



SENATE ECONOMIC REFERENCE COMMITTEE
INQUIRY INTO THE EFFECTIVENESS OF THE
TRADE PRACTICES ACT 1974
IN PROTECTING SMALL BUSINESS

SUPPLEMENTARY
SUBMISSION ON BEHALF OF THE
INDEPENDENT LIQUOR GROUP

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INTRODUCTION

Further to our substantive submission to the Committee, ILG submits for the Committee's consideration a supplementary submission that outlines our concerns and a response to other party's submissions and evidence tendered in hearings.

ILG has particular concern over the misuse of market power and advocates clearer definitions of this particular section of the Act in order to provide guidance to business and the courts.

Attention also needs to be focused on predatory pricing activities in a market and when below-cost pricing is anti-competitive.

ILG also supports proposals for manufactures, suppliers and retailers to submit trading terms to the ACCC.

SECTION 46 - MISUSE OF MARKET POWER

ILG maintains that the Boral decision has resulted in a weakening of the Parliament's intention with this particular section of the Act.

Some parties have suggested that a preferable option is to wait as more case law develops.

It is well recognised that the development of case law is a lengthy process, and it is more than likely that further decisions will follow the precedent clearly set in the Boral decision.

It is therefore imperative that Parliament pass legislation that effectively validates the Parliament's original intent in relation to the misuse of market power.

It is recognised by both large and small business that tightening the Act is likely to lead to changes in the behaviour of companies in ensuring they stay within the bounds of the Act.

Having clear guidelines on what is unacceptable corporate behaviour will encourage business to ensure their operations, and business plans are compliant.

This will provide a significant improvement to small businesses that are not in a position to litigate in relation to the misuse of market power due to a number of factors, not the least being cost.

It was recognised in ILG's appearance before the Committee that there exist circumstances in relation to the exclusion of independents from shopping centre developments that may be in breach of Section 46 (1)(b) of the Act.

ILG submits that there are many circumstances in which a breach of the Act may occur but which remain unchallenged due to the expense and time for a small business to take the appropriate steps and seek remedial action or reluctance on the part of the ACCC to initiate action.

It is, therefore, imperative that an improved definition of the misuse of market power is determined so that major retailers, manufacturers and suppliers act in an appropriate manner.

Business will generally take proactive measures to avoid coming to the attention of the ACCC.

This will have an immediate impact on reducing the likelihood of large business potentially breaching the Act. Presently, however, most are aware that smaller businesses are not in a position to contest the breach due to the inherent nature of small businesses being time poor and not willing to invest money into uncertain cases.

ILG submits that it is unlikely any adverse unintended consequences would occur as a result of placing definitions in the Act and that consumers would not be disadvantaged from such measures being introduced.

BELOW COST PRICING

ILG submits that it would be beneficial for the courts to have direction on what constitutes below-cost pricing so that more accurate decisions can be made as to when below-cost pricing becomes an attempt to remove a competitor from the market.

Below-cost pricing needs to be more clearly defined as being for short periods. ILG also supports further definitions of what is predatory behaviour in using below-cost pricing to cause the elimination of a competitor.

PREDATORY PRICING

Evidence was given during appearances that the Boral decision to reduce prices was not predatory because they did not have substantial market power and were, therefore, not in a position to influence prices across the market.

ILG contends that the very nature of competitive markets is for the market to follow the lowest price on offer even if it is not financially viable.

It appears to be a well-established practice for markets with a small number of large competitors to reduce prices below cost for a sustained period until a smaller, more innovative competitor is either removed from the market or taken over by a large player. There is sufficient examples to suggest that this is the case even in the absence of formal communications between the larger competitors.

It is imperative that courts are given improved definitions and guidelines in the Act to ensure they have an appreciation of when pricing below avoidable cost is a misuse of market power.

BETTER PRICES

ILG contests claims made by Coles Myer in the Senate Hearings that they do not generally obtain better prices than independent operators when purchasing.

ILG submits that the actual price charged for product may be a case of 'like terms for a like deal', however, the large chains are provided with much greater ancillary support than independents.

This support may be in the form of advertising assistance so that the chains are able to obtain greater coverage and drive sales or through certain marketing and promotional activities only available to the chains.

ILG is not in a position to provide clear evidence of the terms differing between independents and chains, yet prima facia evidence would provide a very strong suggestion that this does occur.

It is also likely that suppliers and manufacturers would not be agreeable to voluntarily providing this information to a regulator.

The invoice for particular goods does not always disclose the full pricing story.

ILG strongly supports the proposal of the Tasmanian Independent Retailers that all manufacturers, suppliers and retail firms annually disclose their trading terms to the ACCC on a confidential basis.

It is imperative that such a proposal includes all aspects of trading terms including promotional and marketing activities as well as rebates, and is not simply limited to price alone. It is also important that such a proposal, if enacted, be subject to scrutiny and review so that methods of failing to disclose information are captured.

This would immediately provide a significant levelling in the playing field and allow greater competition across all markets.

LICENSING OBJECTIONS

Coles Myer asserted that it is simply common industry practice to object to any new liquor licence being sought by a potential entrant into the market and argued that objections occurred for commercial reasons to:

- a.) keep a potential competitor out of the market; or
- b.) to restrict new licences applications to on-premise sales only so that it does not compete with another operators off-premise business

This purely commercial rationale in keeping out or curtailing competition is not what industry evidence suggests.

Objections have historically been lodged by licensees because they feel that there already exists an adequate number of liquor licences to provide alcohol in a safe and responsible manner to the community they serve.

The official records of objections being upheld are based on the community not "needing" a new licence not because an operator seeks to keep or drive away competition to protect shareholder return.