

21 July 2008

Committee Secretary  
Senate Economics Committee  
Department of the Senate  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Secretary,

### **Inquiry into the Trade Practices Legislation Amendment Bill 2008**

The Post Office Agents Association Limited (POAAL) submits the attached paper for consideration by the Senate Standing Committee on Economics for the above Inquiry.

POAAL represents the business interests of thousands of small business people. They include the owner/operators (Licensees) of almost 3000 Licensed Post Offices (LPOs). LPOs form almost 80% of Australia's network of post offices. POAAL members are also made up from the 5,000 Mail Contractors who deliver mail and parcels under contract to Australia Post.

Although Licensees operate under a formal agreement with Australia Post, they have often had need to rely on the protection of the existing legislative framework. POAAL as an independent industry body has been instrumental in providing them support through dispute resolution processes and has a number of observations that might assist the Committee to ensure that the principles of the Trade Practices Act are more effectively achieved.

A number of concerns on behalf of Licensees and Mail Contractors have been the subject of communications with the Australian Competition and Consumer Commission (ACCC). POAAL has developed a sound relationship with the ACCC and has the utmost respect for the professionalism and commitment of its officers.

It is also fair to say that POAAL has a good working relationship with Australia Post and that AP for the most part has the intention in dealing properly and fairly with its small business partners. However, it is not uncommon for decisions to be taken or omissions to be made by that GBE, which can have the effect of severely disadvantaging Licensees or Mail Contractors. As small business people they have very limited capacity to absorb the financial implications of the errors or omissions of their principal.

Without access to an independent industry representative body and a set of principles associated with fair behaviour as codified in the Trade Practices Act many small entrepreneurs would be driven from their business. It is therefore opportune for the effectiveness of that legislation to be reviewed and we proffer some suggestions to assist that process.

If the Committee would like any clarification, POAAL representatives would be available for discussion.

Yours faithfully,



Ian Kerr  
CEO



# POAAL

Post Office Agents Association Limited  
ACN 006 382 314

**SUBMISSION FOR THE**

**SENATE STANDING COMMITTEE ON ECONOMICS**

**IN REGARD TO THE**

**TRADE PRACTICES LEGISLATION AMENDMENT BILL 2008**

**July 2008**

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## **BACKGROUND**

1. The Post Office Agents Association Limited (POAAL) welcomes the opportunity to comment on the *Trade Practices Legislation Amendment Bill 2008*.
2. POAAL represents the nearly 3,000 small business owners of the Licensed Post Office network that comprise around 80% of the Australia Post retail network. Our members are also drawn from the approximately 5,000 mail contractors who deliver mail and parcels to Australia Post customers across the country together with around 650 Community Postal/Mail Agents. (Further information on the background of our organisation may be found on our website [www.poaal.com.au](http://www.poaal.com.au)).
3. Our members are all small business owner/operators with an estimated investment of at least one billion dollars in the Postal business alone. They are the front line for the services provided to Australian communities especially in regional, rural and remote areas of Australia.
4. In contrast, they are contracted to one of the largest and most powerful organisations in Australia. Australia Post is a Government Business Enterprise (GBE) regularly ranked as one of the top ten employers and amongst the top six financial performers in the country. Its huge management infrastructure has powerful resources at its disposal to ensure that its interests are protected.
5. POAAL has a high level of interest on behalf of its members in the effectiveness of the Trade Practices Act as it relates to the protection of these small business operators and, by extension, the communities they serve.

## **TRADE PRACTICES LEGISLATION AMENDMENT BILL (NO.1) 2007**

6. We note that Schedules 1 and 2 of the Bill amends the Act to
  - Address predatory pricing in section 46;
  - Clarify the role of recoupment in predatory pricing cases under section 46; and
  - Confer jurisdiction on the Federal Magistrates court in matters arising under section 46;

and Schedule 3 of the Bill amends the Act and ASIC Act to:

- Require that one of the Australian Competition & Consumer Commission's (the ACCC's) Deputy Chairpersons have knowledge of, or experience in, small business matters;
- Repeal the thresholds for unconscionable conduct cases under section 51AC of the Act and section 12CC of the ASIC Act; and
- Clarify the ACCC's information gathering powers under section 155.

