Law Council
OF AUSTRALIA

Via email **economics.sen@aph.gov.au**

Mr John Hawkins
Committee Secretary
Senate Economics Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Hawkins

**Inquiry into the Trade Practices Amendment (Guaranteed Lowest Prices - Blacktown Amendment) Bill 2009**

I have pleasure in enclosing a submission which has been prepared by the Trade Practices Committee of the Business Law Section of the Law Council of Australia.

This submission has been approved by the Business Law Section. Owing to time constraints, the submission has not been reviewed by the Directors of the Law Council of Australia Limited.

If you have any questions in relation to the submission, in the first instance, please contact the Chair of the Trade Practices Committee, Dave Poddar on (02) 9296 2281.

Yours sincerely

W Grant

Bill Grant
Secretary - General

11 September 2009

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# Submission on the *Inquiry into the Trade Practices Amendment (Guaranteed Lowest Prices - Blacktown Amendment) Bill 2009*

Submission by the Trade Practices Committee of the Business Law Section of the Law Council of Australia

11 September 2009

**SUBMISSION TO SENATE ECONOMICS COMMITTEE BY THE TRADE PRACTICES COMMITTEE OF THE BUSINESS LAW SECTION OF THE LAW COUNCIL OF AUSTRALIA**

## 1. Introduction

The Law Council of Australia is the peak national body representing the legal profession in Australia.

The Trade Practices Committee of the Business Law Section of the Law Council of Australia (**Committee**) is pleased to offer the following comments on the *Trade Practices Amendment (Guaranteed Lowest Prices - Blacktown Amendment) Bill* 2009 (**Blacktown Bill**). The Blacktown Bill has been introduced as a private Members Bill by Senator Barnaby Joyce and Senator Nick Xenophon to amend the *Trade Practices Act 1974* (Cth) (**Act**) to prohibit geographic price discrimination.

## 2. Executive summary of submission

The Committee agrees that it is necessary to prohibit predatory pricing behaviour. However, the Blacktown Bill is not directed to that end and is likely itself to have an anti-competitive effect. First, there are existing legislative provisions intended to capture such conduct. Second, the Blacktown Bill is significantly flawed, at both the conceptual and practical level.

In our view, the most significant conceptual flaws of the Blacktown Bill (and its proposed prohibition of geographic price discrimination) are that it:

- is inconsistent with the recommendations of several Australian competition and regulatory review committees which have considered price discrimination issues in Australia in detail, as well as being inconsistent with the approach taken in comparable jurisdictions;
- fails to distinguish between pro-competitive and anti-competitive price discounting and so will cause a chilling of beneficial price competition, to the detriment of consumers; and
- is likely to have adverse effects on the less advantaged members of society.

Due to the likely adverse impact on consumers, including those less advantaged, the Committee opposes the Blacktown Bill. We have explained below in some detail the negative implications of the Bill and the reasoning behind our view.

## 3. Background

### 3.1 Proposed Bill

On 24 June 2009, Senator Barnaby Joyce and Senator Nick Xenophon introduced the Blacktown Bill. The stated purpose of the Blacktown Bill is to "*reduce predatory pricing by requiring corporations to offer and supply products at consistent prices across adjacent markets, and for related purposes*".

The Blacktown Bill proposes to introduce a new section 46C into the Act which establishes a *'Guaranteed Lowest Prices Rule'* (**Price Rule**). This Price Rule would require corporations, at a retail outlet operated by the corporation (or a related entity), to:

- supply or offer to supply a particular product to a consumer;
- at a price being the lowest price the product is supplied or offered for supply at the same time at any retail outlet operated by the corporation (or a related entity) under the same trading name within a distance of 35 kilometres.

The Blacktown Bill would further require that any discount, rebate, credit, allowance or 'special deal' offered by the corporation or a related entity to consumers in relation to product(s) to which the rule applies must also be offered at each retail outlet covered by the Price Rule. Similarly, any surcharge imposed on consumers in relation to product(s) to which the rule applies would also need to be imposed (on the same terms and conditions) at each retail outlet covered by the Price Rule.

The Blacktown Bill proposes to create some exclusions from the Price Rule.

- First, it provides that the price of product(s) at genuine factory, warehouse, or clearance outlets is to be disregarded, along with the prices marked down because the outlet is genuinely closing down; the product is imminently perishable; the product or its packaging is damaged; the product is to be permanently removed from the range of products supplied or the product has deteriorated in value as a result of being on display.

