

Newspaper distribution and the Trade Practices Commission

Warren Pengilly examines the story so far and raises some concerns about the current inquiry

Over a period of years, commencing 1980, the Trade Practices Commission has granted authorisations on public benefit grounds to a number of distribution arrangements for newspapers and magazines in the various states of Australia. The first authorisation was in New South Wales on 7 February 1980. The same public benefit as found in New South Wales was confirmed in subsequent cases in Victoria in 1982, Tasmania in 1984 and 1985, Queensland in 1985 and Western Australia in 1986. Thus, the fundamental public benefit found in the New South Wales system in 1980 was carried through unquestioned until at least January 1986 when the Western Australian application was determined.

This point is important because statements have been made that the Commission is now concerned at the effect of old authorisations "granted in the 1970s". In fact, none of the authorisations were granted in the 1970s. The first was in 1980 and the principle upon which it was based was consistently confirmed, the latest confirmation being four years ago. Indeed, the South Australian determination in 1988 does not negate this principle - but more of this later.

Basis upon which prior agreements were authorised

The systems of distribution are different in the various states. The New South Wales system is here discussed as the authorisation precedent. In essence, this system involves the joint appointment by publishers of territorial newsagents which all publishers then agree to supply. The publishers also agree not to supply any other territorial newsagent. The territorial newsagent may appoint sub-agents and is required to appoint a sufficient number of sub-agents to enable his or her territory to be adequately serviced. The Newsagency Council (consisting of various publishers and the Newsagents Association) may appoint sub-agents in the event that the newsagent does not comply with his or her obligations in this regard.

The territorial newsagent undertakes home delivery of newspapers and magazines at a maximum price prescribed by the publishers. The newsagent also undertakes to

maintain an adequate display and range of publications. In practice, this means that newsagents stock a considerable number of publications which are regarded by many newsagents as uneconomic. A number of these publications without the system simply would not be stocked at retail level at all. These obligations are, in effect, the "quid pro quo" for the grant of the territorial monopoly.

There are some misunderstandings about the system and it is fair to say that even a number of newsagents do not understand it completely. The publishers agree only not to supply another "look alike" newsagency in the territory. There is nothing in the present agreement which prohibits the publishers from supplying other outlets such as supermarkets or cafes. Further, retail outlets at airports and railways are not covered by the arrangement. As stated, the territorial newsagent has the right to appoint sub-agents in his or her territory and the obligation to do so to ensure that his or her territory is adequately serviced.

The agreement is frequently characterised as a newsagents' agreement. It is not. It is a publishers' agreement. Should any publisher believe that the agreement is not in its best interest and in the interest of most efficient distribution of magazines and newspapers produced by it, then such publisher can, subject to some formalities, leave the arrangement and set up alternative distribution channels.

Why the prior agreements have been authorised

The arrangements have been authorised on the basis that they deliver the following public benefits:

1. The system ensures a wide range of newspapers and magazines stocked at a very low cost and distributed through a prompt and efficient home delivery service.
2. The system of obligatory home deliveries ensures widespread home distribution of newspapers and magazines. Only more limited home deliveries would continue in the absence of these restrictions.
3. The fixing of delivery fees for home deliveries is important because this

prevents home delivery obligations being avoided by excessive delivery charges being imposed.

4. The restriction that there be only one specialist accredited newsagent in each territory provides a secure financial base in return for which the newsagent ensures provision to all within its territories of prompt low cost home delivery service.
5. The specialist newsagency system provided by the arrangement is more likely to ensure convenient availability to the public of a wider range of publications than would otherwise be the case - particularly in outlying areas or other low population areas.

What is the Trade Practices Commission now doing?

The Trade Practices Commission changed its attitude somewhat to newspaper and magazine distribution when it evaluated the South Australian system. A final determination was made in relation to South Australia in November 1988. The South Australian determination did not illegalise territorial delivery monopolies. However, agents holding the territorial home delivery monopoly in South Australia hold a delivery monopoly only. Retail selling agents are appointed by publishers as a matter of individual publisher decision.

The Commission regards its South Australian decision as being important enough for it to re-assess the principles upon which its prior authorisations were based. It should be said, however, that the Commission was considering in South Australia a position which had historically developed there. Of the 198 delivery agents in South Australia at the time, 148 did not in fact also operate at the retail level though there was nothing to prevent their doing so if they wished.

One of the concerns of newsagents is that an historically different system operating in South Australia may be thought to set the "trend" nationally whereas the historic development of distribution systems in each State is quite different. Further, although the Commission regards the South Australian decision as some sort of trend setter, the reality is that, because of historical differ-

ences, South Australia was prepared to make certain concessions in order to obtain an authorisation in that State. Presumably, such concessions would not have been made in other States if they had been sought by the Commission when their authorisation applications were considered by it. This is because of the historically different distribution systems which have evolved in other states which are quite different to those in South Australia.

