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9th July 2007

The Secretary, Mr Peter Hallahan
The Senate, Standing Committee on Economics
Parliament House
CANBERRA
ACT 2600

FAXED
5.00 pm

9/7/07

SPJ JG

Fax 02 6277 5719

Dear Mr Hallahan

1. Misuse of market power, leveraging market power, coordinated market power, predatory pricing
2. S 51 AC Trade Practices Act

I am in receipt of the Standing Committee on Economics' invitation to comment on the above reviews to the Trade Practices Act.

A major problem for me is:

1. Time;
2. Getting rewarded for many hours of free time already given to the retail industry on leasing, general retail and small business issues (including the TPA);
3. Making a living; and
4. Seeing that inquiries lead to something that is for the improvement of industry, business etc.

I am therefore going to make a short submission. My CV is attached to me Webpage.

We consultants, valuers, business persons are at the coalface of many issues.

Some of us are practical, understand business economics, property economics, economics. Our strategic policies of this country's economic investments both outside the country and in it need urgent review. Who owns some of our strategic assets? Others talk the talk, they have never walk the walk. They do not understand what works and does not work.

I have been very "in your face" in terms of modus operandi with you in the past.

My concern is that legislators and regulators: do not listen; or legislate to the mid-point of no-where and the goal post: move into the distance; make legislation "vague" causing costly litigation for judges to interpret the law; or do nothing.

Independent Retail Property Advisors

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|---|---|--|
| <ul style="list-style-type: none"> • Rent reviews • Rent comparables • Rent determinations | <ul style="list-style-type: none"> • Outgoings analyses / benchmarking • Business analyses / benchmarking • Ratio and sensitivity analyses | <ul style="list-style-type: none"> • Tenancy disputes • Lease negotiations • Compensation matters |
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The proof in the pudding must be in the numbers. The monopoly/oligopoly of Coles/Woolworths, retail lease issues reflected in increasing occupancy costs, business failures and so on in times of abundance.

None of this is new. I therefore do not want to duplicate what I have said before, only that the law should be simple, certain and finetuned from time to time.

On S 46 - see Annexure A

With regard to market power the law should be capable of reversing it if it is unfair, so that Coles & Woolworths and other designated commercial monopolies/oligopolies sell down their market share, including regional local markets- see the NARGA PwC report just released.

Then there is ample evidence of small retailers having to buy stock at "retail price" from Big W/Coles/K Mart/Woolworths, because suppliers supply them at above the price that the abovementioned stores retail it at! One does not need to be Einstein to figure out in order to do so, our major retailers within the overall pricing strategy of their suppliers are being subsidized by small business as a whole.

Then as the head of one regulator said at the Virgin Small Business Summit, the rules that apply overseas cannot apply to Australia, it is a much smaller market!

A market is a market is a market. The principles of monopolies/oligopolies apply irrespective if it is a major market such as the USA, Australia or Fiji. There is able mature legislation in the USA on these issues. There are principles in the UK that no grocery retailer may hold more than 25% market share, and the top four had 75% of the market share of that given market vs our case in Australia.

Then there are the conglomerates springing up within, Grocery, liquor, fuel, newsagency, the butcher, baker, green grocer, fish and delicatessen. Now the grab for pharmacy. How practically does the legislation address that?

Following on from the PwC report, Annexure B sets out the benefits to an economy of having big and small business in balance. My Annexure B is material I got from overseas many years ago which is a summary of the PwC report, but without the research behind it viz. someone had done it before.

In effect, what goes into the legislation must work. It must not be a "feel-good" job for politicians. It must be tested and revisited.