- Second, it provides that the Price Rule does not apply to a corporation where that corporation or a related entity operates five retail outlets or less in Australia under the same trading name.

### 3.2 History of legislative prohibitions against price discrimination in Australia

Prior to 1995, the Act contained a specific provision which prohibited price discrimination in certain circumstances (including potentially, 'geographic' price discrimination). Section 49(1) relevantly provided that:

> *49(1) A corporation shall not, in trade or commerce, discriminate between purchasers of goods of like grade and quality in relation to*
>
> *(a) the prices charged for the goods;*
>
> *(b) any discounts, allowances, rebates or credits given or allowed in relation to the supply of the goods;*
>
> *(c) the provision of services in respect of the goods;*
>
> (d) *the making of payments for services provided in respect of the goods*
>
> *if the discrimination is of such magnitude or is of such a recurring or systematic character that it has or is likely to have the effect of substantially lessening competition in a market for goods, being a market in which the corporation supplies, or those persons supply, goods.*

Subsection 49(2) contained two defences to price discrimination, which applied where:

- the discrimination made only reasonable allowance for differences in the cost or likely cost of manufacture, distribution, sale or delivery resulting from the differing places to which, methods by which or quantities in which the goods are supplied to the purchasers; or

- the discrimination was constituted by the doing of an act in good faith to meet a price or benefit offered by a competitor of the supplier.

Following its enactment, the operation and utility of section 49 were considered by the Swanson Committee (1976), the Blunt Committee (1979) and the Hilmer Committee (1993). The merits of reintroducing a price discrimination prohibition (section 49 having been repealed in 1995) were also considered by the Dawson Committee (2003).

Each of these expert committees recommended the repeal of section 49 and rejected the insertion of a specific price discrimination provision of any kind into the Act. Broadly, the principal reasons given were that:

- price discrimination is generally more pro-competitive than anti-competitive, and so enhances economic efficiency and therefore community welfare;
- by limiting price flexibility, competition is reduced; and
- anti-competitive price discrimination is adequately addressed by other provisions of the Act, namely sections 45, 46 and 47.

The Hilmer Committee concluded that the purpose of section 49 was not for the promotion of competition but for the protection of small business. Yet the Hilmer Committee also found that no significant benefits were conferred on small businesses by section 49.[1]

Section 49 was repealed in 1995 in accordance with recommendations made by the Hilmer Committee in its report. The Second Reading Speech for the amending legislation, given by Senator Crowley, noted:

> *The prohibition against price discrimination is to be repealed as the provision is largely redundant, and the conduct it is designed to address is adequately covered by other provisions of the Act.*

The most recent inquiry into price discrimination was undertaken in 2008 by the Australian Competition and Consumer Commission (ACCC) in relation to retail pricing for standard groceries. In its report, the ACCC considered and recommended against the reintroduction of the former section 49 or any equivalent, stating that the current provisions of the Act were adequate to address anti-competitive price discrimination.[2] It further stated that geographic price discrimination encourages local competition and is generally not anti-competitive.[3]

### 3.3 Comparable approaches to price discrimination

While comparable overseas jurisdictions have taken differing approaches to regulating price discrimination, as a general proposition there is limited support for specific legislative provisions dealing with price discrimination (geographic or otherwise).

The United States has, and Canada used to have, specific prohibitions on price discrimination. However, in the case of the United States, those prohibitions have been highly criticised as being overly complex and preventing price competition and, in practice, actions alleging anti-competitive price discrimination conduct have been brought under different provisions. In Canada, the prohibition was recently repealed.

In New Zealand, the United Kingdom and the EU, there are no specific legislative provisions dealing with price discrimination, and actions for anti-competitive price discrimination are instead pursued under their respective prohibitions on misuse of market power.

Please see the **Annexure** for further detail on the situations in various overseas jurisdictions.

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1 Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy* (AGPS, Canberra, 1993), 80.
2 ACCC, *Inquiry into the Competitiveness of Retail Prices for Standard Groceries* (ACCC, 2008), 444.
3 Ibid.

## 4. Conceptual and practical flaws

### 4.1 No identifiable benefits

According to reports, the 'Blacktown Bill' resulted from a concern that a major oil company had been discounting at only one or two of its service stations with the alleged purpose or effect of either forcing an independent retailer out of the market or deterring the independent retailer from competing on price in the future.

