

9 July 2007

Committee Secretary
Senate Economics Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Secretary,

Inquiry into the Provisions of the Trade Practices Legislation Amendment Bill (No.1) 2007 & Trade Practices Amendment (Predatory Pricing) Bill 2007.

The Post Office Agents Association Limited (POAAL) submits the attached paper for consideration by the Senate Economics Committee for the above Inquiry.

POAAL represents the business interests of thousands of small business people. They include the owner/operators (Licensees) of almost 3000 Licensed Post Offices (LPOs). LPOs form almost 80% of Australia's network of post offices. POAAL members are also made up from the 5,000 Mail Contractors who deliver mail and parcels under contract to Australia Post.

Although Licensees operate under a formal agreement with Australia Post, they have often had need to rely on the protection of the existing legislative framework. POAAL as an independent industry body has been instrumental in providing them support through dispute resolution processes and has a number of observations that might assist the Committee to ensure that the principles of the Trade Practices Act are more effectively achieved.

A number of recent concerns on behalf of Licensees and Mail Contractors have been the subject of communications with the Australian Competition and Consumer Commission (ACCC). Over this period POAAL has developed a sound relationship with the ACCC and has the utmost respect for the professionalism and commitment of its officers. There are, however, some limitations with the current legislation which we believe could restrict the ACCC from achieving fairness for small business people.

Our concerns also relate to the poor access for small business owners to the remedies provided in the Act and subsidiary legislation.

It is also fair to say that POAAL has a good working relationship with Australia Post and that AP for the most part has the intention in dealing properly and fairly with its small business partners. However, it is not uncommon for decisions to be taken or omissions to be made by that GBE, which can have the effect of severely disadvantaging Licensees or Mail Contractors. As small business people they have very limited capacity to absorb the financial implications of the errors or omissions of their principal.

Without access to an independent industry representative body and a set of principles associated with fair behaviour as codified in the Trade Practices Act many small entrepreneurs would be driven from their business. It is therefore opportune for the effectiveness of that legislation to be reviewed and we proffer some suggestions to assist that process.

If the Committee would like any clarification, POAAL representatives would be available for discussion.

Yours faithfully,



Ian Kerr
CEO



POAAL

Post Office Agents Association Limited
ACN 006 382 314

SUBMISSION FOR THE

SENATE ECONOMICS COMMITTEE

IN REGARD TO THE

INQUIRY INTO THE PROVISIONS OF THE TRADE PRACTICES

LEGISLATION AMENDMENT BILL (NO.1) 2007

&

TRADE PRACTICES AMENDMENT (PREDATORY PRICING) BILL

2007

July 2007

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BACKGROUND

1. The Post Office Agents Association Limited (POAAL) welcomes the Australian Senate's initiative to examine the effectiveness of the Trade Practices Act 1974 and its objective of protecting Small Businesses.
2. POAAL represents the nearly 3,000 small business owners of the Licensed Post Office network that comprise 80% of the Australia Post retail network. Our members are also drawn from the approximately 5,000 mail contractors who deliver mail and parcels to Australia Post customers across the country together with around 650 Community Postal/Mail Agents. (Further information on the background of our organisation may be found at the attachment to this submission or on our web-site www.poaal.com.au).
3. Our members are all small business owner/operators and it is estimated that they have invested at least one billion dollars in the Postal business alone. They are the front line for the services provided to Australian communities especially in regional, rural and remote areas of Australia.
4. In contrast, they work for one of the largest and most powerful organisations in Australia. Australia Post is a Government Business Enterprise (GBE) regularly ranked as one of the top ten employers and amongst the top six financial performers in the country. It has a huge management infrastructure with powerful resources at its disposal to ensure that its interests are protected and its position within the business community sustained.
5. As such, POAAL has a high level of interest on behalf of its members in the effectiveness of the Trade Practices Act as it relates to the protection of these small business operators and, by extension, the communities they serve.

TRADE PRACTICES LEGISLATION AMENDMENT BILL (NO.1) 2007

6. We note that the provisions of the bill introduce three aspects of reform relating to:
 - a. the creation of a second Deputy Chairperson position at the ACCC;
 - b. the misuse of market power (amendments to section 46); and
 - c. unconscionable conduct (amendments to section 51AC).
7. Our submission deals with these in turn.

