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Legislation Committee

Trade Practices Amendment (Guaranteed Lowest Prices - Blacktown Amendment) Bill 2009

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Senate Economics Legislation Committee

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Chapter 1

Introduction

1.1 On 24 June 2009, the Trade Practices Amendment (Guaranteed Lowest Prices—Blacktown Amendment) Bill was introduced into the parliament. The bill is co-sponsored by the Leader of the Nationals in the Senate, Senator Barnaby Joyce, and independent Senator Nick Xenophon. The Blacktown Amendment is designed to curb 'geographic price discrimination'. This occurs when a business charges different prices for the same product in two or more different locations.

1.2 Treasury explained the concept of geographic price discrimination in their submission to this inquiry:

> Geographic price discrimination occurs when a business charges different prices for the same product in two or more different locations. This pricing flexibility is widely used by businesses in many different industries. There are various reasons why a business might use geographic price flexibility. These might be related to supply-side aspects, such as differentials in costs or the scope of operations between locations; or demand-side factors, including the size of the local population, and the nature of local competition. Each of these reasons, including competitive differences, is a legitimate reason for prices to vary among locations.[1]

1.3 The Second Reading Speech of the bill explained that geographic price discrimination is 'widely recognised' as a tactic to diminish competition between independents and retail giants. Big businesses would charge a lower price where competition from independents exists in a given area, but charge higher prices in adjacent areas where there is no independent operator. The Second Reading Speech noted that:

> Over time, geographic price discrimination will lead to the demise of competition and the independent operator, allowing the retail giant to then set prices without any competitive pressure from those independents. The inevitable result is that consumers pay more once the independents are driven from the market.[2]

1.4 However Treasury amongst other submitters to the inquiry, argue that the bill contradicts the object of the *Trade Practices Act* by prohibiting competitive behaviour and is contrary to trends overseas where similar provisions have been found to unnecessarily harm consumers.[3]

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1 Treasury, *Submission 10*, p 2.

2 Second Reading Speech, *Senate Hansard*, 24 June 2009, p. 55.

3 Treasury, *Submission 10*, cover letter.

1.5 The bill would amend the existing predatory pricing provisions in section 46(1) of the *Trade Practices Act 1974* (TPA). This section prohibits businesses that have substantial market power from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor.

1.6 The fundamental question raised by the bill is whether the same product sold in different locations should be considered and priced the same, or whether there are legitimate operational reasons—which do not disadvantage consumers—for corporations to vary their retail prices from one local outlet to another.

Conduct of the inquiry

1.7 The committee advertised the inquiry in *The Australian* newspaper and on the committee's website and wrote to stakeholders, inviting written submissions by Friday 11 September 2009. It received 13 submissions, which are listed at Appendix 1.

1.8 The committee held a public hearing in Sydney on 25 September 2009 where it took evidence from Treasury officials, among others. Appendix 2 lists those who appeared at this hearing. On 5 October in Melbourne, the committee took evidence from the Australian Competition and Consumer Commission.

1.9 The subject of geographic price discrimination also arose during the Senate Economics References Committee's inquiry into the federal government's planned GROCERYchoice website. Public hearings for that inquiry were held in Canberra on 18 September and 28 October, and in Melbourne on 6 October 2009. References are made to the relevant parts of these hearings in this report.

1.10 The committee thanks all who contributed to this inquiry.

Structure of the report

1.11 This report is divided into the following chapters:

- chapter 2 outlines the provisions of, and the rationale for, the bill;
- chapter 3 presents the evidence that geographic price discrimination exists in the retail grocery and petrol markets in Australia;
- chapter 4 looks at the TPA's current and past provisions outlawing predatory pricing and geographic price discrimination, as well as the international experience with price discrimination laws; and
- chapter 5 describes practical concerns and gives the committee's view of the bill.

Chapter 2

The bill: provisions and rationale

2.1 The bill requires corporations to supply products at consistent prices across adjacent markets. All retail outlets owned by the corporation must sell at this price within a distance of 35 kilometres.

2.2 The bill inserts a new subsection 46C into the *Trade Practices Act 1974*. Subsection 46C(1)—labelled the Guaranteed Lowest Prices Rule—states:

> A corporation must, at a retail outlet operated by the corporation or a related entity, supply or offer to supply a particular product to a consumer at a price being the lowest price the product is supplied or offered for supply at the same time at any retail outlet operated by the corporation or a related entity under the same trading name within a distance of 35 kilometres.

2.3 If the corporation or related entity offers a discount, rebate, credit, allowance or special deal to consumers in relation to products to which the Guaranteed Lowest Prices Rule applies, it must match the offer for the same product sold at each retail outlet covered by the Rule (46C(5)). Equally, where a corporation imposes a surcharge on consumers in relation to products to which the Guaranteed Lowest Prices Rule applies, it must impose the same surcharge at each retail outlet covered by the Rule (46C(6)).

Which entities are covered by the bill?

2.4 Subsection 46C(7) of the bill states that the provisions of the Guaranteed Lowest Price Rule do not apply to a corporation or a related entity which operates five retail outlets or less in Australia under the same trading name.

2.5 Subsection 46C(8) of the bill defines 'a retail outlet operated by' in terms of 'a corporation or a related entity'. All retail entities with more than five individual outlets will be covered by the legislation including franchises where the franchisee owns more than five outlets.

2.6 The bill applies only to the sale of goods. It does not apply to services.

Practices exempt from the bill's provisions

2.7 Subsection 46C(3) of the bill proposes several exceptions to the Guaranteed Lowest Prices Rule. These include where the price of a product is marked down because:

- the product is supplied or offered for supply at a genuine factory, warehouse or clearance outlet;
- the outlet is genuinely closing down;

- the product is imminently perishable;
- the product or its packaging is damaged;
- the product is to be permanently removed from the range of products supplied or offered for supply at the retail outlet; or
- the product has deteriorated in value as a result of being on display in a retail outlet for a substantial period of time, having regard to the nature of the product.

The rationale for the bill

2.8 The drafter of this legislation, Associate Professor Frank Zumbo of the University of New South Wales, has explained the bill's rationale in the following terms:

> …the focus of the Blacktown Amendment is to ensure that consumers get the lowest possible price for a product everyday and everywhere in the same geographic area.[1]
>
> …the Blacktown Amendment simply requires that the company charges consumers the lowest price for the same product everyday and everywhere in all retail outlets operated by the company under same trading name in the same geographic area. Under the Blacktown Amendment so long as the company charges consumers the lowest price for the same product everyday and everywhere in the same geographic area, it is a matter for the company to choose that price, and even whether or not it chooses to sell products below cost.[2]

Concentration of the Australian retail grocery and petrol markets

2.9 The concern that geographic price discrimination allows firms to exploit a lack of competition in certain locations is partly founded on the view that Australia's retail grocery and petrol markets are highly concentrated. The argument is that the higher the market share a company enjoys, the less competition it faces and the greater its capacity to maintain higher prices in uncompetitive areas and lower—even predatory—prices in high competition areas.

2.10 The Southern Sydney Retailers Association told the committee that Australia had 'the highest and fastest accelerating supermarket food prices in the developed world'. Mr Craig Kelly, President of the Association, noted the retail price for products such as milk and eggs has been rising faster than the Consumer Price Index (CPI). The farm gate price for these products, on the other hand, has not kept pace with the CPI.[3]

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1 Associate Professor Frank Zumbo, *Submission 11*, p. 8.

