Australian National Retailers Association (ANRA)

Submission to the Senate Standing Committee on Economics Inquiry into the Provisions of the Trade Practices Legislation Bill (No 1) 2007 and the Trade Practices Amendment (Predatory Pricing) Bill 2007

July 2007

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Contents

Executive Summary

The retail sector in Australia is a critical part of the domestic economy. It contributes 6% to Australian's economic output, represents nearly 300,000 enterprises and employs 1.5 million people, making it the most significant employer in the country. Large retailers play a very significant role in the retail sector and in the overall economy. Access Economics estimates that large retailers comprise 0.2% of all retail establishments but generate 51.4% of total retail revenue, 39.9% of value added and employ 49.7% of workers in the retail sector.

The food retail sector specifically in Australia, is very diverse with over 50 million customer transactions per week at a wide selection of around 30,000 food retail outlets from general stores to independent supermarkets to larger supermarket chains to bakeries to markets to butchers and convenience stores – usually all within close proximity. Australia's large retailers support the need for appropriate regulation to protect and enhance the wider business environment. However, current proposed amendments to the Trade Practices Act 1974 would have very specific and negative impacts on the retail sector. These amendments would:

- damage the capacity of this country's largest employers to prosper and support hundreds of thousands of Australian workers and their families engaged in the fresh food and grocery sector

- create a new and onerous level of 'red tape' for small businesses and independent operators in the retail sector and make them an unanticipated target of ill-conceived new laws

- ultimately mean higher prices at the checkout for Australian shoppers and further pressure on the family budget

The current discussion of a need to change and complicate the current legislation is supported by a small section of the media and retailers represented by lobby groups such as the National Association of Retail Grocers of Australia [NARGA].

The large retailers share an over-riding concern that consumers get the best merchandise at the best price, all the time. There is a real need to address several very basic misconceptions that some sections of the media and stakeholders promote as fact about pricing, with little supporting data, these include:

- That the large retailers are forcing prices up and down to disadvantage small operators and "muscle" them out of the market.

- That consumers are being ‘ripped off’ by the major supermarkets
- That Australia is far more expensive and that our food prices have increased radically compared to other OECD countries

The truth of the matter is that approximately 96% of food retailers in Australia are small businesses and this is also the same number of small retailers per head of population as there were in 1976, over 30 years ago. In fact according to recently released research completed by PriceWaterhouseCoopers for NARGA, the small and independent retail sector is booming in the current economic and legislative climate.

Pricing at discounted levels is not ‘ predatory pricing’ regardless of the size of the retailer or the level of discounts. This is a common practice across all retailing sectors. It benefits consumers and keeps businesses competitive. If it were otherwise, all retail prices would, eventually, be set at the level of the least efficient operator in the market.

From the consumers perspective, in relative terms, food is cheaper now than it was 26 years ago. ANRA commissioned a study of the affordability of groceries and its impact on Australian families. The study shows Australians had to do just 229 minutes of work in order to buy a typical basket of groceries in 2006, compared to 28 years ago in 1978 when 250 minutes of work was required. In the last 10 years (1996-2006) the amount of work required to buy the basket of groceries remained remarkably stable.

When comparing price levels for consumer goods and services among OECD countries Australia ranks about in the middle. For some countries, the food price differences with Australia reflect differences in overall macroeconomic settings. That is, food price inflation will grow at a rate somewhat similar to overall inflation, and some countries have been running a lower inflation rate than Australia (hence, their food price growth is lower). Other factors having an impact on prices include: the weather, petrol prices and the application of the GST.

This paper comments on the changes to the TPA proposed by the Government in its Trade Practices Legislation Amendment Bill (No.1) 2007 and those proposed by Senator Fielding in the Trade Practices Amendment (Predatory Pricing) Bill 2007.

Although we would suggest that great caution must be exercised in any move to increase the regulatory burden in this area, it is the impact of the Trade Practices Amendment (Predatory Pricing) Bill 2007 proposed by Senator Fielding which is of the greater concern.