Second Deputy Chairman of the ACCC

8. POAAL supports the creation of a second Deputy Chairperson position for the ACCC to be filled by a candidate who is experienced in small business matters.
9. POAAL has a strong relationship with the ACCC. It has relied on guidance and the operation of the ACCC's powers to attend to a number of matters affecting the small business operators in the postal and related industries. POAAL also acknowledges that the nature of issues and challenges confronted by small business owners will demand special skills, experience and abilities to enable this person to address the range of matters affecting small business owners in the Australian community.
10. While the present Act deals with the objective of avoiding unconscionable conduct, it has been the observation of POAAL that this is not always achieved in the current framework. This is especially so in situations where the supervisory authorities appear to be under-resourced to "prevent" the action rather than just attempt to remedy the problem once it has occurred. By then it is often too late for the small business operator.
11. A person with the necessary experience and authority, such as a Deputy Chairman within the ACCC, should enhance the ability of the Commission to give effect to these current and emerging issues. POAAL would like the Government's commitment such that the resources of the Commission will be sufficient to ensure the Act is appropriately enforced.

Misuse of Market Power

12. The Australian market place has characteristics that differ to those of the international market places of Europe and North America. Our small population has seen a tradition of relying on either government or organisations that have developed over many generations to provide the country's major enterprises. Examples are Telstra, which relied on the government to establish and maintain, and major Australian enterprises such as Myer and Coles which have established themselves over many years. These and foreign enterprises come with capital backing and financial resources which dwarf the capacity of many local enterprises. While market dominance may have been encouraged in a bygone era, today the country requires a regulatory environment to ensure that the 'market power' of these enterprises is not operating to the detriment of the current needs of the Australia community.

13. POAAL supports the proposed bill as it takes a further step to refine the issues of market power. It notes the need for appropriate protection to be available to those emerging market players which may otherwise be driven out of business or face circumstances where continued investment in wealth producing activities are limited.

Coordinated market power

14. POAAL supports the recommended changes to section 46 so that a court may take into account a firm's interactions with corporations not in the same corporate group or related to the firm. While POAAL does not suspect that this type of activity is prevalent, especially in the postal industry, it is important to establish the standards of behaviour that major corporations are required to observe from the outset.

'Substantial degree of power' is not a threshold of substantial control

15. POAAL supports the principle in the Bill which acknowledges that a corporation can have 'a substantial degree of power in a market' and that section 46 can apply to situations where several corporations operating in the same market each have a substantial degree of power in that market.
16. POAAL also supports the notion that a court in examining these matters should not be limited to taking these matters into account in deciding whether a corporation has a substantial degree of power in a market.

Below-cost pricing

17. In this area the matter has received substantial review by the ACCC under its recent powers in the Australian Postal Corporations Act. The ACCC reported recently on the use of Australia Post's reserved services and whether it was cross subsidising its competitive services with business from its "monopoly." Within the Postal Industry there currently seems to be sufficient review and authority to examine and publicly report on this type of issue.
18. POAAL is in agreement however, with the broader principles expressed in the bill that will operate in the community as a whole.

Unconscionable conduct

19. The issue which is of most interest to POAAL in this area of reform is that of unilateral variation of contracts. It is noted that new provisions include

lists which are tailored for business consumers that either supply or acquire the goods or services in question.

20. POAAL supports the principle that the unilateral variation of contracts or agreements may be an indication that unconscionable conduct has occurred or will occur and that there is a need for a court to consider such action when determining whether there has been a breach of section 51AC. POAAL has encountered instances where Australia Post has changed wording in agreements without the proper written consent of the Licensee.
21. POAAL has had numerous discussions with Australia Post in this area both when advocating systems to deal with differences between Australia Post and licensees and over individual conflicts where POAAL has represented its members. Examples include attempts by Australia Post local managers to vary a contract during or in anticipation of the sale of a Licensed Post Office. Such variations for example might include changing the diagram that accompanies a Licensee Agreement to show the whole of the premises in a LPO. This effectively gives control of the premises and its whole operation to Australia Post. In most cases small Licensees need to operate their business in conjunction with other services; e.g. general store, gifts, stationery, newsagency, pharmacy, etc, to make them viable. To have this flexibility arbitrarily removed reduces the capital value of the business and forces the incoming Licensee to submit to the control of Australia Post in everything they undertake.
22. Often these issues have been able to be resolved once they are notified to POAAL and the issues represented on behalf of the member. However the proposed changes to the legislation would place greater accountability on Australia Post to ensure that its officers did not engage in such behaviour.
23. There are other acts which POAAL represents as unconscionable conduct but on which the legislation appears silent. POAAL recommends that the bill be further developed to ensure that these are also addressed in this review. They include the following.
 - a. **Refusal to negotiate** on new arrangements when there is a clear obligation to do so. Like most big businesses, Australia Post changes its methods of operation to meet emerging customer needs or to respond to the opportunities of new technology etc. Changes to the skill levels and requirements of its Licensees must also change yet Australia Post is reluctant to negotiate to new terms or consideration for these changes. Refusing to negotiate on such issues represents a situation that a small business person is powerless to deal with alone. A requirement to consult and

negotiate at an early stage on such changes would provide better balance in the business relationship.

