Chapter 5

Practical concerns with the bill

Impact on prices for consumers

5.1 The committee heard that the present structure of Australia's retail grocery market is not indicative of a lack of competitive pressure in the sector, nor its capacity to pursue geographic price discrimination for anti-competitive purposes.

5.2 The Australian National Retailers Association (ANRA) told the committee that in a contestable market, predatory pricing would be difficult to achieve. It argued that it is not the presence of a certain number of operators in a market that would indicate the presence of monopoly power but whether the market as a whole is contestable. An ANRA spokesperson explained that if there are few entry costs to a new player joining the market, 'the threat of entry itself is a guarantee of competitiveness'. He cited the recent entry of Costco into the Australian market and concluded that the market is 'fairly contestable'.[1]

5.3 Conversely, the Southern Sydney Retailers Association told the committee that geographic price discrimination only happens in areas where there is a substantial lack of competition. The Association argued that the practice in turn ‘destroys competition, distorts investment and is a significant economic problem for this country’. High prices in a market should encourage investment and the entry of small competitors. However:

> ...when a small business knows that geographic price discrimination exists, he knows that the minute he goes into that market that large store can simply come in and undercut him in price or so called match his price but in effect undercut him while keeping prices in their other locations high. It becomes a significant disincentive to investment. Also it sends the wrong investment signals.[2]

5.4 The Association told the committee that the Blacktown Amendment would redress this situation by creating a proxy for competition:

> If this Blacktown amendment comes in, it will give that small businessman a chance. He will say: ‘I can go in and undercut that big supermarket price. I went to the markets early this morning and got a special buy on apples’—or whatever the goods were—‘and I can undercut them on price, win market share and drive prices down.’ That is what will happen in the market. It will free people up to give lower prices. It will increase competition. The big supermarket will then have to work out what it is

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1 Dr Brendan Long, ANRA, *Proof Committee Hansard*, 25 September 2009, p. 14.

2 Mr Craig Kelly, Southern Sydney Retailers Association, *Proof Committee Hansard*, 25 September 2009, p. 11.

> going to do: 'Am I going to leave my price higher and lose market share or am I going to lower them to match it? If I have to lower my prices, I have got to lower them everywhere.' And that is what they are most likely to do.[3]

5.5 However this argument is entirely dependent on the assumption that the "small" retailer would in fact lower their prices on a particular item to undercut the larger players – rather than simply price match or only slightly undercut those who would be required to uniformly price across stores. Furthermore should the retailers uniformly price their items at a higher end of the scale the ultimate outcome could be higher prices across the entire sector for consumers.

5.6 It is interesting that independent retailers felt that the price transparency offered by the GROCERYchoice website would possibly lead to "price maintenance" across a range of competitors.

> I made the point at the time that if you made available on a particular site the price of milk—and I think CHOICE used the word 'gaming'—why would somebody not go one cent cheaper? Over a period of time, would you end up with retail price maintenance by default? What would be the incentive for anybody to price baked beans at any different price to what was there?...There is that chance. If we stocked 16,500 items and you had 500 items on a website, why would I ever be one cent more expensive than Coles or Woolworths? Why would I ever be one cent cheaper?...Why would I not be the same price? What you end up with is everybody selling at the same price…When the wholesale price of one of those items goes up and one retailer—me or Coles or Woolworths or whoever—puts its price up from $1.60 to $1.80, why would anybody else go to $1.79? Why would they not go to $1.80?[4]

5.7 However they argue that the price uniformity across geographic areas imposed by this legislation on all retail outlets with more than five stores would not result in price maintenance and would benefit competition.

5.8 Both the ACCC and Treasury expressed concern that the Bill would result in higher prices over the long term for consumers:

> If businesses were required to set a single price at all stores in a particular region (as defined by the 35 kilometre rule in the Bill), they would choose a price somewhere between the highest and lowest prices in that region. In locations of lower prices, the Blacktown Amendment Bill would cause a business to raise prices. The Bill would also have the effect of removing incentives for competitors to compete strongly on price, with the likely result that they also would raise prices. In such locations consumers will be forced to pay higher prices under the Guaranteed Lowest Prices Rule contained in the Bill compared to a flexible pricing scenario.[5]

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3 Mr Craig Kelly, *Proof Committee Hansard*, 25 September 2009, p. 8.