We would urge the Committee to have in the forefront of their consideration - what will give Australian shoppers and families, the widest choice and the lowest prices?

The extraordinary contribution that the larger retailers make to the overall health of the Australian economy must be a critical issue when new and potentially burdensome regulation is being considered.

Put simply the status quo has stimulated a vibrant competitive market with new small and independent players entering the market place each year. It has also seen prices that in relative terms are better now than they were as a percentage of income, 30 years ago and which place Australia in the middle of the ladder of OECD countries for grocery prices.

Any legislative framework considered should encourage business to be more efficient and attuned to the needs of consumers.

Retail and the Australian Economy – a snapshot of the sector

"The retail sector represents a sizeable component of the Australian economy. An efficient, dynamic retail sector will have a significant bearing on the nation's productivity, the well-being of a large portion of the workforce and the ability of consumers to conveniently select and purchase a wide range of products needed for their everyday lives. Accordingly, it is vital that policy-makers devote attention to the retail sector and ensure that there is supportive regulatory environment free from unnecessary impediments. "

The Economic Significance of the Retail Sector, Access Economics, March 2007
(report commissioned by ANRA)

The retail sector contributes 6% to Australian's economic output and employs 1.5 million people or nearly 15% of the national workforce. In 2005-06, the Australian retail industry:

- comprised 329,142 establishments and 295,000 enterprises;
- generated value added of $56.6 billion, or 6.2% of value added by all industries;
- employed 1.5 million full-time and part-time workers (15% of the national total) with total wages amounting to $39.2 billion; and
- generated $7.1 billion in exports (3.6% of the national total) compared to $2.7 billion in imports (1.3% of national total).

Retail is the largest employer in the economy. It is the largest employer of part-time workers and fourth largest employer of full-time workers (after the manufacturing, construction and property/business services sectors). It is a particularly important employer of young people, providing flexible first time job options, providing half of all jobs for those aged 15-19. For married women re-entering the workforce retail is one of the leading career choices, accounting for 14% of all jobs held by married women.

The sector has been growing as a sector substantially over the last decade and it represents a diverse mix of large medium and small businesses providing choice and convenience to Australian shoppers.

The robust growth recorded by the retail sector over the past four years is a reflection of the solid economic performance for the whole economy. Retail turnover in real terms increased at an average annual pace of 3.8% on the back of steady increases in household disposable incomes.

The following table summarises its performance over this period and clearly highlights the growth of new players in the marketplace.

Retail Sector Performance, 2001-02 to 2005-06

	2001-02	2002-03	2003-04	2004-05	2005-06	Average growth rate (01-02 to 05-06)
Retail turnover ($m)	225,965	232,767	244,555	253,776	262,567	3.8%
Value added ($m)	47,460	49,455	52,259	54,535	56,618	4.4%
No. of establishments	299,114	305,621	313,447	321,635	329,142	2.4%
No. of enterprises	252,000	261,000	273,479	284,000	295,000	3.9%
Employment	1,377,775	1,439,225	1,439,250	1,489,400	1,499,600	2.1%
Exports ($m)	5,400	5,273	6,260	6,069	7,065	6.7%
Imports ($m)	2,197	2,189	2,269	2,458	2,749	5.6%
Total wages ($m)	33,274	36,045	35,230	37,654	39,177	4.1%

Access Economics report for ANRA, March 2007

The Productivity Commission has observed that the retail sector has made “an important contribution to Australia’s productivity growth”.

Large retailers play a very significant role in the retail sector and in the overall economy. Access Economics estimates that large retailers comprise 0.2% of all retail establishments but generate **51.4% of total retail revenue**, **39.9% of value added** and **employ 49.7% of workers** in the retail sector.