If the oil company's conduct in this situation had the alleged anti-competitive purpose or effect, the concern is a legitimate competition policy issue. However, it is submitted that the proposed prohibition of geographic price discrimination pursuant to the Blacktown Bill is not an appropriate or effective way to address this concern. It follows that no identifiable benefit would result from the Blacktown Bill being enacted. Rather, as explained in this section, the Bill has serious conceptual and practical flaws and is likely to give rise to significant consumer detriment.

### 4.2 Conceptual flaws with the proposal

In the Committee's view, a prohibition on geographic price discrimination – as proposed by the Blacktown Bill – has two key conceptual flaws.

*Discourages pro-competitive discounting / reduction in price competition*

The Blacktown Bill fails to distinguish between pro-competitive (or beneficial) price discounting and anti-competitive discounting. In doing so, it would discourage pro-competitive price discounting and reduce price competition.

If enacted, the Blacktown Bill would raise the costs to a firm of cutting its prices in a particular location, since the law would require that these lower prices are extended to all other locations (within a 35 km radius), even though the firm would otherwise not have lowered its prices in those other locations.

Thus, rather than extending lower prices to locations that otherwise may not have benefited from them, the Bill is more likely to discourage firms from price discounting at any of their outlets. Because it raises the cost to a firm of reducing its prices at any particular location, it will discourage pro-competitive price discounting and so have the effect of chilling price competition. For example, it would deter firms from lowering prices to meet or respond to price competition from other suppliers in the particular locality. Some retailers would be prevented from matching a quote by selectively discounting products. An offer of matching or beating a competitor's price - either in a particular case or as a general policy - would not be permitted.

It is clear that competition and consumers would be worse off as a result.

Price competition is the simplest, quickest and most flexible element of competition in the economy. It should remain so, especially for consumer products where profit margins are often very small and the windows of opportunity for profit can open and close very quickly. The Blacktown Bill would unnecessarily and undesirably complicate and slow down what should be the least regulated competitive behaviour available to all businesses, large and small. Such a regulatory intrusion into the competitive behaviour of businesses is both unwarranted and would have unintended consequences for both those businesses and consumers.

Indeed, the Blacktown Bill would have a much greater negative effect than the earlier price discrimination prohibition in section 49 because section 49 only prohibited price discrimination which was likely to substantially lessen competition. This Bill has no such limitation. There is also no proposed defence to a contravention of section 46C, in contrast with the previous section 49, which contained defences regarding differences in costs of manufacture, sale or delivery etc or where discrimination occurred in good faith to meet price or other benefits offered by a competitor.

*Adverse effects on less well-off*

Firms charge different prices in different locations for a range of reasons, including because the cost of supply varies from one place to another (for example, due to variations in land value, rent, transport costs and presentation costs).

As a result, firms will offer lower prices in less advantaged socio-economic areas. Any prohibition on geographic price discrimination would penalise consumers living in these areas because it would be uneconomic for firms to extend the lower prices in those locations to other locations. This would be likely to discourage firms from lowering their prices in any location, resulting in considerable detriment to consumers – in particular, those consumers in less advantaged socio-economic areas which may have previously had the benefit of lower prices.

### 4.3 Practical flaws with the proposal

At a practical level, the Blacktown Bill also suffers from a failure to apply uniformly across firms. The Blacktown Bill has been drafted to apply only to retailers of products who operate more than five retail outlets trading under the same name in Australia. Also, it only applies in respect of outlets which are within a distance of 35 kilometres from one another. The amendment would not apply where:

- the outlets are 'operated' by different corporations which are not related to each other (even if the outlets might all be owned legally and/or beneficially by the one corporation);
- the operator has no more than 5 outlets in Australia;
- the outlets are more than 35 kilometres apart;
- the outlets are trading under different 'trading names';
- an outlet is a 'genuine factory, warehouse or clearance' outlet; or
- the outlets are wholesale outlets and not retail outlets.

There is no settled legal or commercial meaning for any of the expressions 'genuine factory warehouse or clearance outlet' or 'wholesale outlet'. A law which creates a *per se* offence that depends upon the use of such uncertain criteria is a bad law, and is likely to have negative net social utility.

Further, by applying only to some retailers but not others, and only in some geographic areas but not others, the Blacktown Bill would create uncertainty and confusion for retail businesses and consumers. It would substantially add to the compliance costs of doing business in Australia.

