

Tel: 61 2) 9585 0721
Fax: 61 2) 9579 2746
Email: info@narga.com.au

Suite 9, Level 2, 33 MacMahon Street
Hurstville NSW 2220
www.narga.com.au

19 April 2010

Mr John Hawkins
Committee Secretary
Senate Standing Committee on Economics
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Email: economics.sen@aph.gov.au

Dear Mr Hawkins,

Trade Practices Amendment (Australian Consumer law) Bill (No.2) 2010

NARGA represents the independent retail grocery sector comprising over 5000 stores employing more than 225,000 people.

The independent grocery sector now comprises less than 20% of the national grocery market, yet provides essential supplies to thousands of regional and remote communities, particularly those considered too small to be of interest to the major supermarket chains, as well as providing competitive pressure to those chains through larger stores in metropolitan and regional centres.

- NARGA supports the consolidation of federal and state consumer law under a single uniform Act.
- Our view is that the definition of 'consumer' under Part 2-3 – Unfair Contract terms, should be extended to small businesses dealing with relatively larger suppliers and farm businesses dealing with both suppliers and customers. These businesses should have access to a low cost process to address concerns they may have with a supplier, produce acquirer or landlord.

We note that Section 22 dealing with unconscionable conduct in business transactions already recognises that the power difference between large

corporations and smaller entities with whom they trade needs to be addressed. In our view recognition of this power differential needs to be extended to Part 2-3 dealing with unfair contract terms in a manner that constrains larger corporations from dictating unfair terms to smaller entities.

We also note that the explanatory memorandum to the Bill records the Australian Government's commitment to introduce separate legislation later this year to insert into the Act a statement of interpretive principles on unconscionable conduct in relation to small business.

This will be an important amendment given practices within the grocery sector identified by the ACCC during the Grocery Inquiry¹ which noted:

*The inquiry was provided with little evidence to substantiate allegations of buyer power being exercised in an anti-competitive or unconscionable manner. **Having said that, however, there were some complaints of buying power being exercised where the complainant appeared to be genuinely reluctant to give information to the ACCC out of concern about retribution if detail were provided to the ACCC and investigated.*** (p.325 – our emphasis)

and:

*Unless a supplier of a product has a powerful brand (or is able to build such a brand) which the MSCs [that is, Woolworths and Coles] perceive as important to a category, the terms that can be negotiated with the MSC will tend to favour the MSC and from the supplier's perspective may erode over time. This broad, but not universal, trend is reflected in the ACCC's analysis of supply terms over time. **Further, in some case, the MSCs were able to shift costs to suppliers and effectively unilaterally alter the terms on which goods are supplied, even after delivery.*** (p. 383 – our emphasis)

At the same time as the ACCC was conducting the Grocery Inquiry the UK Competition Commission (CC) was completing its inquiry into the UK grocery sector. As part of this inquiry and a previous inquiry into the sector the CC listed an extensive range of practices that may put suppliers (particularly smaller suppliers) at a disadvantage. An edited version appears below:

Practice	Description
Supplier qualification	Require suppliers to meet a set of conditions in order to be listed as a supplier to the chain. This could include the requirement to

¹ Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries, July 2008

	undertake a range of audits to be paid for by the supplier.
Slotting (shelf space) allowance	Require a supplier to pre-pay a substantial fee in order to be listed as a supplier and / or to range a product
Shelf placement	Requiring additional payment for better / more advantageous shelf placement
Requiring a 'best price' guarantee	The supplier must ensure that no other customer gets a lower price or better deal.
Range management fees	Requiring the supplier to pay for the management of their product range in store. ²
Category management support	Requiring suppliers to provide or pay for marketing or management support for their product or category
Charging suppliers for display space	Requires the supplier to pay additionally for display space. Can be dependent or independent of a promotion for the product
Asking the supplier to supply a particular product to that chain only	The supply to the chain of a specific product exclusively to that chain. Could apply to a specific pack size / type. (Does not apply to house brands.)
Demanding unreasonable or disproportionate discounts	Discounts are normally provided on the basis of volume, but retailers can and do ask for discounts beyond that justified on the basis of volume alone.

² This can also result in the supplier paying for additional staff located in the retailer's office.