"The steady improvement in productivity in retailing appears to have been driven by a combination of factors including:

- *the introduction of advanced technology which has facilitated significant improvements in stock management, quality assurance and processing of transactions;*
- *the streamlining of the supply chain for many products (especially in fresh food);*
- *the entry of new players and delivery mechanisms (such as sales over the Internet) that have exerted competitive pressure throughout retailing; and the ability of large retailers to rationalise operations and take advantage of scale economies."*

Access Economics report for ANRA, March 2007

Access Economics have also observed that improvement in productivity in the retail sector appears to have been primarily driven by investments and innovations by the large retailers who clearly have the wherewithal to invest in the new technologies and practices that have been instrumental to the whole sector being increasingly efficient.

Myths and the Fresh Food Marketplace

Reality of Current Pricing

Work, lifestyles and attitudes have changed considerably over the last 20 years and consumers demand a modern shopping environment that reflects this - in terms of convenience, choice, quality, range, price, location and accessibility. Supermarkets have been able to adapt well to the ever increasing demands of today's consumers.

Recently, many inaccurate and misleading claims have been made particularly in the media about the major Australian supermarket chains suggesting:

- they are using 'predatory pricing' tactics to muscle smaller stores in the area out of business after which they increase prices.
- consumers are being 'exploited' where fruit and vegetable prices at the same supermarket chain vary significantly between different store locations/branches, dependent on the level of competition.
- Retail food prices in Australian supermarkets have increased ahead of the rate of inflation and are much more expensive than other developed countries.

The true position is that these claims are based on, at best, a misunderstanding of the Australian food retail market and at worst, a deliberate attempt to mislead consumers into believing they are being exploited and that they are not benefiting from a vigorous and strong competitive marketplace.

Pricing at discounted levels is not 'predatory pricing', regardless of the size of the retailer or the level of discounts. This is a common practice across all retailing sectors. It benefits consumers and keeps businesses competitive. If it were otherwise, all retail prices would, eventually, be set at the level of the least efficient operator in the market.

Historic Pricing Profile

In relative terms, food is cheaper now than it was 26 years ago. ANRA commissioned a study of the affordability of groceries and its impact on Australian families. The study shows Australians had to do just 229 minutes of work in order to buy a typical basket of groceries in 2006, compared to 28 years ago in 1978 when 250 minutes of work was required. In the last 10 years (1996-2006) the amount of work required to buy the basket of groceries remained remarkably stable:

Year	1978	1996	1998	2000	2002	2004	2005	2006
Minutes worked	250	231.1	230	229.3	232.3	226.6	227.2	229.5

ANRA Minutes Worked Analysis 1978-2006, June 2007

Throughout the years, many essentials in the grocery basket actually dropped in price:

Item	2002 price	2004 price
Milk 1L	$1.53	$1.49
Bread (680g)	$2.61	$2.51
Sausages (1kg)	$5.46	$5.32
Bacon (250pkt)	$3.95	$3.85
Sugar (2kg)	$2.35	$2.22
Tea (250g)	$3.83	$3.61

ANRA Minutes Worked Analysis June 2007

Over the same time, income per capita in Australia rose by 83.0%, or 3.9% a year on average. Income growth has been well in excess of price growth over this period, so consumers have more disposable income to spend on food than they did 26 years ago. They are also much better off in terms of the quality and range and the facilities and trading hours convenience than previously.

The 2006 figures were skewed by the effect of the drought on fresh food and dairy produce. The drought meant the increase in the cost of the basket of goods in 2006 (6.0%) was higher than the increase in earnings for the same period (4.9%). Naturally, this lead to an increase in the work required to buy the groceries.

Nevertheless, supermarkets have generally kept increases at a lower rate than income growth. The competitive nature of the retail sector in Australia also puts strong downward pressure on prices. The major Australian supermarkets operate on a margin (before interest and tax – EBIT) of **3.5%** to **5%**. Their equivalents in the UK and Europe operate on margins of **6%** to **7%** and in the USA the margins are 7% to 8%. The Australian supermarkets' margins are also considerably less than most Australian banks and telecommunication companies at 25%.