2 Associate Professor Frank Zumbo, *Submission 11*, p. 9.

3 Mr Craig Kelly, *Proof Committee Hansard*, 25 September 2009, pp 2 and 5.

2.11 In its 2008 report on the competitiveness of retail grocery prices, the ACCC noted the view of 'industry commentators' that Coles and Woolworths account for 80 per cent of retail sales. This estimate comes from analysis by PriceWaterhouse Coopers of ACNielsen data scan and defines grocery retail as all branded packaged groceries (dry goods) excluding house-brands.[4]

2.12 The ACCC has argued that in its view, the major supermarket chains:

> …account for between 55 per cent and 60 per cent of consumer expenditure on grocery items. Woolworths accounts for at least 30 per cent and Coles around 25 per cent. Although each of these shares of retail grocery sales are large for a single company, to say that the MSCs enjoy an 80 per cent share of grocery sales exaggerates the position of the retailers.[5]

2.13 Table 2.1 presents the ACCC's view on the percentage share of Woolworths and Coles' sales for various categories of groceries. It concluded that while Woolworths and Coles are clearly the largest players in each of the product categories:

> …with the exception of packaged groceries, the share of sales attributable to each of Coles and Woolworths are not at a level that raises significant concerns about the current market structure.[6]

Table 2.1: Woolworths' and Coles' share of key grocery category sales

Category	Major supermarket chains' share of sales
Packaged groceries	Approximately 70 per cent
Fruit and vegetables	Up to 50 per cent
Fresh meat	Approximately 50 per cent
Bakery products	Up to 50 per cent
Dairy products	50–60 per cent
Deli products	50–60 per cent
Eggs	Approximately 50 per cent

Source: Australian Competition and Consumer Commission, *Inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p. 57.

4 See Australian Competition and Consumer Commission, *Inquiry into the competitiveness of retail prices for standard groceries*, July 2008, pp 45, 47–48.

5 Australian Competition and Consumer Commission, *Inquiry into the competitiveness of retail prices for standard groceries*, July 2008, pp 45 and 47.

6 Australian Competition and Consumer Commission, *Inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p. 57.

2.14 The concentration of Australia's retail grocery market is also indicated in a comparison of food price inflation with other countries. Australia's prices for food and non-alcoholic beverages are compared with those in some comparable economies in Table 2.2. In 2005, Australian food prices were notably higher than in the US, comparable to those in most European countries and well below those in Japan. Since 2005, food prices (in local currency terms) have grown faster in Australia than in most comparable countries, but so have prices in general (Table 2.3), reflecting among other factors the milder economic slowdown here. The relative price of food has increased in most comparable economies.

Table 2.2: Price level indices: Food and non-alcoholic beverages, 2005, World =100

Australia	**137**	Japan	241
Belgium	138	Netherlands	112
Canada	137	New Zealand	147
France	133	Singapore	119
Germany	133	Sweden	152
Hong Kong	127	Switzerland	186
Ireland	159	United Kingdom	144
Italy	147	United States	112

Source: *Global Purchasing Power Parities and Real Expenditures: 2006 International Comparison Program*, World Bank, Table 2.

Table 2.3: Consumer prices: % change 2005 to 2009 (Q3)

	Food	Core*		Food	Core*
Australia	18.3	11.7	Japan	4.2	-1.1
Belgium	13.0	6.8	Netherlands	8.6	5.8
Canada	14.9	6.5	New Zealand	25.7	9.8
France	7.5	5.9	Sweden	12.9	4.7
Germany	9.7	5.6	Switzerland	3.2	3.4
Ireland	5.6	7.2	United Kingdom	22.4	7.1
Italy	12.2	7.6	United States	12.5	9.4

* All items excluding food and energy. Source: Secretariat, based on OECD, *Main Economic Indicators*.

2.15 Independent retailers have increased their sales over the 2000s, as the (nominal) economy has expanded. The number of independent stores has increased by about 50 per cent since 1999, although this is mostly 'convenience' stores rather than large supermarkets.[7]

2.16 The market share of Metcash-affilated independent supermarkets has held up, but this appears to mainly reflect takeovers of other independent supermarkets.[8]

2.17 Aldi is the most significant new entrant, now having over 200 stores and aspiring to expand to around 700. Costco has only one store, but plans others in the capital cities.[9]

2.18 The market share of independents also varies considerably from state to state. During the inquiry into the GROCERYchoice website the National Association of Retail Grocers discussed what proportion of the market independent retailers covered:

> In Sydney the independent sector is below 10 per cent. It is somewhere around eight per cent…In Victoria, the independent sector sits at about 18 per cent…South Australia sits at about 24 or 25 per cent, and WA is 31 per cent…[and Tasmania] I think the independent sector is somewhere around 12 per cent or 13 per cent.[10]

2.19 In the retail petrol market, the ACCC estimated in a 2007 report that Woolworths/Caltex and Coles Express/Shell account for about 63 per cent of all petrol sales (Table 2.4). As Woolworths/Caltex and Coles Express/Shell have become market leaders, the process of petrol station rationalisation has continued. The ACCC also reported increased use of both outlets' 'shopper docket' schemes, which give shoppers at the respective supermarkets a discount when purchasing their petrol.[11]

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7 Australian Competition and Consumer Commission, *Inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p. 132.

8 Australian Competition and Consumer Commission, *Inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p. 128.

9 Hon Dr Craig Emerson MP, Minister for Competition Policy and Consumer Affairs, media statement, 18 September 2009.

10 *Proof Committee Hansard*, 18 September 2007, pp 71-72.

11 —and, by extension, penalise customers who do not buy at these supermarkets. ACCC, *Petrol Prices and Australian Consumers*, December 2007, p. 77.

Table 2.4: Shares of retail sales by volume by brand in Australia (%)

	2002–03	2003–04	2004–05	2005–06	2006–07
BP	20	20	18	19	19
Shell/ Coles Express	20	20	28	28	25
Mobil*	19	19	12	11	11
Caltex/ Woolworths	34	34	36	36	38
Independents	6	6	6	6	7

Source: *Petrol Prices and Australian Consumers*, Report of the ACCC inquiry into the price of unleaded petrol, December 2007, p. 77. The committee notes that at the time of writing, the ACCC was considering Caltex's proposed $300 million acquisition of 302 Mobil service stations.

Chapter 3

Geographic price discrimination in Australia

What is geographic price discrimination?

3.1 Geographic (or 'spatial') price discrimination is a form of price discrimination. The economic literature identifies price discrimination as where a firm sells two identical units of a good at different prices, either to two different buyers or to the same customer.[1] A common example is the sale of identical tickets to an event which are priced lower for students and pensioners. Geographic price discrimination refers to the sale of an identical good (wholesale or retail) or service at a different price in a different location. It differs from 'price dispersion', which occurs when different sellers offer different prices for the same good in a given market.

3.2 In a 1987 book on pricing strategy, Dr Thomas Nagle referred to geographic price discrimination as segmenting by purchase location. He noted that 'dentists, opticians, and other professionals sometimes have multiple offices in different parts of a city, each with a different price schedule reflecting differences in their clients' price sensitivity'. He observed that many grocery chains classify their stores by intensity of competition and apply lower markups in localities where competition is most intense.

3.3 Dr Nagle also noted that price discrimination by location is quite common in international marketing. He gave the example of Deutsche Grammophon which has historically sold its records 'for up to 50 percent more in the European market than in the highly competitive American market'.[2] Another example are the region codes applied to DVDs which allow movie studios to charge different prices in different parts of the world without customers being able to buy DVDs where they are cheapest. The region codes thereby enable price discrimination.

Supermarkets' pricing policies in Australia

3.4 In March 2008, ALDI became the first grocery retailer in Australia to introduce a national pricing policy across all its stores.[3] Its website claims that through this strategy, the company is 'keeping things fairer for all Australians'. ALDI cited a

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1 *The New Palgrave Dictionary of Economics*, Second Edition, p. 626. Much of the economic literature employs a terminology introduced by A Pigou in *The Economics of Welfare*, (1920, Part 2, Chapter XVII) under which geographic price discrimination is a type of 'third-degree' price discrimination as it involves discrimination between consumers rather than between purchases of an individual consumer; see IPA, *Submission 4*; H Varian, 'Price discrimination' in R Schmalensee & R Willig (ed) *Handbook of Industrial Organisation*, Volume 1, 1989, p 600 and L Phlips, *The Economics of Price Discrimination*, 1983, pp 11-13.

