Australian National
Retailers Association

Submission to

Inquiry into the Trade Practices Amendment

(Guaranteed Lowest Prices - Blacktown Amendment)

Bill 2009

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EXECUTIVE SUMMARY

The Australian National Retailers Association (ANRA) believes that the Trade Practices Amendment (Guaranteed Lowest Prices - Blacktown Amendment) Bill 2009 is entirely misconceived.

The Bill is intended to combat the operation of a practice referred to as "geographic price discrimination", which is extremely rare, if ever present, in the Australian commercial environment. Constraints on the possibility of such behaviour are already dealt with under s46(1) of the Trade Practices Act 1974.

Moreover, the Bill would impose economic distortions and require the introduction of cross-subsidisation of prices in regions and lead to inefficient pricing and to real economic costs. These would be borne most by lower income earners who rely on discounting to meet budget constraints.

The proposed amendments would make stock level management impossible, would require real time price uniformity at regional levels which is simply impractical, and would impose compliance obligations that would be impossible to satisfy. Furthermore, the ACCC would not be able to adequately monitor compliance and the additional regulatory risk that would flow from the proposals would undermine confidence in the current price monitoring arrangements.

The Bill if enacted would reduce competition in the Australian retail marketplace.

INTRODUCTION

The Australian National Retailers Association (ANRA) represents the leading national retailers in Australia, across a broad range of retail products and services. Members of the Association include Australia's most trusted household names in supermarket chains, department stores and speciality retailers.

ANRA members are:

Woolworths	McDonalds	Bunnings Group
Coles Group	Just Group	Best + Less
Franklins	David Jones	Angus and Robertson
Borders	Luxottica Australia	Harvey Norman
Reece	Spotlight	Forty Winks

In 2007 ANRA members employed about 450,000 Australians.

ANRA was formed in 2006 to ensure that governments, and the community, understand the contribution retailing makes to the national economy. The retail sector touches the lives of all Australians every day. An efficient, competitive retail sector generates tremendous consumer and economic benefits. ANRA seeks to ensure that public policy makers understand the retail sector and support policies which enhance the capacity of the sector to meet consumer needs.

THE INTENT OF THE BILL

The Trade Practices Amendment (Guaranteed Lowest Prices - Blacktown Amendment) Bill 2009 was introduced into the Senate by Senators Xenophon and Joyce. In their Second Reading Speeches they indicated that it is an attempt to deal with the perceived problem of anti-competitive pricing and to foster competition in the petrol retail marketing. However, it is clear from the Bill that it is intended to apply to all retail operations within a 35km area provided that the trading entity operates more than five domestic outlets.

It is not clear how the stated intent of the proponents of the Bill will actually be achieved by the proposed amendments to the Trade Practices Act 1974. It is extremely difficult to see how a requirement for a uniform minimum pricing structure in a geographical region could constitute a viable mechanism for dealing with the issue of predatory pricing. If geographic price discrimination was considered a real threat to competition then an appropriate policy approach would be to identify the strategic anti-competitive intent of the party engaging in aggressive discounting behaviour. The proposed amendments ignore the requirement to identify this strategic intent, and therefore are not in any way targeted at anti-competitive strategic pricing behaviour. S46(1) of the Trade Practices Act is broadly sufficient to deal with the remote possibility of any such behaviour. It is the view of ANRA that the proposed changes would in no way improve the capacity of the ACCC to deal with any anti-competitive pricing behaviour.

UNINTENDED ANTICOMPETITIVE OUTCOMES FROM THE BILL

ANRA's principle concerns with the amendments are that they would, if enacted, create fundamental distortions to normal pricing operations and embody significant economic costs. Far from enhancing competition the proposed amendments would be fundamentally anti-competitive.

In a competitive marketplace products are generally priced at their marginal cost. The market clears and output is maximised, at a price which generates normal market returns. In retail outlets sub-marginal cost pricing occurs when surplus stocks are held. Since future demand is often volatile and difficult to estimate, it is inevitable that some surplus stocks will be held from time to time especially if goods are perishable. In these cases sub-marginal cost pricing is an efficient market practice. Moreover, on occasions loss leading items will be priced below marginal costs as a promotional activity. This form of discounting is not anti-competitive but normal marketing practice.

