

Chapter 6

Legal issues and trade practices concerns

6.1 The committee heard evidence during the inquiry relating to legal concerns about the GROCERYchoice website, including the potential for breaches of the *Trade Practices Act 1974* (TPA).

6.2 During the February 2009 meeting between CHOICE and industry stakeholders, some industry representatives expressed concern about the potential for unintentional breaches of the TPA, noting that 'the very discussion of pricing issues as a group was unwise'.¹

6.3 CHOICE's submission stated that it sought legal counsel to address the concerns regarding the potential for, or appearance of, price collusion. CHOICE was advised that any potential breach of the TPA 'would be mitigated if discussions with supermarkets at Industry Forums concentrated on prices, not pricing'.² CHOICE invited a legal representative to attend industry meetings to allay such concerns.

Should CHOICE have been allowed to take on GROCERYchoice?

6.4 CHOICE's commercial activities were also of concern to the National Association of Retail Grocers of Australia (NARGA), raising the question of a potential conflict of interest:

Although CHOICE, as the self-appointed representative of consumers, purports to represent their interests, its consumer advocacy activities might also be seen as a public relations program to promote the sale of its products.

In seeking to acquire control of the GROCERYchoice website, CHOICE could be seen as providing a commercial service to government for a fee, potentially being in conflict with its purported role as an independent consumer advocacy organisation.³

6.5 Unease about such risks played out within the organisation itself, with the resignation of a CHOICE board member, Mr Robin Brown, who disagreed with the board's decision to take on GROCERYchoice:

My view is that this was such a momentous decision for CHOICE, quite unprecedented in its 50-year history; a large amount of government money and a matter that was clearly quite political. I thought that there was a significant risk to CHOICE's reputation as an independent commentator on

1 National Association of Retail Grocers of Australia (NARGA), *Submission 2*, p 9.

2 CHOICE, *Submission 6*, p 14.

3 NARGA, *Submission 2*, pp 9–10.

public policy, on the way markets work and so on; and a risk to its bipartisan approach to politics ... But this particular process was just not quite right and I think it was an error to proceed in quite the way it did and I think there ultimately should have been some kind of process that involved all the members of CHOICE so that everyone involved could be sure that they were getting into something that was appropriate. If that had happened then I guess my resignation mightn't have happened.⁴

6.6 Giving evidence to the inquiry, CHOICE responded that 'the vast majority of board members' were fully supportive of the move and that no conflict of interest was perceived:

We are a fundamentally independent organisation ... Our only interest is that of the consumer. We believe that this site would radically transform the grocery sector. Therefore, we had a duty to take it on. I think it would have been a conflict had we not taken it on.⁵

6.7 CHOICE's submission responded to the concern that the website might have been used as a promotional tool:

Under the terms of the contract, CHOICE had the discretion to brand the website as a CHOICE product and to include extra information in keeping with CHOICE's charter as a well-known and respected social enterprise. CHOICE does not accept advertising in any of its publications and did not intend to do so in GROCERYchoice.⁶

Price accuracy and 'bait advertising'

6.8 The inquiry heard from retailers that the potential for breaches of the TPA was a serious concern under CHOICE's proposed model. The Australian National Retailers Association (ANRA) argued that CHOICE had not sufficiently addressed the question of who would bear the legal liability were they to participate in providing data for the website.

6.9 ANRA cited section 52 of the TPA, which relates to misleading and deceptive conduct, and argued that under the new version of the GROCERYchoice website, pricing information provided in good faith that was later found to be inaccurate could represent a breach of the law:

... it could be deemed to be a technical form of misleading and deceptive conduct if you engage in a process of advertising a product and then you cannot subsequently have any real attempt to make that product available.

4 'Former CHOICE director breaks silence', The World Today, ABC Radio, 27 November 2008, <http://www.abc.net.au/worldtoday/content/2008/s2431375.htm> (accessed 11 September 2009).

5 Mr Nick Stace, CHOICE, *Proof Committee Hansard*, 18 September 2009, p 43.

6 CHOICE, *Submission 6*, p 16.

That is the sense in which the concern was raised. In other words, only in terms of the accuracy of the material presented on the website.⁷

6.10 In addition, ANRA also raised concerns about section 56 of the TPA and the potential for 'bait advertising':

Another legal concern related to the potential risk of breaching the Trade Practices Act by providing a “discounted price” for discontinued items or items in limited supply. The Australian Competition and Consumer Commission (ACCC) insists retailers who advertise products at a certain price must be able to offer to supply those goods at that discounted price for a period that is reasonable, and in quantities that are reasonable. The proposed scheme did not provide sufficient assurance that there it would have in no way risk creating the unintended consequence of a technical breach of breach of s.56 of the Trade Practices Act.⁸

6.11 Tasmanian Independent Retailers echoed ANRA's concerns in relation to sections 52 and 56, referring to recent Federal Court decisions and ACCC settlements in relation to bait advertising and associated activities.⁹

6.12 CHOICE argued in its submission that it did address the issue of data integrity:

CHOICE also sought to address risks in publishing information in good faith which is found to be inaccurate. The legal position confirmed that prices on the GROCERYchoice website are prices valid at a particular point in time and subject to local variation ...¹⁰

6.13 During consultation with industry, CHOICE sought to alleviate concerns about the accuracy of prices to be displayed on the website:

CHOICE undertook to clearly state that the website is a price guide at a defined point in time and that prices may vary at the point-of-sale. CHOICE was prepared to receive updated price files from retailers (daily, weekly or as frequently as the supermarkets would like) and would clearly date and time stamp prices. CHOICE would also educate consumers on the complexities of grocery pricing through articles and directions on our website.