2 Dr Thomas Nagle, S*trategy and tactics of pricing*, Prentice-Hall, New Jersey, 1987, p. 159.

3 This excludes excluding fresh fruit, vegetables and regional bakery lines.

recent poll it had conducted which found that '83 per cent of Australians were unhappy with the way supermarket prices vary from suburb to suburb'.[4] In its submission to this inquiry, the Institute of Public Affairs noted that geographic price discrimination is widely viewed as being 'somewhat immoral'.[5]

3.5 Coles and Woolworths have different arrangements. The head office of the major supermarket chains sets the shelf prices for most of its products in each of its stores. It also sets promotional prices, although not all stores necessarily have the same promotions at any one time. The local store manager can reduce prices below the standard shelf price in a range of circumstances including clearances of discontinued stock and stock approaching its use-by date.[6]

3.6 At a public hearing on 28 October 2009, the Senate Economics References Committee took evidence from both Coles and Woolworths representatives as part of its inquiry into the GROCERYchoice website. Mr Robert Hadler, General Manager of Corporate Affairs at Coles, told that committee that Coles gives its store managers the discretion to compete with their competitors' prices. In their submission Coles argued that:

> Compliance with the Bill for medium to large businesses would be so onerous that it would create the likelihood of a general reluctance to engage in existing discounting practices. The Bill would also significantly affect the ability of retailers to respond quickly to prices offered by their competitors. Coles considers that preserving the dynamic nature of retail pricing is fundamentally important to maintaining a highly competitive retail market.
>
> Compliance with the Bill would necessitate retailers adopting homogenised prices for identical items across most or even all of their respective sites. The likely effect of this would be that retailers would adopt price points at the upper end of their existing pricing bands. This is a result that would not be in the best interests of consumers.[7]

3.7 ANRA told this committee that:

> The prices within the same chain can be quite different. Having asked our own customers why this practice occurs, the response that has been given to me by the national retailers is simply that discretion is given generally to the store manager to engage in whatever discounting he feels appropriate to be able to maintain his stock levels. He has a certain degree of freedom in eliminating certain stock. Head office does not prescribe those costs and in fact probably does not find out about those costs until they have been reported through the normal business communication channels. There is

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4 http://www.aldi.com.au/au/html/ALDI_national_pricing.htm.

5 IPA, *Submission 4*, p. 1.

6 Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p. 467.

7 Coles, *Submission 5*, p. 2.

this dynamic flexibility at store level which is simply a managerial function.[8]

The ACCC report on grocery prices

3.8 The July 2008 ACCC report into the competitiveness of retail prices for standard groceries contains an empirical analysis of Woolworths' and Coles' local store pricing.[9] The aim of the study was to analyse the effects of local competition in grocery retailing. The ACCC compared the prices consumers paid for the same products in different Woolworths supermarkets and, in a separate exercise, compared the prices consumers paid for the same products in different Coles supermarkets.[10] It did not compare Woolworths with Coles prices.

3.9 The ACCC report found that:

- the local presence of a competing supermarket (Coles or Woolworths) has a significant effect on Woolworths' and Coles local pricing. In 2007, consumers shopping at Coles stores with a Woolworths supermarket within one kilometre paid prices that were on average 1.36 per cent lower than the prices paid by consumers at Coles stores without a Woolworths within five kilometres;
- the local presence of an ALDI store lowers considerably the prices consumers pay at the nearby Coles or Woolworths. In 2007, customers shopping at a Coles store with an ALDI within one kilometre paid prices for Coles 'ALDI price check items' that were on average around 5.15 per cent lower than the prices for the same items paid by consumers at Coles stores without an ALDI within five kilometres;
- Woolworths is moving to more uniform pricing across most of its stores. As a result, the local presence of a Coles supermarket on Woolworths local pricing was smaller in 2008 than in 2007. The local presence of an ALDI store still affects Woolworths' local pricing but only for those products that have not been subject to more uniform pricing;
- Coles head office sets lower prices for certain products in stores that have an ALDI store in close proximity. These are mainly products that Coles considers to be comparable to products offered by ALDI; and
- local pricing of Coles and Woolworths' supermarkets has been influenced by discounting to attract customers to a new store, higher transportation costs for

8 Dr Brendan Long, *Proof Committee Hansard*, 25 September 2009, p. 17.

9 The study's findings were presented in Appendix D of the *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008.

10 Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p. 467.

remote stores and varying costs of sourcing and distributing products from local distribution centres.[11]

3.10 The ACCC noted that while there is a high degree of standardisation of shelf products across stores, the major supermarket chains:

> …do vary these prices based on factors including freight costs (especially for remote stores) and the degree of competition.[12]

3.11 The continuing presence of geographic price discrimination is indicated in the GROCERYchoice website which was established by the federal government in August 2008 to monitor and compare grocery prices for typical shopping baskets. The ACCC collected grocery price information in 61 regions across Australia. The website—which has now been discontinued—explains that the regions were established 'to ensure GROCERYchoice is relevant to all Australians' by reflecting 'the lifestyles and shopping practices of Australian consumers'.[13]

3.12 The practice of varying prices for the same product between regions is also apparent from the websites of Coles and Woolworths. Both companies' websites offer their catalogues and weekly specials by requiring the user to enter a postcode. Prices may differ according to the postcode, although the basis for these differences is not clear.

3.13 As part of its inquiry into the GROCERYchoice website, the Senate Economics References Committee asked Woolworths to comment on the discretion that individual store managers have to vary their prices (other than discounting perishables). Woolworths responded that its:

> …store managers can match a price on any product they think places the store at a competitive disadvantage (compared to other retailers in the area) in particular remaining competitive on key value items.[14]

3.14 The References Committee also asked Woolworths the extent of, and the reasons for, cost differences in the price of products sold at its different chains. Woolworths responded that while 'it has many thousands of products with uniform prices', these are mostly for dry grocery items. For fresh foods, such as fruit and vegetables:

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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, pp. 473–478.

12 Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p. 467.

13 'GROCERYchoice', http://pandora.nla.gov.au/pan/87702/20080807-0955/www.grocerychoice.gov.au/Default.html (accessed 18 September 2009).

14 Senate Economics References Committee, *Response to question on notice*, Woolworths, 11 November 2009, p. 3.

> …prices frequently and unpredictably fluctuate on the basis of factors such as availability, quality, competition, stock levels, etc. Thus, despite Woolworths' uniform national pricing, the base price fluctuates over the course of each week with the prices of over thirty percent of products moving up or down at various times in different stores to reflect factors such as supplier cost changes, weekly or daily specials, competition matching centrally or at individual store discretion etc.[15]

3.15 A separate analysis seems to support the finding that prices differ more for fresh fruit and vegetables than for packaged produce. On 10 May 2008, Mr Craig Kelly, President of the Southern Sydney Retailers Association, recorded prices for a basket of 26 fruit and vegetables at Woolworths in Fairfield in western Sydney and, an hour later, at the closest Woolworths in the neighbouring suburb of Greystanes. Mr Kelly's bill at Woolworths in Fairfield came to $45.72. For the same items at Woolworths in Greystanes, his bill was $105.54.[16]

3.16 Mr Kelly noted in his submission that the quality of the items he purchased at both supermarkets was identical. He gave the example of a one kilogram bag of red onions which had the same packaging, labelling, barcode and use by date with the Woolworths in Greystanes charging a 112 per cent higher price than the Woolworths in Fairfield.[17]

3.17 Mr Kelly noted in his submission and in verbal evidence to the committee that the low prices in Fairfield had driven a neighbouring independent green grocer out of business. Twelve months later, in May 2009, he returned to Woolworths in Fairfield to purchase the same 26 items. He found that Woolworths in Fairfield had increased its prices 'on average 80 per cent after the independent was driven from the market'.[18]

3.18 The committee has some concerns with this research. In particular, the 2008-09 comparisons for Woolworths Fairfield are inflated by a few items which should probably have been excluded from the analysis. For example, the 80 per cent increase in prices across the basket as a whole includes a 181 per cent increase in the rice of Navel oranges, a 231 per cent increase in the price of longans and a 436 per cent increase in the price of garlic. [19]

15 Senate Economics References Committee, *Response to question on notice*, Woolworths, 11 November 2009, p. 2.

16 Mr Craig Kelly, *Submission 12*, p. 5.

17 Mr Craig Kelly, *Submission 12*, p. 5.

18 Mr Craig Kelly, *Submission 12*, p. 8.

19 See *Proof Committee Hansard*, 25 September 2009, p. 3.

Petrol retailers' pricing policies

3.19 In its December 2007 report into petrol prices, the ACCC noted that wholesale prices available to customers in Australia vary considerably. The report noted various reasons for these price differences including the discounts and more favourable terms offered to larger players and the exclusive supply arrangements between the supermarkets and respective suppliers.[20]

