

**Review 2006 – Regulatory Functions – Codes of Practice conducted by the  
Independent Gambling Authority**

**Further Written Submissions**

1. The Australian Newsagents' Federation Limited (South Australian Branch) has made written and oral submissions to the Independent Gambling Authority in connection with the Review being carried out by the Authority of Codes of Practice under the *State Lotteries Act 1966*.
2. After making oral submissions at the public hearing on 23 May 2006, the Federation was invited by the Authority to address two issues arising from those submissions. These issues apparently relate to the submission that a Code of Practice providing for the withdrawal of Keno from non-licensed premises over a period of 5 years would amount to a prohibition and therefore be *ultra vires* the power of the Authority under sections 13B and 13C of the *State Lotteries Act*.
3. The particular issues that the Authority has invited the Federation to address are:
  - 3.1 whether such a Code of Practice would involve interference rather than a prohibition;
  - 3.2 if the Code of Practice is directed at the Lotteries Commission of South Australia, whether that would only involve a limitation on the locations at which Keno can be offered.
4. These further written submissions address these two issues.

***Interference or prohibition***

5. Whether or not a Code of Practice involves a prohibition rather than mere interference is a question of fact. In order to determine whether it would involve a prohibition, it is necessary to look to:
  - 5.1 the activity that is to be the subject of the Code; and
  - 5.2 what would be the practical effect of the Code on that activity.
6. The proposal that is the subject of Issue 10 of the Review contemplates that “*The codes applying to the Lotteries Commission should provide for the withdrawal of Keno from non-licensed premises (newsagencies, shopping centre kiosks, pharmacies &c) over a period of 5 years*”. The relevant activity, therefore, is the sale of entries in Keno in non-licensed premises.
7. In the present context, “withdrawal” would mean taking away or removal of the right of the Lotteries Commission to allow the sale of entries in Keno from non-licensed premises.
8. Further, it would have the effect of prohibiting a certain class of persons from being eligible for appointment by the Lotteries Commission as its agents (an issue that also bears on the related matter of contradicting powers that are provided under another Act).
9. Compliance with Codes of Practice that are promulgated under Sections 13B and 13C of the *State Lotteries Act* is mandatory for the Lotteries Commission and its agents. It would therefore become unlawful for the Lotteries Commission, or for members of the Federation acting as its agent, to sell entries in Keno.

10. The proposal that is the subject of Issue 10 of the review clearly involves a prohibition because it would make the activity of selling Keno in non-licensed premises unlawful.
11. For the reasons set out in previous submissions, the powers of the Authority in connection with the promulgation of Codes of Practice do not extend to prohibiting the sale of particular lotteries products from particular venues.
12. Nor do they extend to prohibiting the class of persons who the Lotteries Commission may appoint as its agents to conduct lotteries.

***The proposed Code of practice would not merely be a limitation on location***

13. A restriction on location can also amount to a prohibition.
14. In *Municipal Corporation of Toronto v Virgo* [1896] AC 88, the statutory power under review was a power for licensing, regulating and governing hawkers and others. The Corporation made a by-law that prohibited hawkers from plying their trade in an important part of the municipality. The House of Lords rejected the argument that because hawkers could still carry on their business in other streets, the by-law did not amount to a prohibition.
15. Similarly, in *Co-operative Brick Co Pty Ltd v Mayor &c of the City of Hawthorn* (1909) 9 CLR 301, the by-law under review prohibited the blasting of rock, stone, earth or timber within 100 yards of a street or 200 yards of dwelling. The by-law had been made pursuant to a statutory power to make by-laws for regulating or controlling quarrying or blasting operations. The High Court held that the relevant statutory power allowed the control and regulation but not the prohibition of

blasting and that the imposition of a restriction on blasting within a specified place amounted to an absolute prohibition. The by-law was held to be invalid.

16. In the present circumstances, the relevant activity is the sale of entries in Keno from non-licensed premises. The proposed Code of Practice would prohibit that activity. It is immaterial that the Code would continue to allow the sale of entries in Keno at other venues.
17. The fundamental question is the scope of the Authority's powers, which was the crux of the Federation's earlier submissions. That scope does not extend to regulating either the nature of premises at which entries in Keno can be sold, or the location of those premises.
18. If the Authority was empowered to regulate the location of sale (a proposition that is vigorously rejected) then it follows that a Code of Practice could require the withdrawal of Keno from any kind of premises. That is clearly beyond the scope of the Authority's powers.
19. If the Authority was empowered to regulate the persons who may be appointed as agents of the Lotteries Commission then, similarly, the relevant Acts should further provide for that power, which they do not.