Distribution discounts	Demanding a lower price on the basis of the chain acting as a wholesaler and distributor for the product ³
Demanding / expecting delivery of bonus product	In this case an additional discount is effected by a requirement to deliver more product than appears on the order / invoice. (e.g. a bonus of 15 to the dozen)
Debiting a supplier's invoice without consent or agreement	Charging a supplier costs additional to those agreed, and / or taking the amount from a payment due without consent
Requiring a level of marketing support in the form of 'specials' or recovery of marketing costs	Suppliers are asked to pay for the cost of selling the product at a special promotional price. They need to fund the difference in price, the cost of the price change and the cost of promoting the special ⁴
Asking for a specific level of promotional spend	Suppliers are asked to commit to a specific level of advertising and promotional support in any one year / season
Asking for retrospective discounts	Forcing the supplier to pay retrospective discounts on products already supplied ⁵
Applying a wastage formula that exaggerates the cost of wastage	The supplier is asked to compensate the retailer for product wastage, over and above the true level
Unsold stock	Requiring the supplier to take back

³ Although a discount is justified under these circumstances, it can be greater than the cost involved or the benefit to the supplier.

⁴ In most cases the lower price paid by the retailer applies for a period prior to the promotion and after the promotion. This means that for a short promotion the retailer may demand a lower price for a period of up to 8 or more weeks.

⁵ Can occur, for example, if the product was sold at a lower price to a competitor, or if sales did not meet expectations.

	or compensate for unsold stock
Refurbishment costs	Requiring suppliers to contribute to the cost of refurbishing 'their' section of a store.
Unreasonable payment terms	Demanding a longer than reasonable time to pay or paying at a time longer than agreed in the terms of the contract
Delisting or threatening delisting	Delisting a supplier's product without notice / compensation or threatening to do so in order to force better terms
Delisting products in favour of house brand	Replacing branded product with 'equivalent' house brand, even though the branded product has built up the market demand for that item.
Over-ordering goods on special	Using the promotional period to order goods at a reduced price, which are then sold at full price
Requiring suppliers to pay for pack changes	Changing packaging specifications such as size, type, label and requiring the supplier to pay for the cost of the change and acquisition of the new bar code.
Demanding changes in distribution packaging	Asking the supplier to change distribution packaging specifically for that chain (e.g. the move to 'shelf ready' packaging), even though the format may not suit other chains / retailers.
Parallel importing of former suppliers' products	Using the brand loyalty built up by a supplier, and then undercutting him by importing a similar product / pack

These are also the practices that form part of the relationship between major grocery retailers and suppliers here. Whether or not they are legal in some cases depends, among other factors, on the relative strength of the parties. However, the ACCC has noted that over time a suppliers terms of trade are eroded and cost or risk of doing business is moved from retailer to supplier.

Whilst larger suppliers have some capacity to resist the pressures inherent in these practices, smaller entities do not.

The end result is that increasingly the major chains gain a price or cost advantage over other competitors in the sector, an advantage that is a direct result of their ability to dictate terms because of their size and market share. i.e. the competitive environment within the sector is damaged.

This issue has been addressed by some jurisdiction by identifying, either within the legislation or in binding guidelines under the relevant Act issued by the regulator or in the Act itself, a list of practices seen as unconscionable or unfair. Japan has for example designated a series of practices by 'Large-Scale Retailers' trading with their suppliers as unfair. These deal with some of the range of practices detailed above. A copy of the notification by the Japanese Fair Trade Commission is attached as Appendix A.

We note that the proposed amendment to the Act introduces a range of remedies which apply in the main to consumers. Small business suppliers do have access to these remedies in the case of unconscionable conduct. The question is, given their dependence on the larger retailers, are they in a position to take advantage of them, or would they need more help from a more active regulator?

This also suggests that the definition of unconscionable conduct together with a set of interpretive principles is of critical concern if this section of the Act is going to be of assistance to small business suppliers.

Whilst the proposed amendment to the Trade Practices Act 1974 is a move in the right direction, a basic question remains and that is 'Is it working?' In other words is the competition environment better today than it was when the Act was first introduced.

In the retail grocery sector we have seen the market become hyper-concentrated over that period and none of the recent changes to the Act have improved the regulatory framework in a way that can arrest that trend.

This means that under the current regulatory regime the retail grocery market (and other markets) can only become even more concentrated and less competitive over time.

If the Australian Government's policy is that competition is to be protected or enhanced, the question is then how that is to be achieved. Does the Act need further amendment or should the regulator gain further means of enforcing it?

Please contact us should you require further details.

Yours sincerely

Ken Henrick
Chief Executive Officer