3.20 The ACCC report also recognised that geographic price discrimination exists as some petrol retailers adopt strategies to capitalise on the lesser competition in some areas. It noted that:

> Company data also shows that margins in regional areas are generally higher than in metropolitan cities. Higher margins in country areas has affected the strategy of some businesses such as United Petroleum, which states that it is looking to expand its business by focusing on regional rather than metropolitan sites because there is less competition, lower volumes and higher margins in regional areas.[21]

3.21 In his submission to this inquiry, Associate Professor Zumbo noted that the website www.motormouth.com.au shows:

> …that the same oil company and Coles and Woolworths operated service stations sell petrol at different prices at different locations, not only across a geographic area, but also along and across the very same street. These price differences reflect local competition, with lower prices being found in price competitive local markets.[22]

He noted that the data from the website revealed 'no necessary link' between lower retail petrol prices and a service station being closer to a terminal or refinery, and no necessary link between lower retail prices and 'lower cost' suburbs having lower occupation costs.[23]

3.22 At the public hearing on 25 September 2009, the National Association of Retail Grocers of Australia (NARGA) tabled two photographs of Caltex/Woolworths petrol stations on opposite side of Parramatta Road in Burwood, Sydney. NARGA

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20 Australian Competition and Consumer Commission, 'Petrol prices and Australian consumers—Report of the ACCC inquiry into the price of unleaded petrol', December 2007, p. 113 and p. 126. http://www.accc.gov.au/content/item.phtml?itemId=806216&nodeId=8185570f0f6244d5f20d18d7bc37d1e3&fn=Chapter%208%20Price%20determination%20and%20competition%20at%20the%20wholesale%20level.pdf (accessed 22 September 2009).

21 Australian Competition and Consumer Commission, 'Petrol prices and Australian consumers—Report of the ACCC inquiry into the price of unleaded petrol', December 2007, p. 113 and p. 139.

22 Associate Professor Frank Zumbo, *Submission 11*, p. 3.

23 Associate Professor Frank Zumbo, *Submission 11*, p. 3.

estimates that the two locations are 'about 70 metres apart'.[24] The first photograph, taken at 12.15pm, showed the price of 'Discounted Unleaded' fuel at 125.9 cents a litre. The second photograph, taken at 12.16pm, showed the price of 'Discounted E10' at 122.9 cents a litre.[25]

3.23 Mr Ken Henrick, Chief Executive Officer of NARGA, added:

> The picture we did not get was when we were going back to our office in fairly heavy traffic and could not stop, but there is another Woolworths service station at Roselands on King Georges Road…The price there was 109.9, the reason being that it is right next door to a Mobil service station. The petrol price inquiry which the ACCC conducted said that the average profit margins for the petrol industry are 4.9 cents per litre. So that is a difference between the Roselands store and the other two of 13 or 16 cents per litre, which would seem to suggest that it may be predatory.[26]

3.24 NARGA argued in its submission to this inquiry that the large petroleum retailers 'appear to have a substantial price advantage' in addition to which 'they can adjust their prices across the outlets they control to apply competitive pressure as and where they choose'. It gave the example of a petrol retailer charging higher prices at its stations along the Princess Highway the further south from Sydney they are sited.[27]

3.25 The Service Station Association claimed that its members are 'particularly disadvantaged' by geographic price discrimination. The Association noted that the large industry participants have large and widespread networks of outlets and added:

> It is common practice for them to vary the price at which they sell their petrol to suit the nature of competition at each location. It is the norm, and has been for quite some time, that the large retailers will set lower prices in more competitive areas and higher prices where competition is absent. The key point here is that the price is determined by the competitive nature of the market, not by the socio-economic status of the area. For example, the lower north shore of Sydney maintains a competitive price structure even though it has a very high socio-economic status. It exists because of diversity of competition in the region.[28]

3.26 The Association claimed that large retailers could subsidise lower prices in competitive areas by setting higher prices in areas of ineffective competition. It alleges that the common effect of this cross subsidy is that independent operators are priced out of the market. However, the Association was cautious in its support for the bill, calling for an examination of similar legislation in other jurisdictions to check for

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24 Mr Ken Henrick, *Proof Committee Hansard*, 25 September 2009, p. 26.

25 NARGA, *Tabled documents*, 25 September 2009.

26 Mr Ken Henrick, *Proof Committee Hansard*, 25 September 2009, p. 26.

27 NARGA, *Submission 6*, p. 3.

28 Service Station Association, *Submission 1*, pp. 1–2.

any unintended consequences. It also expressed concern that the bill would involve high compliance costs which may outweigh the benefits of the legislation.[29]

Committee view

3.27 The committee believes that the Blacktown Amendment, and the issue of geographic price discrimination, reflects legitimate concerns about the concentration of Australia's retail grocery and petrol markets. There is an important debate about the costs and benefits of having only two players owning a significant share of Australia's retail grocery market, and addressing the barriers to entry of new Australian and foreign competitors.

3.28 In this context, the committee welcomes the recent moves by the ACCC to remove restrictive clauses in rental tenancy agreements in shopping centres. More consideration should be given to similar types of reform with a view to encouraging greater local competition for the major chains. It is encouraged by the federal government's recent announcement that it will work through the Council of Australian Governments to free up restrictive planning laws. The available empirical evidence suggests that the presence of a second and third competitor in close proximity can deliver lower prices for consumers.

The lack of adequate research

3.29 The committee is surprised how little conceptual and empirical work has been done on the economic theory of geographic (or 'spatial') price discrimination in retail markets and its welfare effects. As Phlips has noted: 'discrimination might be as common in the marketplace as it is rare in the economics textbooks'.[30]

3.30 To the committee's knowledge, there has been no comprehensive empirical study in Australia of the extent of, or the reasons for, geographic price discrimination.[31] This inquiry has produced some claims as to why a company might price differently at its different sites:

- Coles listed several factors in its submission including freight, utility, rent and wage costs, different wholesale prices in different regions and 'subtle quality distinctions' for fresh food;[32]
- Woolworths downplayed the influence of freight costs, noting that 'only a handful of Woolworths stores in the remotest parts of Australia have marginally higher prices due to the extra transportation required';[33]

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29 Service Station Association, *Submission 1*, p. 2.

30 L. Phlips, *The Economics of price discrimination*, Cambridge University Press, 1983, p. 7.

31 The ACCC's 2008 inquiry into the competitiveness of retail prices for groceries in Australia did contain some useful information on the major supermarket chain's pricing strategies.

32 Coles, *Submission 5*, p. 4.

- ANRA explained price differences across stores in terms of stock management, with store managers given discretion to price according to the supply and demand for a product at the store; and
- Associate Professor Zumbo, NARGA and the Southern Sydney Retailers Association saw the rationale as the company wanting to maximise its profits by keeping prices high in uncompetitive locations and lower in areas of high competition.

3.31 These explanations may all have merit. However the committee has had very little evidence of either a qualitative or quantitative nature to indicate why a company does vary its price from one store to another. Without this analysis, it is difficult to quantify the problem that the bill seeks to address.

33 Senate Economics References Committee, Woolworths, *Answers to questions on notice*, 10 November 2009.

Chapter 4

Predatory pricing, geographic price discrimination and the Trade Practices Act

Predatory pricing and the TPA

4.1 Section 46(1) of the *Trade Practices Act* is a general prohibition against the abuse of market power. It precludes a corporation that has 'a substantial degree of power in a market' from taking advantage of that power for the purpose of substantially damaging or eliminating a competitor(s), preventing the entry of a person into the market or deterring or preventing a person from engaging in competitive conduct in that (or any other) market.

4.2 Section 46(1AA) of the Act deals specifically with predatory pricing. It states that a corporation that has 'a substantial share of a market' must not supply goods or services for a *sustained period* at a price that is less than the relevant cost to the corporation of these goods or services, for the purpose of eliminating or substantially damaging a competitor or deterring or preventing a person from engaging in competitive conduct in that (or any other) market.