- b. **Failure to provide advice on entitlements.** Australia Post has a series of systems that must be used by Licensees to claim the commissions and fees that are available to them. When Australia Post fails to identify these to Licensees or it is clear that appropriate claims are not being made this is at the risk of the Licensee. An attempt to make enquires or to request past payments once these errors are identified are often met with resistance by local managers of the Licensees.
- c. **Failure to respond.** Licensees are obliged to respond to correspondence from Australia Post over issues of the LPO operation that may be at variance with the Agreement or to established procedures. Australia Post however, is not similarly obliged to respond to enquiries from Licensees whose complaints of service, supply or enquiries over fees due can be ignored or dismissed without proper examination. This issue can include the failure to consistently supply products to Licensees in the quantity ordered or on the anticipated date or Australia Post's failure to provide products to Licensees which are the subject of promotional campaigns by Australia Post.
- d. **Dispute resolution.** The financial resources of large organisations such as Australia Post enable it to withstand delays or the costs of mediation or arbitration services. A tactic that becomes attractive to local Australia Post managers is to draw out responses and to intimate that a dispute will cause a breach of the relations. These problems occur with small business operators that do not have the protection of a dispute resolution procedure or the Franchising Code of Conduct's dispute resolution coverage. In the Postal Industry the most prominent examples of lack of dispute resolution coverage are mail contractors. POAAL has had to deal with situations where Australia Post has required mail contractors to:-
 - i. absorb additional costs outside of those specified in their agreed contract;
 - ii. deliver to more points and over greater distances than specified in tender documents; and
 - iii. bear the cost of fuel increases even though the contract provides for adjustment.
- e. Mail Contractors have a limited dispute resolution procedure in the General Conditions of their contract with Australia Post. No mediation is available, only discussion with Australia Post and if this

is unsuccessful, the only remaining option is arbitration. This option is not pursued because of relative cost and the fear of being labelled a “trouble-maker”. It is also virtually impossible for the Mail Contractor to have time away from their business to attend to resolving disputes.

- f. **Use of Agreement to restrict trade.** This occurs in situations where Licensees wish to expand a range of the Australia Post services such as Private Letter Boxes or premium services that are attractive to local businesses such as various Express Post services (eg 3 kg large bags and 5 kg jumbo express satchels). By restricting or prohibiting access to these services, the local Licensee is unable to respond to a need for the local community or to expand to the benefit of its business operations and customers.
- g. **Sale of products in competition with its own agents.** An example in this area is the sale of Postpak, a proprietary brand of packing material. Australia Post sells this product in bulk directly to customers at the same price it sells it to Licensees, putting Licensees, who have had to order, pay for and store the product, at a huge disadvantage.
- h. **Transfer of business.** Clients secured and serviced at an LPO are sometimes transferred by Australia Post managers to its corporate operations. This is often accompanied by an additional discount to lure the client into dealing directly with Australia Post rather than continuing to be provided with products and services through the LPO. Having established the business, the Licensee then loses the business, the commissions and possibly flow-on business to Australia Post. This can also be to the detriment of the customer, who may find that under a new agreement with Australia Post they are restricted as to where they can lodge mail or purchase Australia Post products or services.
- i. **Action that prevents business from being undertaken.** Examples in this category include failure to provide basic amenities for mail contractors such as lockers and parking space at Mail Centres so that they may reasonably undertake their contract.
- j. **Misleading information.** An example would be the provision of incorrect information in mail service tender documentation regarding, for example, the number of delivery points or distances to be travelled to perform the mail service. This causes the contractor to underprice the service at tender and then either perform the contract at a loss or surrender the contract to the financial distress of the operator.

24. While the above list is extensive it is not exhaustive and indicates that a range of actions by large corporations can have a series deleterious effect on small business operators over and above those listed in the proposed bill. POAAL would like some consideration to either specific prohibition associated with these types of actions and/or some general omnibus provisions that discourage or penalise such behaviour.