Market Breakdown

The food retail sector in Australia is very diverse with over 50 million customer transactions per week at around 30,000 food retail outlets. Customers have a choice of shopping at general stores, independent supermarkets, larger supermarket chains, bakeries, markets, butchers and convenience stores – usually all within close proximity.

Of the 30,000 food retailers, approximately 96% of these are small businesses – this is the same percentage of small businesses as in the economy as a whole. This is also the same number of small retailers per head of population as there were in 1976, over 30 years ago.

ANRA estimates the market share amongst the larger players is as follows:

Company	**Percentage**
Woolworths	29%
Coles/BiLo	23%
Metcash/IGA Metcash/Other independent supermarkets	6% 3%
Franklins	1%
ALDI	3%
All other food retailers	33%

Despite The level of supermarket concentration in Australia having a significantly greater geographic and demographic spread, it has about the same number of supermarket chains per head of population as occurs elsewhere in the world. Data from Canada, the Netherlands and regions of the US such as California and Florida indicates there is about one major supermarket chain for every six million people which seems to be the required critical mass. Australia's 21 million people support three major groups, Woolworths, Coles and Metcash/IGA.

While small business lobbying groups argue that supermarkets are becoming so popular that smaller stores can't compete and are going out of business, the reality is that both small and larger food retailers are complementary in the delivery of a broad range of retail offers to consumers. The recent PriceWaterhouseCoopers report, "The Economic contribution of small to medium-sized grocery retailers to the Australian Economy, with a particular focus on Western Australia (June 2007)", commissioned by National Association of Retail Grocers of Australia [NARGA] the representative body for the independent grocers and Metcash, indicates that independent supermarkets are growing their market share.

Research completed by Dimasi Research indicates that independent fruit and vegetable shops sell around 50% of all fruit and vegetables, and independent butchers sell over 50% of all meat sold in Australia.

Factors Influencing Australian Food Prices

There have been a number of upstream or supply side factors which have pushed up the price of food in Australia. These include:

The weather - in recent years, the ongoing drought and significant weather events such as the recent floods in regional Victoria and Cyclone Larry have had more impact on food prices than has previously been the case. There has been a lack of supply of a range of produce on regular occasions which has pushed up the price of that produce.

Constrained product substitution - Australia's quarantine laws and distance from other markets restrict its ability to import substitute produce to compensate for local scarcity. Cyclone Larry decimated local banana production, and radically increased prices. However low cost imports were not permitted in line with Australia's quarantine restrictions.

International demand can also exert upward pressure on domestic prices. This was the case with meat following the outbreak of mad cow disease in the US, which led to the banning of US imports into Japan, creating an increased demand for Australian beef.

Petrol prices - With world oil prices more than tripling since 1999, fuel is a significant cost in Australia to suppliers of food because of the large distances which need to be travelled to service the continent. Fuel would account for a more significant share of costs to suppliers of food in Australia than the equivalent in Europe.

GST - while most food is exempt from the GST, it does not apply to all food. Restaurant meals, takeaway food and a number of packaged items all incur GST and so saw a notable one-off price jump when the GST was introduced. All up, food prices rose by **6.6%** in the year after the GST was introduced, which is double average price growth. This makes a contribution to the gap between food price growth in Australia and other countries.

Overseas Price Comparison

OECD data shows food prices in Australia have grown by 67.8% over the 26 year period from 1990 to 2006. This equates to 3.3% per year on average. Australia's food price growth is higher than in many other countries - for example: US (45.9%), UK (31.7%), Canada (30.6%). However it is not possible to directly compare food price increases between Australia and other countries, without taking into account the vast differences in geographic and retail landscapes, GDP and economic performance.

When comparing price levels for consumer goods and services among OECD countries Australia ranks about in the middle. Other indexes, such as the Penn World table and The Economist Big Mac Index, rank Australia in a similar mid-way position.