Price discrimination and the TPA

4.3 The TPA formerly included an explicit 'price discrimination' provision. Section 49(1) stated:

> A corporation shall not, in trade or commerce, discriminate between purchasers of goods of like grade and quality in relation to
>
> (a) the prices charged for the goods;
>
> (b) any discounts, allowances, rebates or credits given or allowed in relation to the supply of goods;
>
> (c) the provision of services in respect of the goods;
>
> (d) the making of payments for services provided in respect of the goods if the discrimination is of such magnitude or is of such a recurring or systematic character that it has or is likely to have the effect of substantially lessening competition in a market for goods, being a market in which the corporation supplies, or those persons supply, goods.

4.4 Section 49(2) listed two defences to 49(1). The first is where there is reasonable allowance for differences in the cost or likely cost of manufacture, distribution, sale or delivery resulting from the different places to which the goods are supplied to purchasers. The second defence is where the discrimination was constituted by the doing of an act in good faith to meet a price or benefit offered by a competitor of the supplier.

4.5 As highlighted by the Law Council of Australia, the Swanson Committee (1976), the Blunt Committee (1979) and the Hilmer Committee (1995) all considered the operation and utility of the Section 49 amendment and recommended its repeal.

4.6 Section 49 was finally repealed in 1995 on the recommendation of the Hilmer Review. The Review found that:

> The Committee does not consider that competition policy should be distorted to provide special protection to any interest group, including small business, particularly where this is potentially to the detriment of the welfare of the community as a whole. Sectoral assistance policy of this sort is generally most efficiently implemented by more open and direct assistance, including budgetary and taxation measures of various kinds. In any event, it seems clear that small businesses have not achieved any significant benefit from the presence of s49.[1]

4.7 The Review concluded that 'to the extent that section 49 has had any effect it seems to have diminished price competition'. It also noted that price discrimination 'generally enhances economic efficiency, except in cases which may be dealt with by s.45 (anti-competitive agreements) or s.46 (misuse of market power)'.[2]

4.8 In 2003, the Dawson Review found that the effect of price discrimination on competition should be considered on a case-by-case basis. In this context, it noted that section 46 is the most appropriate means to tackle anti-competitive price discrimination. Further, the Review considered that there are reasons for differences in wholesale prices in the grocery industry which do not involve anti-competitive practices.[3]

Section 46 is inadequate and ineffective

4.9 The Southern Sydney Retailers Association argued that section 46 of the TPA is 'totally and completely useless against geographic price discrimination'. The Association's President, Mr Craig Kelly, criticised the section 46(1) threshold of 'a substantial degree of market power' and cited Justice McHugh in the Boral case who noted that conduct that is predatory may not be captured by section 46 simply because the predator does not have substantial market power.[4]

4.10 The National Association of Retail Grocers of Australia (NARGA) claimed that a prohibition of price discrimination 'would be a simple way to address that way

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1 Treasury, *Submission 10*, p. 6.

2 Frederick Hilmer, *Report on National Competition Policy*, 1995.

3 Dawson Review, 2003, pp. 96–97 http://tpareview.treasury.gov.au/content/report/downloads/PDF/Chpt4.pdf (accessed 21 September 2009).

4 Mr Craig Kelly, *Proof Committee Hansard*, 25 September 2009, p. 5.

in which market power can be misused'.[5] The Blacktown Amendment would reduce the potential for predatory behaviour and does not depend on a decision of the ACCC to act.[6]

4.11 NARGA argued that price discrimination legislation will assist to make the Australian marketplace more competitive. In NARGA's opinion, section 46 has not been effective at addressing geographic price discrimination. It argued that it is very difficult to prove that market power has been misused. For example, it would not be possible for a small competitor in the petroleum market to determine whether the price at which fuel is being offered by a large chain retailer nearby is predatory.[7]

Section 46 is adequate to proscribe geographic price discrimination

4.12 Other submitters have argued that section 46(1) of the TPA effectively proscribes predatory pricing and, to the extent that it constitutes predatory pricing, geographic price discrimination.

4.13 Coles argued in its submission that the TPA's provisions on predatory pricing are adequate to proscribe against 'geographic price discrimination'. It noted that the Second Reading Speech of the bill did not describe any types of alleged behaviours in the retail sector that could not be addressed under the existing provisions of section 46.[8] Indeed, Coles argued that the bill's ban on all geographic price discrimination is 'incongruous with the spirit and intent of s46 more generally'.[9]

4.14 Treasury wrote in its submission that the section 46 provisions in the TPA are:

> …well targeted to prevent predatory pricing since it takes into account the relevant requirements necessary for a firm to engage in predatory pricing. At the same time it also allows businesses sufficient pricing flexibility to compete effectively and to provide their products at efficient prices.
>
> In contrast, the Bill's single price rule does not distinguish between pro-competitive and anti-competitive behaviour.[10]

4.15 This echoes the finding of the 2003 Dawson Review which found that section 46 of the TPA remained the best means of delineating between competitive and anti-competitive price discrimination.

4.16 The Australian Association of Convenience Stores wrote in its submission:

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5 NARGA, *Submission 6*, p. 3.

6 NARGA, *Submission 6*, p. 5.

7 NARGA, *Submission 6*, p. 4.

8 Coles, *Submission 5*, p. 3.

9 Coles, *Submission 5*, p. 3.

10 Treasury, *Submission 10*, p. 1.

> We see no evidence that collusive practices are determined by geographic or indeed any other size implications and affirm that the Trade Practices Act 1974 (Commonwealth) already provides protection for small retail business against corporations that appear to have a substantial degree of power in the market.[11]

4.17 ANRA told the committee that in its opinion, section 46(1) of the TPA is sufficient to deal with the threat of predatory pricing. It noted that this section required proof of anti-competitive intent and that the bill is silent on this matter. ANRA argued that the bill would effectively be an effects based test rather than a determination of the principle of anti-competitive intent.[12] As Dr Brendan Long told the committee:

> ...it is a mistake to confuse normal market differentials with a deliberate attempt to engage in an anticompetitive practice. The challenge for a regulator is to separate those two elements, which is what the Trade Practices Act does and what the proposed amendment does not do.[13]

4.18 The committee notes that there are alternative approaches to preventing predatory pricing if the existing trade practices legislation is regarded as inadequate. In October 2008, the Senate Economics Committee explained that the Fuelwatch scheme would reduce the scope for predatory pricing:

> Another problem for the independents is that the major chains can spread losses at one station over a number of other stations. This makes it easier for them to engage in a predatory pricing strategy of very aggressively cutting prices at a station next to an independent to drive out the independent (or at least discourage it from trying to undercut the price set by the major station) and covering the loss at this station from profits at other stations…This strategy is *less* likely to work under Fuelwatch, as more motorists will switch from the profitable stations of the major company to the one offering the low price, reducing the chain's ability to cross-subsidise its loss. Furthermore, Fuelwatch makes it much more obvious when large retailers are engaging in predatory pricing and would make it easier for an independent victim to gather the evidence to show a court or the ACCC.[14]

The international approach

4.19 Neither New Zealand, the UK or Canada have any legislation similar to the Blacktown Amendment dealing with price discrimination. An alternative approach to what this bill proposes was, until recently, legislated in Canada. Rather than

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11 Australasian Association of Convenience Stores, *Submission 3*, p. 1. The same argument was put by ANRA, *Submission 9*, p. 3.

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

13 Dr Brendan Long, *Proof Committee Hansard*, 25 September 2009, p. 17.

14 Senate Standing Committee on Economics, *National Fuelwatch (Empowering Consumers) Bill 2008*, October 2008, p 37.

prohibiting any variation in price for the same product within a geographic area, provision 50 of Canada's *Competition Act* established nationwide price discrimination offences with key threshold requirements relating to the anti-competitive effect and purpose.