TRADE PRACTICES AMENDMENT (PREDATORY PRICING) BILL 2007

25. We note the main thrust of the bill introduced by Senator Fielding relates to groceries, fuel and pharmaceutical and toiletry products. POAAL however, argues that other concentrated markets where small businesses have similar problems. The Postal industry is potentially one.
 26. As Senator Fielding notes in his second reading speech 97 per cent of businesses in Australia are small businesses, with fewer than 20 employees. Post Offices Licensees certainly fall into this category. They also represent over 80% of the Australia Post retail network and are the main source of access by the community of Australia. They provide an especially important service in rural and remote communities. These in turn support the viability of those communities and their ability to operate in a modern world.
 27. Licensees as small business operators in the postal industry deserve the benefit of the same principles suggested by Senator Fielding. In our view the principles in the bill should be expressed more broadly rather than being limited to the market sectors given special attention in this Bill.
 28. For example, the test outlined by Senator Fielding with respect to a corporation having either a “substantial degree of power in a market” or “substantial financial power” can clearly relate to Australia Post. In the circumstances the “effects test”, should apply to that industry to ensure that Australia Post is also careful in how it uses that power and that it does not substantially lessen competition. We note Senator Fielding’s comment that the ACCC supported an effects test in evidence to the 2004 Senate Committee inquiry.
 29. POAAL believes that the effects test should be extended to include the effect of acting to the detriment of small businesses. This is a broader test than just offering goods or services at unreasonably low prices, with the purpose or effect of substantially lessening competition. Many actions other than the introduction of artificially low prices can have this effect.
 30. In this regard POAAL prefers the broader protections proposed in the Part IV of the Trade Practices Legislation Amendment Bill (No.1) 2007 which promotes competition by prohibiting conduct that may lessen competition. Section 46 in part IV prohibits corporations from misusing substantial market power to harm or eliminate competitors or competition generally. Part IVA of the act prohibits corporations from engaging in conduct that is, in all the circumstances, unconscionable.
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BACKGROUND ON THE POST OFFICE AGENTS ASSOCIATION LIMITED

Our Organisation

The Post Office Agents Association Limited (POAAL) is the independent industry organisation that has a strong and long term commitment to look after the business interests of the owner/operators of Licensed Post Offices, Community Postal Agents (CPAs) Community Mail Agents (CMAs) and Australia Post Mail Contractors.

There are almost 3000 Licensed Post Offices (LPOs) in Australia, and they form almost 80% of the retail post office network. Each is privately owned and over half of them are situated in country areas. There are 640 CPAs and 135 CMAs in Australia, usually in sparsely-populated areas.

POAAL was formed almost 70 years ago, when owner/operators of post offices recognised that they needed the protection, support and collective strength of an association to effectively look after their needs, especially those who operate small or remotely located post offices. Many LPOs are operated in conjunction with another business: eg, general store, and all would now sell at least some products other than postal.

POAAL has six State Branches, each with a State Chairman and Committee. Committee members come from all parts of each State, and work in a voluntary capacity, bringing experience, dedication and loyalty to their work of assisting their colleagues.

POAAL also regularly briefs Ministers, Shadow Ministers, Government Departments, the ACCC, and others. POAAL regularly makes submissions to Government inquiries and is constantly alert to new opportunities as well as to changes which may impact on the business interests of its members.

A Short History of the POAAL Organisation

The Post Office Agents Association Limited (POAAL) started life as the Non-Official Postmasters Association in 1939. It was formed by a group of Non-Official Postmasters (i.e. owner/operators of non-Corporate PMG post offices) who banded together to share information, to negotiate and talk with the PMG, and to improve the lot of themselves and their colleagues.

Non-Official Postmasters and Postmistresses not only operated post offices, but a large percentage of them operated as Telephone Office-Keepers - that is, they operated a manual telephone exchange and were expected to be on call 24 hours a day, 7 days a week.

By the time the PMG had split into Australia Post and Telecom in 1975, telephone exchanges in Australia were well on the way to becoming automatic. As a result, the number of Non-Official Postmasters and Postmistresses reduced dramatically as small post offices that were in existence mainly to supply telephone services became uneconomic to operate when automation arrived.

The name of the owner/operators of non-official post offices was changed to Post Office Agents to reflect the changed circumstances, and the fact that they were now agents of the principal, Australia Post.

The Non-Official Postmasters Association became the Post Office Agents Association Limited - a company limited by guarantee.

In early 1993, the Licensed Post Office Agreement replaced the former Post Office Agency Agreement. The LPO Agreement took almost three years of negotiation and discussions between Australia Post and POAAL but helped bring the retail sector of the postal industry into modern business practices. It was a massive undertaking for POAAL, severely extending its operational and financial resources. It required a large number of volunteers in all States to assist the National Negotiating Team.

Despite constant pressure and the massive resources employed by AP, the POAAL team persisted in its determination to obtain a fair and equitable agreement for Post Office Agents - one which would not only be easy to understand, but be fair, flexible, and stand the test of time. A dispute resolution process was proposed by POAAL as part of the LPO Agreement, to protect Licensees' investment, and this was eventually agreed to by Australia Post.

Glossary of Terms Used

ACCC	Australian Competition and Consumer Commission
AP	Australia Post
GBE	Government Business Enterprise
CMA	Community Mail Agent/Agency
CPA	Community Postal Agent/Agency
LPO	Licensed Post Office
PMG	Postmaster Generals Department
POAAL	Post Office Agents Association Limited