For some countries, the food price differences with Australia reflect differences in overall macroeconomic settings. That is, food price inflation will grow at a rate somewhat similar to overall inflation, and some countries have been running a lower inflation rate than Australia (hence, their food price growth is lower). For example:

Overall food price growth in **France** was 32.5%, or 1.8% average a year (compared with 2.5% average in Australia). The lower rate of inflation reflects relatively weak demand growth (France has generally had slower GDP growth and a higher unemployment rate than Australia).

Overall price growth in **Japan** was just 6.5%, or 0.4% a year on average. But Japan spent most of the 1990s in recession and is still battling to kick-start its economy.

Overall price growth in **Canada** was 39.3%, or 2.1% a year on average. Canada generally runs a tighter monetary policy than in Australia – the Canadian inflation target is 2%, while in Australia it is 2-3% over the course of the cycle.

A consequence of a tighter monetary policy is that GDP growth can be lower as the tight monetary policy can constrain demand as well as prices. Overall real GDP growth in Australia from 1990 to 2006 averaged 3.3% a year; in **Canada** over the same period it averaged 2.8% a year. The implication is that Australia runs a relatively faster growing economy, though there is a slightly higher risk on price growth; Canada has a slower growing economy (relative to Australia), but with more certainty on prices.

Parts of the agriculture sector in **Europe, Japan and the US** are also heavily subsidised. That means that price pressures, such as due to drought or cyclones, don't necessarily affect the retail price for food - they affect government revenues instead. The EU and the US are larger markets, which have ready access to alternative sources of supply, enabling them to compensate for scarcity in one market.

Small Business in the Retail Landscape

A robust retail environment is made up of a mix of large and small retailers and the healthy interaction between larger retailers and their small business suppliers. Far from suffering the current environment, small business is booming. According to the recent PWC report for NARGA, small and independent grocers are thriving in the current climate and under existing competition rules.

> *"Over 1,209 stores were operating under the IGA banner, the largest independent retailing banner group as of mid 2006. Over 39,000 square metres of selling space were added to the IGA brand by the opening of 44 new stores in 2005/06. More than 48 major refurbishments were completed during the year and the completion of 76 new independent stores is believed to be undergoing consideration for the end of the financial year 2007. FoodWorks, the other large independent banner group and Metcash's largest client also rebranded 350 stores in the financial year 2006. During the next 12 months it is estimated by Metcash that 37 new FoodWorks stores will be opened and 44 stores refurbished and expanded.*
>
> *According to Metcash, sales increased by 6.3% for comparable IGA stores and by 6% for comparable FoodWorks stores in financial year 2006. …Metcash, the major supplier for these SMEs, highlighted in their most recent Annual Report that the strong growth in independent retailers was underpinned by a strong eastern seaboard television campaign and local areas marketing."*
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> PriceWaterhouseCoopers report for NARGA, June 2007

While larger retailers benefit from economies of scale, small businesses do have a number of natural advantages over their larger competitors. For example, smaller businesses are able to adapt to changes in consumer preferences more quickly than the larger chains. They also benefit from a more flexible cost base, particularly labour, which is one of the highest input costs in food retailing. Smaller specialist food stores also carry a larger range of products in their category than the larger supermarkets which are limited by space and cost to be less extensive in each product range. There is also a raft of Federal and State assistance packages and exemptions for small business to reduce costs and the regulatory burden.

Far from the picture of constant warfare between large and small operators which the media like to portray, there are a range of symbiotic and critical small/large relationships which add to the retail experience for consumers. For example, shopping centres have a mix of the major supermarkets and small retailers.

Major supermarkets are usually the anchor tenant that draws large numbers of customers which benefit the small businesses. The small businesses in turn provide the diversity consumers prefer. The major chains also work with many small businesses throughout the supply chain and they actively promote local produce from small suppliers.