On S 51 AC

From a recent press release put out by the Shopping Centre Council who represent the interests of Landlords, it was stated that fewer than 7 leases per 10,000 resulted in a complaint of unconscionable conduct to the ACCC. Had the ACCC proceeded against

Westfield in the Bonelli matter, unconscionable conduct may have been better defined and secondly if the Commission was acting firmly on leasing matters viz. if they were perceived for being effective, then there might be a flood of cases to the ACCC and or maybe even a cycle where if they had been effective, then "no cause for complaint" because they were doing their job and the unconscionable behaviour had ceased. I know there is a lot of behaviour out there that must be unconscionable conduct, not just "tough business".

Conclusion

I have specifically not commented on any particular matter. My response has been of a general nature.

If the Standing Committee on Economics wants to commission my services to research matters, I do so in a diplomatic and effective way to verify any general business matter or matters, leasing, market share, franchise issues and of course economic and economic policy matters.

I am known for being effective, efficient, robust and fair. I do not have any allegiance, other than to see this country going forward.

Business and commerce is logical, it wants logical conclusions, it does not want or have time for endless bureaucracy, red tape, leg ups, to be nannied by governments.

It wants frameworks, fair rules, fair umpires, level playing fields and if someone is playing the man and not the ball, then Tribunals, ADR mechanisms, commissioners etc that are fair and objective.

If you do not have experienced people in place, put them in place to ensure there are outcomes.

Sincerely



Don E Gilbert

Specialist Retail Valuer and Leasing Consultant

Encl Annexure A & B

Annexure A: Antimonopoly or procompetition laws: Federal Trade Commission USA

Act	Reason for legislation	Explanation
Sherman Act (1890) - monopoly or conspiracy in restraint of trade	Prevent monopoly or conspiracy to control product or distribution channels or prices	Aimed at monopolists to restrain trade
Clayton Act (1914)	Prevent tying of contracts viz forcing sale of a product or products with others, exclusive dealing limiting buyer's sources and price discrimination by manufacturers (for example by location)	Aimed at preventing the substantial lessening of competition
Federal Trade Commission Act (1914)	To prevent unfair policies, deceptive advertising and pricing	Aimed at preventing unfair methods of competition
Robinson-Patman Act (1936)	Prohibits paying allowances to "direct" buyers in lieu of middlemen costs (brokerage charges), "fake" advertising allowances or discrimination in help offered and price discrimination on goods of a "like grade and quality" without cost or quantity justification	To prevent excessive price discounts causing injury to small middlemen (from large-chain middlemen) and to prevent injury to "competitors" especially small retailers. Aimed at preventing injury to "competition".
Wheeler-Lea Amendment (1938)	Seeks to deceptive branding & packaging, advertising & selling and pricing.	Seeks to protect the consumer, not just competition, particularly unscrupulous advertisers - "cease and desist" orders.
Antimerger Act (1950)	Seeks to reduce buying of competitors, producers and distributors.	Amendment to Clayton Act to enable FTC to regulate mergers which would substantially lessen competition, including firms reducing competition by buying out supply and distribution channels.
Magnuson-Moss Act (1975)	To prevent unreasonable practices eg false fraudulent product warranties.	FTC gained substantial powers to prevent unfair or deceptive practices. FTC gained powers to make rules easily enforceable including rules about consumer product warranties. Enabled FTC to bring class action suits.

DEG 22/2/2005

Annexure B: Strengths & weaknesses of big & small businesses (and the need for one another in balance)

Small firm

- Flexible decision making
- Local focus
- Client centered
- Creative
- Labour intensive
- Appropriate technology
- Subcontract
- Stable informal labour relations
- Facilitators of growth and structural adjustment
- Ability to grow strongly after recession

Large firm

- Rigid decision making
- National / international focus
- Market centred
- Commercialise innovations with appeal
- Capital intensive
- Advanced technology
- Vertical integration
- Volatile adversarial labour relations
- Multipliers and accelerators of growth and structural adjustment
- Consolidators of existing growth trends

Clearly an economy benefit: from large & small firms in balance. The responsibility is with the ACCC who administers the Trade Practices Act to ensure the balance is maintained.

DEG January 2003, from previous article written in 1995/96