It may also create opportunities for targeted avoidance. For example, if a retailer changed the trading names of its outlets so that they were not the same – e.g. if service stations were trading as 'BP Blacktown', 'BP Seven Hills', 'BP Baulkham Hills' – they might avoid the operation of the proposed prohibition. Alternatively, if the retail outlets were operated by franchisees or other entities not related to each other, they would also avoid the operation of the proposed prohibition.

### 4.4 Preferred conceptual framework

The most desirable feature of competition is driving prices down for the benefit of consumers. Competition laws therefore need to distinguish between pro-competitive discounting and anti-competitive discounting on a case by case basis. In formulating new laws which target pricing conduct, great care should be taken not to inadvertently discourage or stifle pro-competitive discounting.

This was recognised by each of the expert Committees referred to earlier which reviewed the former section 49 of the Act when they concluded, separately but unanimously, that a specific provision in the Act which deals with price discrimination was **not** required. They concluded price discrimination is generally pro-competitive and that other provisions of the Act are able to prevent price discrimination that is anti-competitive.

While section 46 of the Act, which prohibits misuse of market power, does not prohibit price discrimination as such, its terms capture anti-competitive price discrimination. The section prohibits a corporation with a substantial degree of power or a substantial share in a market using that power or share for an anti-competitive purpose. As recognised by the Dawson Committee, market power is necessary for anti-competitive price discrimination as competitors would otherwise be able to undermine the pricing structure.[4] The purpose element of section 46 also allows pro-competitive price discrimination to be distinguished from anti-competitive price discrimination.

The stated purpose of the Blacktown Bill is a reduction in predatory pricing. In the Committee's view, having regard to the existing provisions of the Act (in particular section 46), there is no compelling reason to introduce an additional legislative mechanism to regulate this type of conduct, particularly given the likelihood of significant consumer detriment arising if the Blacktown Bill were enacted.

If you have any questions in relation to this submission, in the first instance please contact the Committee Chair, Dave Poddar, on [02] 0206 2281.

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[4] Dawson Report, 93.

## Annexure

### New Zealand

New Zealand does not have a specific legislative provision dealing with price discrimination. Actions for anti-competitive price discrimination are pursued under section 36 of the *Commerce Act 1986* (equivalent to section 46 of the Act).

### United Kingdom

The *Competition Act 1998* has no specific prohibition on price discrimination. However, sections 2 and 18, which deal with agreements preventing competition and abuse of dominant position respectively, specifically state that these provisions may apply to conduct that applies 'dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'.

### European Union

The EU has similar provisions as the United Kingdom's *Competition Act* 1998 in articles 81 and 82 of the *European Commission Treaty*. Article 81 prohibits agreements which may affect trade between Member States and which have the object or effect of preventing, restricting or distorting competition. Article 82 prohibits abuse of a dominant position in the market where trade may be affected between Member States. As noted in the Dawson Committee's report, while price discrimination conduct might be captured by these provisions, most cases of such behaviour generally only brought where there is alleged predatory pricing.[5]

### Canada

Until 2009, section 50 of Canada's *Competition Act* contained a criminal price discrimination provision, which made it an offence to provide a discount or other allowance to one purchaser over another, engage in geographical price discrimination or sell products at unreasonably low prices with the effect of substantially lessening competition or eliminating a competitor.

This provision was repealed in early 2009. Price discrimination and geographic price discrimination were considered to be beneficial to competition, and any anti-competitive conduct could be more appropriately handled under the civil provisions of the legislation dealing with abuse of dominant position (sections 78 and 79).

### United States

The *Robinson-Patman Act 1936* prohibits price discrimination which has the effect of substantially lessening competition or creating a monopoly. It also contains a defence where the discrimination is an allowance for the cost of manufacture, sale or delivery.

As noted in the ACCC's report on its inquiry into grocery pricing, the *Robinson-Patman Act 1936* has been highly criticised for being overly complex and preventing price competition. It has also been widely used against small businesses, thereby undermining the intended purpose of directing the provisions at large retailers. Although the *Robinson-Patman Act 1936* is still in force, the Federal Trade Commission now generally handles anti-competitive price discrimination under section 2 of the *Sherman Act 1890* (which prohibits monopolizing any part of trade or commerce).

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[5] Dawson Report, Chapter 4.