²

¹⁰ A list of the parties consulted is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

¹¹ Subsections 90(5A) & 90(5B).

¹² *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

44. AEPMA submits that, through setting higher standards, the Codes will result in a public benefit by improving goods, services and professionalism in termite management, meaning that homes and other buildings will be in better, longer lasting condition and consumers will not incur the significant costs involved in dealing with termite damage.
45. The ACCC notes that the existing mandatory standards as part of the regulatory framework were developed by Standards Australia in conjunction with relevant industry experts. As mandatory standards, they set out the minimum technical standards to which pest managers and termite management system installers must adhere.
46. The ACCC notes AEPMA's submission that its Codes set higher standards than those required by the regulatory framework and provide recognition for signatories who adhere to these standards. While the ACCC has not formed any view about the adequacy or otherwise of that framework, to the extent that consumers value adherence to these higher standards this will encourage pest managers and termite management system installers to become signatories to the Codes and commit to these standards.
47. In addition to abiding by the standards set out in the Codes, pest managers who choose to be bound by the Codes are also required to meet specified levels of practical experience and education in termite management practices in order to become a signatory to the Codes.
48. The ACCC considers that this is likely to result in a public benefit by providing a means for businesses to differentiate themselves through choosing to be bound by the Codes and providing consumers who value adherence to the standards set out in the Codes with information to inform their decisions when purchasing termite management services.
49. The Codes also include dispute resolution processes that consumers are able to avail themselves of and provide for remedies and sanctions for signatories found to be in breach of the Codes. Available sanctions include suspension or termination of a person's right to be a signatory to the Codes.
50. The ACCC notes that, other than those sanctions relating to suspension or termination, the remedies and sanctions available under the Codes are only enforceable with the consent of the signatory found to be in breach. For example, while the Code Disciplinary Committee can order corrective action or restitution, it has no authority to require the Code signatory comply with the order, although failure to comply would likely result in suspension or termination of the persons status as a signatory to the Codes. The ACCC also notes that many consumers would have access to protections under the *Australian Consumer Law*.
51. Notwithstanding this, the ACCC considers that the dispute resolution procedures set out in the Codes are likely to deliver some public benefit. Code signatories must have a documented customer complaints handling procedure which complies with the Australian Standard on Complaints Handling. This, along with the dispute resolution processes in the Codes, is likely to be of some utility in handling disputes and promote greater confidence in services offered by signatories to the Codes.

Public detriment

52. The CCA does not define what constitutes a public detriment and the ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.¹³

53. AEPMA submits that the proposed conduct will not result in any public detriment, as customers remain free to choose any pest management technician to undertake work. AEPMA notes that compliance with the Codes may increase costs for pest managers and termite management system installers but argues that these increased costs will be minimal.

54. The ACCC considers that the proposed conduct is likely to result in little public detriment. The ACCC notes that becoming a signatory to the Codes is voluntary and is not a requirement in order to offer pest management and/or termite management system installation services. Becoming a signatory to the Codes is one of a number of ways in which pest managers may be able to demonstrate the quality of the services they offer. Further, pest managers are not required to be an AEPMA member in order to become a signatory to the Codes, although signatories that are not AEPMA members will be required to pay a participation fee.

55. The ACCC considers that the additional costs incurred by signatories to the Codes, in the form of the participation fee and/or operational costs incurred in complying with the standards contained in the Codes, may assist in the realisation of a corresponding increase in the quality of the goods and services supplied. For example, the costs incurred in adopting the standards set out in the Codes or implementing a consumer complaints handling process may improve the quality of goods and services supplied by the Code signatory.

56. The ACCC considers that public detriments could result from disciplinary procedures relating to enforcing the standards of the Codes where being a signatory to the Codes is necessary to compete in an industry. Public detriment could also result if disciplinary procedures do not provide signatories with sufficient procedural fairness. However, in this case, as noted, the ACCC considers that being a signatory to the Codes is not necessary to supply termite management services. Further, the ACCC considers that the dispute resolution process provides procedural fairness by requiring that complaints are investigated, the body hearing the complaint is independent and written reasons for decisions are provided. The operation of the Codes and details of complaints and actions taken are also reviewed annually by the Administrative Committee.

Balance of public benefit and detriment

57. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.

58. The ACCC considers that the Codes are likely to result in public benefits by providing a means for businesses to differentiate themselves through choosing to be bound by the Codes and providing consumers who value adherence to the

¹³ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

standards set out in the Codes with information to inform their decisions when purchasing termite management services.

59. The ACCC considers that the Codes are likely to result in little public detriment. Becoming a signatory to the Codes is voluntary and is not a requirement in order to offer pest management and/or termite management system installation services.
60. For the reasons outlined in this draft determination, the ACCC is satisfied that the proposed conduct is likely to result in a public benefit that would outweigh the likely public detriment, including the detriment constituted by any lessening of competition that would be likely to result.
61. Accordingly, the ACCC proposes to grant authorisation. The ACCC's draft determination is not an endorsement of AEPMA's Codes. Further, it should not be seen as advocating any particular standard for termite management.

Length of authorisation

62. The CCA allows the ACCC to grant authorisation for a limited period of time.¹⁴ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
63. In this instance, the ACCC proposes to grant authorisation for five years.

Draft determination

The application

64. Application A91578 was made using a Form B, under subsection 88(1A) of the CCA. Authorisation is sought to make and give effect to two voluntary codes of practice for termite management. The two codes are:
- AEPMA's Industry Code of Best Practice for Termite Management, and
 - AEPMA's Industry Code of Best Practice for Termite Management During Constructions.
65. Authorisation is sought as the proposed conduct may contain a cartel provision within the meaning of Division 1 of Part IV of the CCA (other than an exclusionary provision).
66. Subsection 90A(1) of the CCA requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

67. For the reasons outlined in this draft determination, the ACCC is satisfied, pursuant to sections 90(5A) and 90(5B) of the CCA, that in all the circumstances the proposed conduct for which authorisation is sought is likely to result in a public

¹⁴ Subsection 91(1).

benefit that would outweigh any likely detriment to the public constituted by any lessening of competition arising from the proposed conduct.

Conduct which the ACCC proposes to authorise

68. The ACCC proposes to grant authorisation A91578 to the proposed conduct described at paragraph 64.
69. The ACCC proposes to grant authorisation A91578 for five years.
70. Under section 88(10) of the CCA, the ACCC proposes to extend the authorisation to future parties to the proposed conduct.
71. This draft determination is made on 30 August 2017.

Next steps

72. The ACCC now seeks submissions in response to this draft determination. In addition, consistent with section 90A of the CCA, the Applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.