4.20 In March 2009, provision 50 was repealed because price discrimination, predatory pricing and geographic price discrimination were considered not necessarily harmful to economic welfare and could be beneficial to competition. As a result of the amendments, non-dominant businesses are free to offer different prices for the same product in different parts of Canada. Dominant firms will still 'have to be careful not to engage in any practices that could be found to have an anti-competitive purpose and be likely to prevent or lessen competition substantially'.[15] Predatory pricing will now be dealt with under the civil abuse of dominance provisions in the Competition Act.[16]

4.21 Treasury noted in its submission to this inquiry that the trend in Australia and overseas has been to repeal provisions similar to those contained in the bill because of the negative consequences of these provisions.[17]

4.22 As the Law Council of Australia stated in its submission:

> In New Zealand, the UK and the EU there are no specific legislative provisions dealing with price discrimination and actions for anti-competitive price discrimination are instead pursued under their respective prohibitions on misuse of market power.[18]

4.23 The literature distinguishes between price discrimination as a competitive and legitimate pricing tactic and the constraints of anti-trust (predatory pricing) legislation. Dr Nagle, for example, considers geographic price discrimination to be both a common and acceptable competitive tactic, but cautions:

> One must be particularly careful when segmenting by location to counter competition. The Robinson-Patman Act explicitly forbids anyone "to discriminate in price…where the effect of such discrimination may be to substantially lessen competition…" As a rule, you can cut price selectively in one geographical area to meet the price of a competitor. It is risky, however, to undercut the prices of a local competitor while keeping prices higher elsewhere. Unless the local competitor is itself financially strong and the selective price cutting is done only to defend rather than to gain market

15 Paul Crampton, 'Major changes to the Competition Act (Canada) and the Competition Bureau's Enforcement Policies, *The antitrust source*, June 2009, pp. 3–4. http://www.abanet.org/antitrust/at-source/09/06/Jun09-Crampton6-29f.pdf (accessed 16 September 2009).

16 Competition Bureau Canada, 'Proposed changes to the Competition Act', http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/00243.html (accessed 16 September 2009).

17 Treasury, *Submission 10*, p. 1.

18 Law Council of Australia, *Submission 2*, p. 3.

> share, the local competitor has a good chance of winning a claim that your local price cutting is anticompetitive.[19]

4.24 The ACCC in giving evidence to the committee also highlighted their concerns that this Bill is unlike any other trade practices legislation in operation in any other similar jurisdiction to Australia. Whilst the United States does have some legislation it was described by the Law Council of Australia as "overly complex and preventing price competition".[20] The ACCC commented that:

> Moving to the US experience, the Robinson-Patman Act has been quoted by some as being akin to the proposals in the Blacktown amendments. Commentators that draw that analogy must be reading different text to what I am. I understand that US laws do not prohibit price discrimination per se but rather prohibitions require a finding of a substantial lessening of competition. Defences are also available, allowing businesses to reflect differing costs and to match prices. These are big differences to what is on the table here today. I note also that both judicial and academic commentators in the US encourage a reading down of those provisions, and commentators note that regulators have not been particularly active in the field.[21]

Costs differences and matching a competitor's price

4.25 The former section 49(2) of the TPA contained two defences relating to the higher cost of the manufacture, distribution, sale of delivery of goods to different areas and where a company acts in 'good faith' to match a competitor's price. Submitters to this inquiry have highlighted both these factors in defence of geographic price discrimination.

4.26 Treasury has argued that the bill 'seems to be premised' on the assumption that 'a good that looks the same is the same, regardless of where and how it is sold'. It emphasised that location, surroundings, service and convenience are all significant components of any product and must be taken into account when determining price.[22]

4.27 Coles has cited the following factors as to why its retail sites may sell the same product at different prices:

- freight costs vary in transporting products to different sites (a point also highlighted by 7-Eleven Stores);[23]
- rental tenancy agreements can vary from site to site;

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19 Dr Thomas Nagle, *The strategy and tactics of pricing*, Prentice-Hall, New Jersey, 1987, p. 160.

20 Law Council of Australia, *Submission 2*, p. 3.

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

22 Treasury, *Submission 10*, p. 2.

23 7-Eleven Stores Pty Ltd, *Submission 8*, p. 2.

- products delivered directly to site commonly have different wholesale prices in different regions;
- products may be chosen for promotion in some sites but not others due to its popularity within the demographics of a particular area;
- fresh products may have 'subtle quality distinctions' based on their sourcing origins which is often reflected in minor price variations;
- utility and other rates vary at different sites; and
- staffing levels and wages differ between different sites.[24]

4.28 The July 2008 ACCC report into the competitiveness of retail prices for standard groceries found that grocery prices differ between locations for a number of reasons. The report concluded that price differences for groceries were largest for goods which are more likely to be regionally sourced, such as fresh produce. The minimal competition in some areas partly reflects the small size of the communities:

> …which means that there is limited scope for the entry of multiple stores. Higher prices for groceries in these locations may partly reflect a lack of competitive pressure, but also results from higher operating costs relative to turnover.[25]

4.29 Treasury's submission noted the ACCC's publication *Understanding petrol pricing in Australia* which listed various reasons as to why petrol prices, and competition in petrol retailing, might vary among locations. The ACCC concluded:

> The influence of these factors can vary considerably between locations, resulting in substantial differences in prices. It is not surprising therefore that there are considerable variations in petrol prices across locations, including differences between city and country prices.[26]

4.30 There will obviously be some cost differences between locations. The ACCC study showed that there are price differences resulting from lack of competition in some locations. What is not clear is the relative size of these effects.

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24 Coles, *Submission 5*, p. 4.

25 Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p. 87.

26 Treasury, *Submission 10*, p. 2.

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

Minority Report by Senators Joyce and Xenophon

Introduction

1.1 This inquiry was established to inquire and report on the Trade Practices Amendment (Guaranteed Lowest Prices – Blacktown Amendment) Bill, jointly introduced to the Senate on 24 June 2009 by Senators Barnaby Joyce and Nick Xenophon.

1.2 The Bill is designed to end the anti-competitive practice of geographic price discrimination, which can potentially drive independent retailers out of the market or deter them from cutting prices.

1.3 The Bill will require large retailers such as major supermarket chains and oil company operated service stations to charge the same price for the same product at all of their retail locations within 35 kilometres of another one of their sites.

Market dominance

1.4 In terms of supermarket dominance, it's estimated that Woolworths and Coles control around 80 percent of supermarkets over 2000 square metres and 60 percent of the petrol sector.

1.5 Woolworths began selling petrol in 1999 and in 2003 joined with Caltex, which propelled it from the fifth-largest petrol retailer to equal second. Now, Mobil is proposing to sell 302 service stations in the eastern states to Caltex, giving Woolworths/Caltex an even larger market share.

1.6 The proposed Caltex acquisition itself raises serious competition concerns, enabling Caltex to gain a dominant position in the retail and wholesale petrol markets, thereby increasing the opportunities for geographic price discrimination by Caltex. The Woolworths/Caltex alliance has also enabled Woolworths to increase its dominance of the retail petrol market.

1.7 Coles also joined the petrol sector in 2003, entering into an alliance with Shell. This alliance has also enabled Coles to gain a dominant position in the petrol retail market.

1.8 The ACCC noted in its 2007 report into petrol prices that Coles and Woolworths' presence in the sector had impacted independent petrol stations:

> …the exclusive supply arrangements between the supermarkets, Coles Express and Woolworths and respective suppliers, Shell and Caltex, have diminished the supply options for many independent resellers.[1]

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1 ACCC, *Petrol prices and Australian consumers*, December 2007, p. 126.

1.9 But the role of independent retailers is crucial to ensuring a competitive marketplace. Independent retailers are critical to putting downward pressure on retail prices.

1.10 As the Service Station Association stated in its submission to the inquiry:

> It is universally accepted that diversity of competition is essential if consumers are to enjoy proper competition, and small independent retailers are an essential ingredient in that mix.[2]

1.11 Coles and Woolworths' market power in the supermarket and petrol sectors has placed extreme pressure on independent retail and petrol station operators, with many forced to close as a result of being unable to survive under the pricing practices and growing dominance of Coles and Woolworths.

1.12 The Service Station Association wrote that, due to Coles and Woolworths' large and widespread networks of outlets:

> It is common practice for them to vary the price at which they sell their petrol to suit the nature of competition at each location. It is the norm, and has been for quite some time, that the large retailers will set lower prices in more competitive areas and higher prices where competition is absent.[3]

Geographic price discrimination

1.13 Geographic price discrimination is the practice whereby a business charges different prices for the same product in two or more different locations. Treasury argues that there are various reasons why a business might use geographic price discrimination, or "price flexibility", as Treasury chooses to refer to it.