4 Mr John Cummings, *Proof Committee Hansard*, 18 September 2009, p. 65.

5 Treasury, *Submission 10*, p. 3.

5.9 In giving evidence to the committee the ACCC also expressed concerns:

> Unfortunately the bill takes quite a blunt approach when dealing with this issue—an issue which has more than one dimension. The absence of a link to anti-competitive effect or purpose means that the bill will catch not only the occasions of anti-competitive price discrimination but also the many examples of harmless or even pro-competitive price discrimination that occur in the marketplace today. Related to this is the real concern that, absent that link, the amendments could do more harm than good.[6]

5.10 The ACCC also expressed concerns that the normal discounting behaviour of retailers due to increased demand or supply of goods may be reduced as a result of the Bill:

> In most cases, for industries that currently have price differentials across regions it is very unlikely that prices will gravitate towards the lower end. Generally speaking businesses will want to maintain at least the same average margins. More likely, at the very least, some prices will go up and others will go down. For example, the higher margin areas might see price falls but the current lower margin areas might see price increases. I am a little worried that, at worst, under the proposal as it is, prices could gravitate upwards to the current ceiling or beyond. This could happen where ad hoc discounting, currently prevalent in the Australian marketplace, which lowers overall pricing, is discouraged or where competitive pressures are dampened because of these provisions.[7]

5.11 The committee also note the contradictions that appear when comparing evidence provided to the Fuelwatch inquiry that by legislating that retailers fix prices for a period of twenty-four hours it would stifle discounting—yet this Bill which will effectively see uniform pricing across most major retail outlets all of the time—has not drawn the same concerns regarding the ability to discount.

5.12 For example the committee heard from Associate Professor Zumbo during the Fuelwatch inquiry that:

> There will be a failure to deliver real competition between retailers. The proposed Fuelwatch system would create an artificial environment. It would force retailers to stick to a price for 24 hours. It would remove pricing competition within that 24 hours. Price is the essence of competition. Therefore the proposed Fuelwatch is an interference in that pricing mechanism.[8]

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6 Mr Scott Gregson, *Proof Committee Hansard*, 5 October 2009, p. 3.

7 Mr Scott Gregson, *Proof Committee Hansard*, 5 October 2009, p. 3.

8 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 1 August 2008, p. 38.

5.13 The Australian Convenience and Petroleum Marketers Association commented on the proposed Fuelwatch legislation that 'the consumer's ability to get the best deal at all times will be diminished.'[9]

5.14 Perhaps ironically, these criticisms are even more appropriate for the "artificial environment" that will be created by this legislation – where the large retailers as well as any number of small to middle sized retail stores will effectively be forced to uniform price without any "guarantee" that lowest prices will prevail.

5.15 The Law Council of Australia raised its concerns that the amendment:

> …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.[10]

Committee view

5.16 The committee heard evidence that ALDI already uniformly prices nationally, Woolworths are moving to a national uniform pricing policy and Coles set their maximum prices nationally but allow store managers to lower prices to manage stock or compete locally. Therefore it is possible that this legislation will impact the pricing behaviour of the major stores it targets very little, but have a much larger impact on small to medium chains across the entire retail sector. The committee is very concerned that no substantial survey of retail chains outside the grocery and petrol sector appears to have been undertaken in regards to the legislation. The committee is also concerned that the bill may unintentionally increase prices across the board for consumers and result in substantially less discounting that currently occurs.

The domino effect

5.17 One of the practical issues raised by the bill is what Coles has referred to as the 'domino effect'. A retail outlet that first lowers its price on a product will force all affiliated outlets within a distance of up to 35 kilometres to match that lower price, in turn requiring all affiliated outlets within 35 kilometres of these 'secondary' outlets to follow suit, and so on.

5.18 It would seem that—given the presence of at least one affiliated supermarket (and petrol) outlet within 35 kilometres of each other within the metropolitan area—the knock on effect will be substantial. Indeed, it seems likely that corporations such

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9 Fuelwatch inquiry, Australian Convenience and Petroleum Marketers Association, S*ubmission 6*, p. 4.

10 Law Council of Australia, *Submission 2*, p. 4.

as Coles and Woolworths would be required to have uniform pricing for their products in each of the capital cities.

5.19 The bill, as currently drafted, would essentially require Coles and Woolworths to set a uniform national pricing strategy for each of the metropolitan areas.[11]

5.20 In states such as South Australia, the 35 kilometre rule would essentially result in the entire metropolitan area having price uniformity across any retail outlet with more than five stores. This would potentially encompass smaller retail businesses including clothing stores and some fruit and vegetable retailers.

5.21 When asked about this impact on smaller retail chains both NARGA and Professor Zumbo claimed that such stores would normally have uniform pricing anyway. However no empirical evidence was provided to the committee, using surveys of such chains or any other research, to demonstrate that uniform pricing is adopted across all retail outlets with more than five stores.