To further mitigate risks of inaccurate prices CHOICE undertook to:

7 Dr Brendan Long, Australian National Retailers Association (ANRA), *Proof Committee Hansard*, 6 October 2009, p 47.

8 ANRA, *Submission 11*, p 6.

9 Professor Ian Duncan, Tasmanian Independent Retailers, *Proof Committee Hansard*, 6 October 2009, p 98.

10 CHOICE, *Submission 6*, p 14.

- draft a Memorandum of Understanding [MOU] defining the retailer's responsibility to provide accurate information and CHOICE's responsibility to accurately publish that information;
- ensure data integrity by applying technical and manual Quality Assurance processes to information supplied, and
- apply prominent caveats to the website.¹¹

6.14 The retailers' response to the MOU has been discussed in chapter 4.

6.15 CHOICE also undertook to:

- republish the special prices as they appear in retailers' catalogues and re-iterate the same disclaimers as used by retailers (eg available while stocks last);
- facilitate consumer reporting of advertised products which are not available in reasonable quantities or for a reasonable time; and
- make clear to consumers the possible variation between price reported and actual shelf price.¹²

6.16 Given that Woolworths has publicly stated that it is moving towards a system of uniform pricing on packaged groceries, Senator Barnett asked what the retailer's objection would be to providing such data for a GROCERYchoice website:

You could set a national price for baked beans of \$2 but once you put that can of baked beans in every local market there are a lot of factors that affect the price. A store manager has discretion to change that price down to be able to meet local competition ... You have overstocks and different things that happen during the course of the week. Food retailing is a complicated science.¹³

6.17 It is notable that the advertising catalogues currently circulated by grocery retailers already contain caveats and disclaimers about product availability at certain times and locations. The retailers' objection to real-time pricing data being out of date once it is on a website appears inconsistent given that arguably 'out of date' information is already available through these catalogues. Woolworths stated outright that 'we put our brochures out over Sunday night and Monday morning, and they are basically out of date by Monday afternoon' as local store managers price check their competition and adjust prices accordingly.¹⁴

11 CHOICE, *Submission 6*, p 15.

12 CHOICE, *Submission 6*, p 15.

13 Mr Andrew Hall, Woolworths, *Proof Committee Hansard*, 28 October 2009, p 24.

14 Mr Hall, Woolworths, *Proof Committee Hansard*, 28 October 2009, p 26.

ANRA's role in the GROCERYchoice negotiations

6.18 CHOICE also raised concerns about ANRA stepping in to conduct negotiations on behalf of its supermarket members (see chapter 4). CHOICE recommended that the influence of ANRA be closely examined, suggesting that 'their work undermined a market development which may have increased competition'¹⁵:

Whether or not ANRA's behaviour was in breach of the *Trade Practices Act*, it had the effect of advantaging sellers (supermarkets) at the expense of buyers (consumers). The Committee should consider the power and influence of ANRA as a barrier to the future competitiveness of the sector as much as their role in the demise of GROCERYchoice.¹⁶

6.19 Associate Professor Frank Zumbo was also concerned by ANRA's behaviour during the GROCERYchoice negotiations, suggesting the potential for breaches of section 45 of the TPA.

6.20 He argued firstly that, assuming that there is a market for the supply of information on grocery prices, the effect of the supermarkets—through ANRA—refusing to supply price information to CHOICE could be seen as substantially lessening competition for the provision of price information:

What is important to ascertain is what actual discussions occurred between ANRA, Coles, Woolworths and Franklins. Were they collective negotiations? Were they individual negotiations? What is the effect of those negotiations?¹⁷

6.21 He also highlighted the commercial nature of the negotiations that ANRA was undertaking:

If an industry association is making representations to the government or government agencies, that is one thing; but, if an industry association then undertakes bargaining negotiations, makes representations about what could be a commercial proposition, what could be the provision of information, what could be the refusal for providing information, then you are in very dangerous ground, a very dangerous area.¹⁸

6.22 Secondly, Associate Professor Zumbo drew attention to subsection 45(4D) which relates to exclusionary provisions:

Exclusionary provisions are defined as a provision of a contract, arrangement or understanding whereby:

(b) the provision has the purpose of preventing, restricting or limiting:

15 CHOICE, *Submission 6*, p 20.

16 CHOICE, *Submission 6*, p 13.

17 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 6 October 2009, p 4.