> These might be related to supply-side aspects, such as differentials in costs or the scope of operations between locations; or demand-side factors, including the size of the local population, and the nature of local competition. Each of these reasons, including competitive differences, is a legitimate reason for prices to vary among locations.[4]

1.14 Further, the ACCC told the Senate Committee hearing that it:

> …does not believe there is something inherently wrong with price discrimination. We do not believe it is inherently anticompetitive.[5]

1.15 The Australian National Retailers Association claims that geographic price discrimination is 'extremely rare, if ever present, in the Australian commercial environment'.[6]

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2 Service Station Association, *Submission 1*, p. 1.

3 Service Station Association, *Submission 1*, p. 1.

4 Treasury, *Submission 10*, p. 2.

5 Mr Scott Gregson, ACCC, *Proof Committee Hansard*, 5 October 2009.

1.16 Similarly, Coles argued that geographic price discrimination does not exist. However, Coles did acknowledge that it gives its store managers discretion to adjust prices to compete with local competition.[7]

1.17 Geographic price discrimination is a common pricing strategy which, from time to time, raises competition concerns. For example, under United States anti-trust laws the practice is considered illegal in certain circumstances.

1.18 There are at least four reasons why geographical price discrimination might be regarded as objectionable:

- It may be regarded as inherently inequitable or unfair for different people to pay a different price for the same good;
- It allows for the anti-competitive practice of predatory pricing;
- It allows firms to exploit a lack of competition in certain locations; and,
- It reduces economic efficiency through increasing the search costs to consumers of locating the 'best price'.

1.19 On a practical level, the impact of geographic price discrimination means that consumers could be faced with the same brand of service station or supermarket just kilometres apart, or even on the same street, charging different prices for exactly the same product, with consumers getting the product cheaper where there is local competition and paying a higher price where there is a lack of local competition.

1.20 Indeed, it is fair to argue that it would not be acceptable for a company to discriminate when selling a product based on a customer's religion, gender or race. Why, then, should it be acceptable for a company to discriminate on the basis of consumers' location?

1.21 The ACCC's July 2008 report—*Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*—found that the local presence of a competing supermarket (Coles or Woolworths) has a significant effect on prices.

1.22 Consumers shopping at Coles stores with a Woolworths supermarket within one kilometre paid prices that were on average 1.36 percent lower than the prices paid by consumers at Coles stores without a Woolworths within five kilometres.

1.23 Customers shopping at a Coles stores with an ALDI within one kilometre paid on average around 5.15 percent lower than the prices for the same items paid by consumers at Coles stores without an ALDI within five kilometres.[8]

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6 Australian National Retailers Association, *Submission 9*, p. 3.

7 Coles, Submission 5, p. 3. Mr Robert Hadler, *Proof Committee Hansard*, GROCERYchoice inquiry, Senate Economics References Committee, 28 October 2009, p. 16.

8 ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008.

1.24 Coles argued in its submission to the Committee that the reason for different pricing of goods at Coles' different sites is a result of business costs, and ignores the inference that it's due to competition factors.

1.25 Some of the general costs of doing business and other factors that can contribute to different pricing at Coles' different sites [are]:

> Freight costs vary in transporting products to different sites;
>
> Rental tenancy agreements can vary from site to site;
>
> Products delivered directly to sites or to the Coles' distribution centres, commonly have different wholesale prices in different regions;
>
> Products may be chosen for promotion in some sites but not others due to popularity within the relevant demographics of given areas;
>
> Fresh products may have subtle quality distinctions based on their sourcing origins and this is often reflected in minor price variations;
>
> Utility and other rates vary at different sites; and the
>
> Staffing levels and wage differentials that exist between sites.[9]

1.26 However, no evidence to support these large cost differences was provided to the Committee, and given Aldi operates on a national pricing policy and Woolworths is moving in the same direction, it would seem that cost differences (especially within the one metropolitan area) cannot be sufficient to justify price discrepancies.

1.27 In fact, Woolworths recently commented that prices within metropolitan areas do not differ as a result of cost differences:

> Individual differences between store operating costs…are merely reflected in some stores making a better return than others, not in retail price variation…Only a handful of Woolworths stores in the remotest parts of Australia (eg Weipa and Gove) have marginally higher prices due to the extra transportation required.[10]

1.28 The Committee did express concerns about the impact this Bill, if passed, would have on products which varied in quality, such as fresh fruit and vegetables.

1.29 Firstly, it has to be noted that Coles and Woolworths don’t advertise the difference in quality of fruit and vegetables between their stores and it's fair to argue that produce between stores within a 35 kilometre region would likely be sourced from the same distribution centre.

1.30 This Bill seeks to address the issue of identical products being priced differently within the same area, and, as such, fresh produce could have the benefit of

9 Coles, *Submission 5*, p. 4.

10 Woolworths, *Responses to questions on notice for GROCERYchoice inquiry*, Senate Economics References Committee, 11 November 2009.

an exemption under the Blacktown Amendment relating to 'imminently perishable.' This exemption would allow fresh produce to be priced to reflect the variance in produce that may arise during the shelf life of the produce.

1.31 Competition expert, Associate Professor Frank Zumbo from the University of New South Wales, argues that, ultimately, price variation tends to be driven by the presence, or lack thereof, of competition.

> Coles and Woolworths will only lower their prices in a local market where they have to by the presence of a strong price competitive independent in that local market.[11]

1.32 Coles also stated in its submission that:

> Compliance with the Bill would necessitate retailers adopting homogenised prices for identical items across most or even all of their respective sites. The likely effect of this would be that retailers would adopt price points at the upper end of their existing price bands.[12]

1.33 This argument was supported by the Law Council of Australia, who claimed:

> If enacted, the Blacktown Bill would raise the costs to a firm of cutting its prices in a particular location, since the law would require that these lower prices are extended to all other locations (within a 35km radius), even though the firm would otherwise not have lowered its prices in those other locations. Thus, rather than extending lower prices to locations that otherwise may not have benefited from them, the Bill is more likely to discourage firms from price discounting at any of their outlets.[13]

1.34 However, this implies a lack of a desire by large corporations to provide all consumers with lowest possible prices everyday.

1.35 Hypothetically speaking, if competitive markets have lower prices and monopoly markets have higher prices, then the impact of the Blacktown Amendment would be to lower prices in monopoly markets to the level of prices in competitive markets.

1.36 In this way, the Blacktown Amendment replicates the competitive process obviously lacking in monopoly markets.

1.37 Contrary to criticisms of this Bill, a company choosing to raise prices in competitive markets following the enactment of the Blacktown Amendment would simply lose business in those competitive markets. With competition keeping prices low in competitive markets, the Blacktown Amendment would require those low prices to also be offered in monopoly markets. As such, where there are more

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11 Associate Professor Frank Zumbo, *Submission 11*, p. 3.

12 Coles, *Submission 5*, p. 2.

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

monopoly markets than competitive markets, the benefits of the Blacktown Amendment would be magnified accordingly through lower prices across those monopoly markets.

1.38 On the other hand, if there are many competitive markets and modest numbers of monopoly markets, the impact of the Blacktown Amendment will still, as its drafters intended, be beneficial in bringing the benefits of lower prices from the competitive markets to the monopoly markets. Again, the Blacktown Amendment would provide consumers with lowest possible prices everyday.

1.39 As Associate Professor Frank Zumbo stated in his submission to the Committee:

> A single lowest price strategy everyday and everywhere in the same geographic area is the most economic and competitive pricing strategy that a company can adopt. A single lowest price strategy in these circumstances means that the company will be maximising its customer base and turnover as it will be attracting customers with the most competitive price that the company can offer consumers everyday and everywhere in the same geographic area.[14]

1.40 Currently, it's understood that prices, including promotional prices, are set by the Head Offices of Coles and Woolworths and then can be modified as and when determined by the local store manager.

> The local store manager can reduce prices below the standard shelf price in a range of circumstances including clearances of discontinued stock and stock approaching its use-by date and as a response to local competition.[15]

1.41 In contrast, supermarket chain, ALDI, has a national pricing policy whereby all items are priced uniformly across all stores across the country.