Compliance costs for small businesses

5.22 There is concern that the Bill would impose unnecessary compliance costs on small and medium-sized businesses. If a franchisee that owns six stores wanted to drop the price of one of its products at one store in response to the price-drop of a nearby competitor, it would have to coordinate the new price at the other five stores. This would potentially require an onerous change to the franchisee's software system. Managers would be required to advise of all price changes on all product lines continuously.[12]

5.23 The Law Council of Australia also noted some drafting problems with the definitions in the exemptions in the bill. The bill exempts products supplied or offered for supply at a genuine "factory", "warehouse" or "clearance outlet". However none of these terms are recognised as definitions either commercially or legally. It would therefore be extraordinarily difficult in the absence of any commercial definition or legal precedent to determine where this exemption would or would not apply.

Stock management

5.24 The committee also notes the concerns of the major supermarket chains that the bill would have an adverse effect on their stock management. It notes the comments of the Australian National Retailers Association (ANRA) that the efficient allocation of goods in a highly competitive market requires 'a very rigorous form of

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11 Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p. 473.

12 See Associate Professor Frank Zumbo, *Proof Committee Hansard*, 25 September 2009, p. 38. ANRA, *Submission 9*, p. 5. Dr Brendan Long, *Proof Committee Hansard*, 25 September 2009, pp 21–22.

stock control management'.[13] In ANRA's view, the bill would affect a company's ability to discount prices to clear stock.

5.25 The bill allows discounting for an outlet that is closing down or because a product is damaged, imminently perishable or is to be permanently removed from supply. It is not clear to what extent individual supermarkets move prices in response to short-term inventory fluctuations. For example, on an unseasonably cool and wet summer's day, sales of soft drinks will slow. Do stores just order fewer bottles in their next delivery, or do they cut prices below cost to clear the shelves?

Pricing of fresh fruit and vegetables

5.26 The third issue of a practical concern relates to stores' pricing of fresh fruit and vegetables. The bill contains a provision for company to discount perishables at one of its stores, but it does not allow for a product of a different quality to be priced differently. The committee understands that, currently, store managers at Woolworths and Coles have some discretion to set the price of certain fruit and vegetable products depending on their quality.

Obligation to supply

5.27 The fourth matter of practical concern with the bill is the reference to 'must supply'. The ACCC noted in its evidence to the committee that:

> Read literally, as a court may well read it, this requires a retailer to sell the same products at each of its outlets and exposes retailers who choose to supply different product ranges to suit the market differences to possible prosecution. Obviously unintentionally it would expose retailers to alleged contravention when they run out of stock at one location but continue to supply it at other locations.[14]

Ad-hoc store discounts

5.28 A further concern raised was about the impact of the bill on 'haggling' about prices or special discounts:

> The provision of ad-hoc discounts is a normal feature of many Australian markets. Negotiated prices for electrical goods, for example, or a discount to local community organisations may well be a thing of the past. More formal policies, such as trade discounts or match-to-beat policies may, too, come into question, depending on the interpretation of the legislation.[15]

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13 Dr Brendan Long, *Proof Committee Hansard*, 25 September 2009, pp 15 and 21. See also Mr Scott Gregson, ACCC, *Proof Committee Hansard*, 5 October 2009, pp 3–4.

14 Mr Scott Gregson, ACCC, *Proof Committee Hansard*, 5 October 2009, pp. 3–4.

15 Mr Scott Gregson, General Manager, Enforcement Operations, Australian Competition and Consumer Commission, *Proof Committee Hansard*, 5 October 2009, p 4.

5.29 The common example of haggling could be going to a bulky goods store to buy a washing machine. The sticker price is $500 but you talk to the salesperson and he says he could offer it for $480 if you pay cash. You try your best to look unenthusiastic and say you are not prepared to pay more than $440. The salesperson furrows their brow, ruffles some papers, taps away at a pocket calculator, perhaps confers with a colleague and then with a pained expression says the absolute lowest price they could offer is $450 and you agree to this, congratulating yourself on how your negotiating savvy had saved you $50.

5.30 If the bill requires all sales to be at a uniform price, then the retailer will need to lower the sticker price and compete more transparently. An unintended consequence may be that retailers simply stop discounting in this way altogether resulting in less ability for consumers to "haggle" or renegotiate on a ticket price.

Committee conclusions

5.31 The committee believes that there are legitimate operational reasons as to why the price of a good may vary between a company's metropolitan stores. Furthermore the committee agrees that the bill does not differentiate between price discrimination that is competitive and advantages the consumer with lower price outcomes and price discrimination that is non-competitive and possibly predatory and is of disadvantage to consumers.

5.32 The committee have grave concerns that this legislation may unintentionally result in higher prices for consumers for retail goods as a result of uniform pricing with no "guaranteed" lowest prices being offered at all.

Recommendation 1

5.33 The committee recommends that the Senate reject the bill.

Senator Annette Hurley

Chair