Beyond the rhetoric about the impact of large retail chains on regional communities it is vital to remember that over 50% of supermarkets' fresh food is sourced directly from the thousands of Australian farmers and growers who have the longer term certainty of contracted arrangements for supply. This is a promise that small retailers are unlikely to be able to make to hardworking growers and suppliers, particularly in regional communities.

Impact of the Proposed Amendments to the Trade Practices Act 1974 [Cth].

ANRA represents the largest retailers in Australia including the major supermarket chains. These companies are strong and committed supporters of the principles of competition and fair trading policy enshrined in the Trade Practices Act 1974 [Cth] (TPA).

This paper comments on the changes to the TPA proposed by the Government in its Trade Practices Legislation Amendment Bill (No.1) 2007 and those proposed by Senator Fielding in the Trade Practices Amendment (Predatory Pricing) Bill 2007.

While ANRA suggests that caution must be exercised in any move to increase the regulatory burden in this area, it is the impact of the Trade Practices Amendment (Predatory Pricing) Bill 2007 proposed by Senator Fielding that is of the greater concern.

The amendments proposed by Senator Fielding are misconceived and therefore would distort the original intent of the TPA relating to the preservation and promotion of competition, in the best interests of all Australian consumers and is therefore of great concern.

Those amendments would have the presumably unintentional effect of entrenching in legislation specific business sector interests at the expense of the welfare of consumers and the wider business community, both big and small. Importantly, the assumption that there is a genuine case for change is unsupportable, given that the independent supermarkets and small speciality food retailers are growing in number and market share in the existing marketplace.

The Australian Bureau of Statistics indicates that the number of independent supermarkets and grocery stores has remained relatively constant over the last 10 years at approximately 4,400 with an increase in the retail food market share from 15% 18 months ago to around 19% today. The continued presence of a significant number of independents demonstrates that they are successfully competing in the retail sector.

Competition delivers customers lower prices and products and services more attuned to their needs. A regulatory framework that inhibits competition and is a disincentive for retailers to search for greater efficiency must ultimately increase prices.

The irony is that the almost certain effect of both proposed amendments may be to create an environment where retail prices are kept artificially high – a practice which, under a different guise known as resale price maintenance, is absolutely prohibited under the TPA.

Key Concerns with the Proposed Amendments

The Fielding Amendments - Targeting Specific Product Sectors

The Bill proposed by Senator Fielding (the Fielding Amendments) targets only the markets for "groceries", "sale of fuel" and pharmaceutical products, proprietary medicines and toiletries". It does so without any definition or guidelines to definition of those markets.

The Bill goes against the spirit of the TPA which is, and must be designed for general application across the economy and not be sector specific. Regulation of market forces by laws which prevent misuse of market power by means of predatory pricing has long been accepted as necessary and ANRA does not argue against that proposition. It is, however, both unnecessary and fraught with danger to single out specific sectors for regulation of the type sought to be achieved by the Fielding Amendments.

The Fielding Amendments also almost certainly create another level of complexity and uncertainty to section 46 of the TPA which will not assist the competitive health in any sector of the Australian business community, whether big or small, nor would they serve the interests of consumers.

The Fielding Amendments leave open what constitutes the three identified markets, not only in terms of geographic compass, but, more importantly, in terms of the products included in them. While this may not be such a problem in regards to the retail fuel market, the same cannot be said for the "groceries" and the "pharmaceutical products, proprietary medicines and toiletries" markets.

To give some indication of the problem, what products constitute the "groceries" market? Is it intended to be every product for sale at a supermarket, a definition which may be supported when the dictionary meaning of the word "grocery" is considered? The Collins Australian dictionary definition of the word "grocery" includes "foodstuffs and other household supplies". This may conceivably include the toiletries which are available for sale in a supermarket but which appear to be the subject of a separate market in the Bill.