The proposed amendments would eliminate the capacity of retailers, with more than five outlets, to price efficiently with a mind to current stock levels. Once delivered to a retail outlet the stock of products must be monitored by the outlet management. Short term excess stocks at the outlet must be reduced by discounting to prepare for new stock to be supplied. Geographic uniform pricing across a 35km region, would mean that in most areas of a major city all prices would have to be discounted in uniformity. Not only would this measure make it impossible to clear excess stock at one locality by targeted discounting, providing a discount at all localities would create stock shortages in many localities.

Efficient stock management would become impossible to manage on a day to day basis. The result is that the perishable items could not be really discounted but would have to be completely written off. The final result of such a measure would be to increase costs to retailers which would be passed on the consumers. Such uniform pricing in a region would drive up prices, especially grocery prices, and hurt average families who often rely on discounting to meet demand of the family budget. Those who are most likely to be adversely affected by the amendments are those who most need to make use of the discounting: lower income earners.

A further anti-competitive element of the proposed amendments is that it would distort pricing signals. Even within a geographic region of 35km there is scope for very dirrerent costs of retail operations. Land and overhead costs can be a function of a very specific location. Even small distances can produce very different costing structures. Such costs need to be included in the efficient pricing operations of a retail outlet. These amendments would not allow for recognition of such costs in the price, and would therefore fundamentally distort pricing. In low cost localities the price would be inflated and in higher cost localities it would be suppressed. These proposed amendments would mandate, and in fact necessitate, a cross-subsidisation within the 35km region. This would reduce the allocative efficiency in the market as a whole, lead to a less efficient allocation of economic resources, and reduced productivity.

REGULATORY BURDEN POTENTIALLY CREATED BY THE BILL

The Bill would impose significant and unnecessary regulatory burdens on business that is against the public interest and Government policy. The most obvious cost is that the proposed amendments make no specification of the time period under which the uniformity is to be assessed. In fact the amendments require that uniformity of the minimum prices be applied at all times. This would require permanent real time price monitoring. This does not now occur as outlet managers have discretion over discounting. These managers would be required to advise of all discounts on all products lines continuously. This would be highly labour intensive and require costly new software to be developed and brought online.

In reality, full compliance would not be practical at the outlet level. The risk of unintentional non-compliance would be unreasonably high. Regulators would also need to be engaged in a very labour intensive monitoring activity. The informational requirements on the regulator would be extreme. This not only has costs to the taxpayer but greatly increases the chance of regulatory failure and would undermine confidence in the price monitoring system. Compliance costs are passed on to the consumer and the taxpayer, and the risk of non-compliance would compromise the regulatory arrangements in a fundamental way.

What is predatory pricing?

The notion of 'predatory pricing' is a somewhat rare and almost theoretical form of pricing behaviour in contemporary economic understanding. It is generally understood in two ways.

The first possibility is a strategic decision to engage in a short term 'price war' that is intended to force a competitor out of the market or significantly damage the competitor. The outcome then sought is to raise the price to extract monopoly rents when the competitor withdraws from the market or is financially crippled as a result of the price war. While campaigns of heavy discounting are observed on occasions, it is highly uncertain whether such campaigns are intended to remove a competitor to create an effective monopoly rather than just capture market share through legitimate discounting. Unless the market is not contestable, due to the presence of sunk entry costs or other impediments, new entrants will enter the market and reduce the price to the competitive level. Consequently, in reasonably competitive markets this type of short run so called predatory pricing is usually costly and counterproductive as new market entrants will ensure that any subsequent monopoly pricing is not sustainable.

The second and more complex situation occurs when 'predatory pricing' becomes a form of complex gaming behaviour whereby one competitor seeks to signal a low pricing structure to competitors which is in fact a deception. In this case the intended result is that the competitor is discouraged and exits the market. It is a stylised theoretical outcome that is not observable in real economic behaviour. Moreover, this form of informational asymmetry appears very difficult to achieve and sustain.

This is the only way to establish that so called predatory pricing is not normal competitive price discounting is to identify an anti-competitive intention from the price discounter. This is exactly what the current law in Australia seeks to do. Section 46(1) of the Trade Practices Act prohibits businesses that have substantial market power from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into a market or deterring or preventing a person from engaging in competitive conduct in a market. In addition, section 46(1AA) prohibits businesses with a substantial share of a market, having regard to the number and size of its competitors in the market, from selling goods or services for a sustained period at a price below their relevant cost of supply. In both cases the specific intention of the entity engaging in strategic pricing behaviour is required to be ascertained.