The Commission's "study"

The present inquiry by the Commission is stated to be a "study". The public stance of the Commission is that this study has nothing to do with the prior authorisations.

This writer has argued elsewhere (see *Bond Law Review*, June 1990) that the Trade Practices Commission does not have legal power to conduct its study. The Commission, not surprisingly, vigorously asserts to the contrary. Short of legal proceedings, this issue will not be resolved.

Notwithstanding assertions from the Trade Practices Commission that its study has nothing to do with prior authorisations, most newsagents have a clear perception to the contrary. Indeed, the Commission has done its best to state one thing and give the impression of another. While the Commission, from time to time, seems to assert that its study is a piece of pure research, it equally points out that it wishes to reform the industry. It further states that it will not hesitate to use its power to review or revoke prior authorisations "should it prove necessary". The Commission clearly wishes to obtain some sort of acceptable consensus through its study but it is obvious that, in the ultimate, the study is sanction driven. To try to separate the study from the market reality against which it is based is commercially unrealistic. The Commission, by its own statements, hardly encourages newsagents to make such a separation.

The Commission has a power to review prior authorisation if it appears to the Commission that there has been a material change of circumstances since the grant of the original authorisation. The Commission has not stated any material change of circumstances but its statements that it wishes to reform the industry can be consistent only with the view that it has the belief that there are changed circumstances and that, in the ultimate, it will seek to review prior authorisations.

What has happened?

The Commission has now produced an issues paper. In the view of the Australian Newsagents Federation, this issues paper

poses considerable difficulties. There are a number of assertions in it and, indeed, some of the so-called "issues" have clearly been couched in terms of prima facie conclusions.

Given this, the Australian Newsagents Federation sought access to all submissions lodged so that it could evaluate them and answer them on their merits. As many of the issues raised by the Trade Practices Commission involve factual evaluations, this was thought not unreasonable and, as the Newsagents Federation said, the complaints and submissions should be available to it as a matter of basic fairness if nothing else. The Commission has refused to make submissions available and has stated that it will defend Freedom of Information Act proceedings in relation to them.

The Commission believes it appropriate to divulge some information orally in negotiations but intends to disclose only such information as it thinks to be appropriate. Not surprisingly, the Newsagents Federation believes that this approach must be a matter which makes the Commission study necessarily incomplete because it is based on assertions which must remain untested.

The Present Position

The present position appears to be that various states will make their own submissions on the "Issues Paper". There are, of course, other possibilities such as political representations or legal action in relation either to the Commission's power to conduct its study or in relation to the Commission's denial of "natural justice" by declining to make submissions made to it available for comment.

Not surprisingly, there are also negotiations going on with the publishers. The view of the publishers appears to be that they wish to retain the benefits of the present system but they seek to change the system in various ways. There would appear to be no doubt that the Commission's inquiry is a matter which has attraction to the publishers as a vehicle to effect changes in the present system.

TPC rulings - an inhibition to change

One of the major inhibitions to change to date and for the future is the ruling of the Trade Practices Tribunal (the appellate body from the Commission on public benefit authorisation issues) that even the minutest of changes (even if an improvement on the present system) brings with it the possibility of a total re-argument of all public benefit issues. Further, if a subsequent authorisation application is not granted, this is, of itself, grounds for revocation of an already granted authorisation. Parties thus have no

incentive to seek authorisation for even beneficial changes as they do not want to incur the problems and expense of re-proving what was previously accepted nor to take the risk of having present protection removed in the event of an adverse decision in a subsequent case.

TPC rulings - an inhibition to change

Though the Tribunal states (and the Commission would undoubtedly agree) that arrangements should be updated from time to time, the Tribunal's ruling operates to preserve the status quo rather than encourage that change which is preached. If for no other reason than costs, the present system operates to discourage, rather than encourage, the updating and improvement of prior authorised arrangements. The ruling of the Trade Practices Tribunal that any amendments to authorised arrangements put all issues back into the pot for re-argument, even though public benefit had been previously established, resulted in proposals to update the newspaper distribution system in NSW and the ACT being withdrawn in 1986.

The Prognosis

The present system has some inadequacies which all acknowledge. If the present system is radically changed, however, the results must be uncertain. It seems that home delivery service must decrease and its costs increase - if not overall, then in a number of identifiable areas. From statistics as to variety of publications in retail outlets, it seems undoubted that Australia has a wider range of publications available in retail outlets than in all other comparable countries. The present arrangements clearly deliver the public benefits upon which their authorisations are based. Whether a re-structured system will achieve the same benefits, if the Commission forces any such radical restructuring, is at best problematic.

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