18 Associate Professor Zumbo, *Proof Committee Hansard*, 6 October 2009, p 10.

(i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or

(ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions;

You would need two or more parties that are competitive with one another. Certainly Coles, Woolworths and Franklins were competitive with one another, so the question is if there were discussions between Coles, Woolworths and Franklins. If you have two or more parties that are competitive, that is enough to capture all the parties, so in that case ANRA itself could be party to a possible breach of section 4D and, in turn, section 45.¹⁹

6.23 When Senator Joyce suggested to the ACCC that the use of ANRA by Coles and Woolworths could be seen 'as two major organisations working very closely for a common purpose', Mr Brian Cassidy, Chief Executive Officer, responded:

I do not know. Maybe it is two major organisations using their representative body ... That is the way representative bodies work.²⁰

6.24 Associate Professor Zumbo commented:

These are very serious concerns, because it is an age-old problem under the Trade Practices Act about what industry associations can and cannot do. If they engage in collective bargaining, they should lodge a notification with the ACCC. So a further question is: has ANRA lodged a collective bargaining notification with the ACCC? If not, there would be serious questions as to whether ANRA had entered into agreement with Coles, Woolworths and Franklins that Coles, Woolworths and Franklins would refrain from supplying price information to CHOICE or they would only supply price information on conditions determined by ANRA and/or Coles, Woolworths or Franklins.²¹

6.25 ANRA rejected the allegation that its role in negotiations on behalf of its members was in any way a breach of the TPA:

The question turns in section 4D of the definition section of the *Trade Practices Act*, which essentially says that exclusionary dealing relates to when two competitors come together in a market and so cooperate, come to an understanding or contract or agreement that would be seen to form an intention to restrict competition. It is related very much to the market in which the players operate. In this sector, the competition is between grocery retail. That is where the members participate. Certainly what the competitors are not competing over is the provision of information technology products and consultation services like website design and so forth. It is quite clear that there would be no breach whatsoever, in our

19 Associate Professor Zumbo, *Proof Committee Hansard*, 6 October 2009, p 4.

20 Mr Brian Cassidy, ACCC, *Proof Committee Hansard*, 18 September 2009, p 29.

21 Associate Professor Zumbo, *Proof Committee Hansard*, 6 October 2009, p 4.

view, in relation to exclusionary dealing provisions, because they relate to a completely different form of competition and not competition in the market in which our members compete.²²

6.26 ANRA stated that its role was to provide an 'efficient voice' for its members and that it was simply acting as a 'good broker' to bring some focus to discussions about the website.²³

6.27 Senator Xenophon questioned ANRA further about its role:

Senator XENOPHON—Mrs Osmond, you have said that ANRA has been 'the good broker' in relation to this and that you are an efficient voice for your members. I do not doubt that. But you say that that relates to policy and legislative issues. That is a fair statement. But isn't this case here, in relation to the GROCERYchoice website, going beyond policy and legislation? Because of the very nature of what the website was attempting to do, doesn't it go beyond that into the actual commercial operations of those members?

Mrs Osmond—It is no different from, for example, us having a conversation on behalf of our members about the realities of how something like unit pricing will operate, which we have done also ... We were attempting to bring a single, focused voice to discussing the practicalities of how this would go forward, and that is part of what we do.

Senator XENOPHON—Isn't there a distinction, though, between a debate about unit pricing, where each retailer sets its own prices, and the issue here, which is what various stores will be charging, and for that information to be disseminated to consumers? Unit pricing is a policy issue. Isn't it a little different, though, in terms of what GROCERYchoice was attempting to achieve?

Mrs Osmond—No, I do not believe so ...

... **Senator XENOPHON**—But doesn't the issue of implementation involve commercial decisions being made by the individual retailers as to how it will work in a practical sense? There is a distinction between the two, isn't there?

Mrs Osmond—It was our job to amplify the concerns of our members, and that is what we did. As I mentioned earlier, those individual members will have individual views and take their own individual actions in terms of either a competitive or a commercial matter.

Senator XENOPHON—Sure. But they did not actually do that here, because they chose you—Coles, Woolworths and Franklins chose ANRA to represent their concerns to government.

22 Dr Long, ANRA, *Proof Committee Hansard*, 6 October 2009, p 47.

23 Mrs Margy Osmond, ANRA, *Proof Committee Hansard*, 6 October 2009, p 48.

Mrs Osmond—They had had extensive discussions up to that point with CHOICE and continue to have some discussions past that point. We were asked to become part of the discussion to bring some clarity.²⁴

Committee view

6.28 The committee is concerned about the role played by the Australian National Retailers Association during negotiations with CHOICE about the GROCERYchoice website and believes the matter warrants further investigation.

Recommendation 7

6.29 The committee recommends that the Australian Competition and Consumer Commission investigate any potential breaches of the *Trade Practices Act 1974* in relation to the role played by the Australian National Retailers Association in negotiations with CHOICE over the GROCERYchoice website.