1.42 ALDI's website states:

> We believe you shouldn't have to pay more for your groceries simply because of where you live, which is why from Rosehill to Rutherford, Bundaberg to Ballarat, you'll pay the same low prices on groceries in every ALDI store. It's our way of keeping things fairer for all Australians.[16]

1.43 Geographic price discrimination enables 'predatory pricing' to occur, which is when a firm with 'deep pockets' cuts prices at an outlet to below-cost for a sustained period of time to drive a direct competitor out of business. Subsequently, once the competition is gone, prices tend to rise above competitive levels.

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14 Associate Professor Frank Zumbo, *Submission 11*, p. 5.

15 ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p. 467.

16 http://www.aldi.com.au/au/html/ALDI_national_pricing.htm

1.44 It is important to note that competition is not only reduced by actual predatory pricing but by the threat of it. An independent may be deterred from entering, or an existing operator from cutting prices, for fear of inducing a predatory response from a major chain.

1.45 Over a number of decades, domestic competitors having a comparable scale of operations to Coles or Woolworths have been very rare and have either been bought out by one of the major supermarket chains or have exited the local market.

1.46 Only one foreign competitor (Aldi) has entered the retail market to a point that it offers some competitive tension at the retail level, and even then it only retains a market share of a few percent. Another foreign entrant—Costco—has only recently opened a single outlet.

1.47 The advantage of this Bill is that it reduces the credibility of an implicit or explicit threat to engage in predatory pricing, as a below-cost price could not be charged next door to an independent retailer, but would have to be offered across all stores within a 35 kilometre region.

Impact on Independents

1.48 The consequence of geographic price discrimination on smaller retailers and independents is such that they are being priced out of the market.

> In petrol retailing, small independent operators are in decline, brought about by the huge distortion in market power between them and the supermarkets and the multi-national oil companies. The reduction in the number of service stations has accelerated since the supermarkets entered the industry to the extent that many small communities no longer have a petrol outlet to service their needs.[17]

1.49 The experiment conducted by the Southern Sydney Retailers Association in 2008–09 clearly demonstrated the impact of geographic price discrimination on independent retailers and on consumers.[18]

1.50 Situated less than 5kms apart, the shopping centre in Greystanes, Sydney, featured a Woolworths supermarket with no competition, while the Woolworths in Fairfield had an independent grocer selling produce in the same shopping centre.

1.51 On the same day, less than one hour apart, the same basket of goods was purchased from the two Woolworths supermarkets.

1.52 There was a staggering 131 percent difference between the costs of the baskets—higher at the Greystanes Woolworths, which did not have any competition.

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17 Service Station Association, *Submission 1*, p. 1.

18 Southern Sydney Retailers Association, *Submission 12*.

1.53 One year later, the same experiment was conducted; however, the independent grocer at Fairfield had since closed down.

1.54 Perhaps unsurprisingly, the cost of the same basket of goods at the Fairfield Woolworths had increased 80 percent on the previous year.

> It was obvious that once the independent competitor disappeared, so did the low prices.[19]

1.55 This case study, and how the Blacktown Amendment would have potentially altered the situation, was discussed during the Committee hearing.

> CHAIR—Do you think Woolworths should go down to the lower price that they charge at Fairfield, or should it be somewhere between the Fairfield price and the Greystanes price? If Woolworths had to charge exactly the same price for that basket of fruit and veg, do you think they would go down to the absolutely lowest price?
>
> Mr Kelly—They would have an option. Woolworths could have raised their prices in 2008, when the independent was there. The only thing stopping them was that independent business being there. If Woolworths decided to raise their prices at Fairfield, they would simply lose business to the independent competitors. They would have a choice. If they raised their prices at Fairfield because of this law, they would lose business—and that would stop them from doing it. The competition at Fairfield would act as de facto competition for the non-existent competition at Greystanes to bring those prices at Greystanes down.[20]

1.56 Further, in terms of entry to the market:

> CHAIR—If the prices are so high at Greystanes, why do you think a competitor has not moved into the area?
>
> Mr Kelly—It is because of the practice of geographic price discrimination. A competitor can see the super competitive prices that Woolworths are charging at Greystanes. If I were a small greengrocer or independent businessman I would normally think it was a great opportunity for me to go into Greystanes shopping centre and open up a small business and bring that competitive pressure. But that businessman knows that the minute he does that, no matter what price he puts up, Woolworths will automatically slash their prices to supposedly match him without regard to any price they have in the other shopping centre.[21]

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19 Southern Sydney Retailers Association, *Submission 12*, p. 8.

20 Mr Craig Kelly, Southern Sydney Retailers Association, *Proof Committee Hansard*, 25 September 2009, p. 4.

21 Mr Craig Kelly, Southern Sydney Retailers Association, *Proof Committee Hansard*, 25 September 2009, p. 3.

Conclusion

1.57 This Bill seeks to ensure that consumers are provided with lowest possible prices everyday and everywhere within a 35 kilometre region.

1.58 The dominance of Coles and Woolworths in both the supermarket and petrol sectors means that small independent retailers can be priced out of the market and retail prices inflated in areas where there is no competition.

1.59 Geographic price discrimination is a real and existing threat to competition and is unfair for consumers who, within one suburb, may face price differences of 100 percent for the same product, or 10 cents a litre, for example.

1.60 While overhead costs may vary from site to site, it has to be fair to say that those costs cannot be so substantially different within 35 kilometres as to require highly inflated retail prices or price variations for an identical product.

1.61 Geographic price discrimination not only affects consumers but also small businesses who can be driven out of business as a result of the ever expanding market power held by the two major supermarket chains in both the supermarket and petrol sectors.

1.62 This Bill seeks to address this issue and promote a level and competitive playing field by ensuring that the anti-competitive practices of geographic price discrimination and predatory pricing are effectively dealt with.

Recommendation 1

1.63 That the Bill be passed.

Alternate Recommendation

Defer consideration of the Bill and establish a Working Group to examine the extent and nature of geographic price discrimination within the major metropolitan and regional centres in Australia. The Working Group could include officials from Treasury and the ACCC, representatives from the major supermarket and petrol retailers, small business groups and consumer groups and academic experts.

SENATOR BARNABY JOYCE

Leader of the Nationals in the Senate

SENATOR NICK XENOPHON

Independent Senator for South Australia

APPENDIX 1

Submissions Received

Submission Number	Submitter
1	Service Station Association Limited
2	Law Council of Australia
3	Australasian Association of Convenience Stores
4	Institute of Public Affairs
5	Coles Group Ltd
6	National Association of Retail Grocers of Australia
7	BP Australia Pty Ltd
8	7-Eleven Stores Pty Ltd
9	Australian National Retailers Association (ANRA)
10	The Treasury
11	Associate Professor Frank Zumbo
12	Southern Sydney Retailers Association
13	Associate Professor Peter Earl

Additional Information Received

Received from Treasury on 20 November 2009; answers to Questions on Notice taken at a public hearing in Sydney on 25 September 2009.

TABLED DOCUMENTS

25 September 2009, SYDNEY NSW

National Association of Retail Grocers of Australia (NARGA):

- *Parramatta Road, Burwood 12.15pm* Photo A
- *Parramatta Road, Burwood 12.16pm* Photo B

5 October 2009, MELBOURNE VIC

Australian Competition and Consumer Commission (ACCC)

- *Blacktown NSW* Map
- *Melbourne VIC* Map

APPENDIX 2

Public Hearings and Witnesses

SYDNEY, FRIDAY 25 SEPTEMBER 2009

ABBOT, Ms Simone, Acting Senior Adviser, Competition and Consumer Policy Division
Department of the Treasury

HENRICK, Mr Ken, Chief Executive Officer
National Association of Retail Grocers of Australia

KELLY, Mr Craig, President
Southern Sydney Retailers Association

KENNEDY, Dr Steven, General Manager, Competition and Consumer Policy Division
Department of the Treasury

LONG, Dr Brendan, Director of Policy and Strategy Development
Australian National Retailers Association

SALISBURY, Mr Kim, Acting Manager, Competition Policy Framework Unit
Department of the Treasury

van RIJSWIJK, Mr Gerard, Senior Policy Adviser
National Association of Retail Grocers of Australia

ZUMBO, Associate Professor Frank
Private capacity

MELBOURNE, MONDAY 5 OCTOBER 2009

GREGSON, Mr Scott, Group General Manager, Enforcement Operations
Australian Competition and Consumer Commission