Similarly, is it intended that the "pharmaceutical products, proprietary medicines and toiletries" market encompass all products sold through pharmacies, including prescription drugs, consumer healthcare products and toiletries?

It appears that the Fielding Amendments are an attempt to regulate retail channels or sectors rather than "markets", as that term is used in competition law. Attempting to force such regulation into the confines of the misuse of market power provision of section 46 of the TPA is bound to create increased uncertainty for all participants in those channels, regardless of size. It can only serve to increase the difficulties in obtaining "results" under section 46 of the TPA as participants will be forced to seek clarification of the meaning of the amended section from the Courts.

Each of the three defined "markets" are certainly sectors in which Coles and Woolworths operate or would like to operate. However, there is no evidence of market failure specific to these sectors and in fact the pharmacy sector is already highly insulated against open competition. New entrants and prices are strictly controlled and supermarkets are prohibited from either co-locating or operating pharmacies.

We would argue that a freeing up of regulation in that area, rather than increasing it as the Bill attempts to do would result in more effective competition and better value for customers– as has been the case overseas. We do not think Senator Fielding's Bill will effectively promote competition in these sectors.

<u>The Fielding Amendments - Will the amendments assist small businesses in claims against big business?</u>

For the reasons set out in the preceding section, the provisions suggested in this Bill will if introduced, represent a nightmare for small operators, the very group that Senator Fielding purports to support. However, it is not only the definitional uncertainties which will create problems. Assuming that a Court, in the absence of a defined national grocery market, adopts the reasoning previously used by the ACCC when considering matters involving supermarkets. The ACCC has previously defined the geographic limits of the supermarket or retail groceries market as being approximately a 5 km radius around every supermarket.

If this definition is accepted there could be many, many small markets across the country where smaller operators could be seen as having "substantial market or financial power". Thus, the Fielding Amendments could hit independents and family owned stores as well as Coles and Woolworths and severely control their ability to maintain competitive pricing.

<u>The Fielding Amendments - inaccurate data as base for change</u>

Public statements by Senator Fielding indicate a lack of exposure to the ABS and international retail market share figures and a lack of understanding of the current market share percentages. As has already been mentioned, the market for smaller operators has been very buoyant and has seen considerable growth, so it can hardly be realistically suggested that they are suffering any hardship under the current Act. Also the Explanatory Materials to the Bill refer to rising prices with no mention of the drought or other legitimate impacts.

The Fielding Amendments - application to companies with "substantial power"

The Fielding Amendments provide that a corporation which has a substantial degree of power in a market or substantial financial power in a market must not engage in "predatory pricing". ANRA is particularly concerned with the concept of financial strength or financial power being introduced into the legislation.

While it is generally understood that market power relates to a corporation's ability to raise prices above supply cost without rivals taking away customers over time, the concept of "financial power", particularly in the diversified and complex retail market is neither meaningful nor a relevant concept in current Australian competition law and would, if passed, result in significant disruption to normal market practices, unintended application to many small businesses and commercial confusion.

The Bill does not offer any clarification as to what constitutes "substantial financial power". For example, is it measured in assets, borrowing power, lack of debt, high revenues or some combination of these or other factors? Does having a financially strong parent company, or belonging to a financially strong corporate group, either in Australia or overseas, constitute "substantial financial power"? Once again, the necessary imprecision of what constitutes financial power is only likely to create uncertainty and confusion in the law.

Depending on how the concept of financial power is interpreted, a much greater range of conduct could fall within the scope of the 'financial power' concept and result in an increased number of court actions and ACCC investigations, even though a company's conduct could well be constrained by competitive forces in the market.

Both amendments – the concept of predatory pricing

ANRA submits that the inclusion of a specific prohibition against predatory pricing in both Bills is both unnecessary and liable only to result in increased uncertainty for all businesses, no matter their size, increased litigation and runs a risk of being interpreted such as may give rise to increased prices for Australian consumers.

ANRA also submits that the law as it presently stands is more than adequate to deal with those cases where a powerful competitor seeks to harm or drive out of business another competitor by pricing its goods or services at levels which are predatory. Attempts to specify what constitutes predatory pricing are, in the case of the Fielding Amendments misguided and dangerous and, in the case of the Government's Bill, a legislative classification of existing Courts' interpretation of the law.

Under the current state of the law, a company which has a substantial degree of market power must not take advantage of that power for the purpose of, inter alia, damaging or eliminating a competitor. Where such a company prices below its average variable cost of production for that proscribed purpose, it may be found to contravene section 46.

The amendments proposed by Senator Fielding, however, introduce a new concept of “offering goods or services for sale at Fielding Amendments unreasonably low prices”. The Bill introduces this term but does not give any realistic direction on how to interpret it. The ‘offence “ in the Bill does not include selling below cost but merely selling at a price which is “unreasonably low”. In ANRA’s view, there is a fundamental flaw in the Fielding Bill’s failure to address what factors are to be taken into account when determining whether prices are unreasonably low. This failure does not allow any business, large or small, to know what factors it can legitimately take into account when setting prices. For example, there are legitimate needs of many retailers to sell below cost on occasions due to about to expire use by dates, clearance sales and the desire and need to clear excess stock.

Further, and this is also true of the Government’s Bill, rather than making it easier for small business to take on larger businesses, it fails to address the fact that there are many legitimate factors which will impact on a company’s pricing and ability to price at low levels, which will not, and should not, always be visible to competitors. For example, factors such as the cost of rent and labour and the efficiencies and economies of scale to be obtained from volume (all of which are the hallmarks of legitimate competition) will all impact on the reasonableness or otherwise of pricing.

The absence of any clear definition, the introduction of this specific prohibition on predatory pricing will only serve to create substantial confusion as retailers seek some effective way of interpreting this measure and complying with it should it be passed.

Given the uncertainty with the way the amendments and, in particular, Senator Fielding’s amendments may be interpreted, they could well hamper the ability to respond to price competition. The end result could be a retail sector that is much more cautious in price setting, resulting in higher costs being paid by consumers. In effect, the amendments may result in a form of unwitting resale price maintenance by individual competitors (which, ironically, is prohibited by the TPA when such conduct occurs between suppliers and resellers of products), as retailers become fearful of reducing prices lest they become embroiled in a predatory pricing investigation

<u>The Fielding Amendments – introduction of an effects test.</u>

The Bill introduces an “effect on competition” test and an effect of “eliminating competitors” standard, in addition to the purpose test currently found in section 46. ANRA submits that such a test is completely counter to the aims of the TPA, which is to protect competition and consumers.

Competition is, by its nature, aggressive. The concept of an effects test would result in the protection of inefficient operators at the expense of those who operate efficiently.

Such a test would reduce incentives for retailers to compete vigorously and consumers would be the losers. It would, for example, prevent consumers benefiting from the large number of retailers who “guarantee to meet the cheapest price”. Leaving aside the difficulties of proof associated with an effects test, the Bill ignores the basic fact that customers should be able to decide where they shop and why, not constrained by an ill conceived law.

Conclusion

ANRA suggests to the Committee that any legislative framework should encourage business to be more efficient and attuned to the needs of consumers. The extraordinary contribution that the retail community and particularly the larger retailers, make to the overall health of the Australian economy must be considered when new and potentially burdensome regulation is being contemplated.

Large and small operators in the retail marketplace in this country are experiencing growth and higher productivity within the current system. Any amendments should be considered in the context of the potential consequences for those the law is intended to protect ie Australian consumers rather than to benefit a particular section of the retail industry that has failed to provide any justification for such protection from healthy competition.

We urge the Committee to consider with great care and caution the Government Bill to amend the Trade Practices Act. In relation to Senator Fielding's Bill we submit that it has the potential to damage a highly effective and consumer oriented market place, and therefore should be rejected.