### **Second Deputy Chairman of the ACCC**

7. POAAL supports the requirement that a second Deputy Chairperson position for the ACCC is to be filled by a candidate with knowledge of or experience in small business matters.
8. POAAL has a strong relationship with the ACCC. It has relied on guidance and the operation of the ACCC's powers to attend to a number of matters affecting the small business operators in the postal and related industries. POAAL also acknowledges that the nature of issues and challenges confronted by small business owners will demand special skills, experience and abilities to enable this person to address the range of matters affecting small business owners in the Australian community.
9. While the present Act deals with the objective of avoiding unconscionable conduct, it has been the observation of POAAL that this is not always achieved in the current framework. This is especially so in situations where the supervisory authorities appear to be under-resourced to "prevent" the action rather than just attempt to remedy the problem once it has occurred. By then it is often too late for the small business operator.
10. A person with the necessary experience and authority, such as a Deputy Chairman within the ACCC, should enhance the ability of the Commission to give effect to these current and emerging issues.

### **Misuse of Market Power**

11. The Australian market place has characteristics that differ to those of the international market places of Europe and North America. Our small population has seen a tradition of relying on either government or organisations that have developed over many generations to provide the country's major enterprises. Examples are Telstra, which relied on the government to establish and maintain, and major Australian enterprises such as Myer and Coles which have established themselves over many years. These and foreign enterprises come with capital backing and financial resources which dwarf the capacity of many local enterprises.

While market dominance may have been encouraged in a bygone era, today the country requires a regulatory environment to ensure that the ‘market power’ of these enterprises is not operating to the detriment of the current needs of the Australia community.

12. POAAL supports the proposed bill as it takes a further step to refine the issues of market power. POAAL notes the need for appropriate protection to be available to those emerging market players which may otherwise be driven out of business or face circumstances where continued investment in wealth producing activities are limited.

### **Unconscionable conduct**

13. The issue which is of great interest to POAAL in this area of reform is that of unilateral variation of contracts.
14. POAAL supports the principle that the unilateral variation of contracts or agreements may be an indication that unconscionable conduct has occurred or will occur and that there could be a need for a court to consider such action when determining whether there has been a breach of the Act. POAAL has encountered instances where Australia Post has changed wording in agreements without the proper written consent of the Licensee/Franchisee.
15. Examples include attempts by Australia Post local managers to vary a contract during or in anticipation of the sale of a Licensed Post Office. Such variations might include, for example, changing the LPO floor plan that is attached to Licensee Agreement to allocate the whole of the LPO premises to Australia Post products and services. This effectively gives control of the premises and its whole operation to Australia Post. In most cases small LPOs need to operate in conjunction with other services; e.g. general store, gifts, stationery, newsagency, pharmacy, etc, to make them viable. To have this flexibility arbitrarily removed reduces the capital value of the business and forces the incoming owner to submit to the control of Australia Post in everything they undertake.
16. Often these issues have been able to be resolved once they are notified to POAAL and the issues represented on behalf of the member. However, legislation should place greater accountability on Australia Post and other principals in similar situations to ensure that its officers do not engage in such behaviour.
17. Australia Post wields such power over its Mail Contractors that any contract variations that it “proposes” to Contractors are in reality a *fait accompli*. Contractors are powerless to negotiate with Australia Post.

Moreover, Australia Post refuses to negotiate or discuss such contract variations.

18. There are other acts which POAAL represents as unconscionable conduct but on which the legislation appears to be silent. They include the following.
  - a. **Refusal to negotiate** on new arrangements when there is a clear obligation to do so. Like most big businesses, Australia Post changes its methods of operation to meet emerging customer needs or to respond to the opportunities of new technology etc. Refusing to negotiate on such issues represents a situation that a small business person is powerless to deal with alone. A requirement to consult and negotiate at an early stage on such changes would provide better balance in the business relationship.
  - b. **Failure to provide advice on entitlements.** Australia Post has a series of systems that must be used by Licensees to claim the commissions and fees that are available to them. When Australia Post fails to identify these to Licensees or it is clear that appropriate claims are not being made, Australia Post is silent. Attempts to make enquiries or to request past payments once these errors are identified are often met with resistance by local Australia Post managers, a clear example of a large company using its size, position and resources to deny a smaller company its due.
  - c. **Failure to respond.** Licensees are obliged to respond to correspondence from Australia Post regarding breaches of the LPO Agreement or other operational standards. Australia Post however, is not similarly obliged to respond to enquiries from Licensees whose complaints of service, supply or enquiries over fees due can be ignored or dismissed arbitrarily. This issue can include the failure to consistently supply products in the quantity ordered or on the anticipated date or Australia Post's failure to provide products to Licensees which are the subject of promotional campaigns by Australia Post.
  - d. **Dispute resolution.** The financial resources of large organisations such as Australia Post enable them to withstand delays or the costs of mediation or arbitration services. A tactic that becomes attractive to local Australia Post managers is to draw out responses. Another is to intimate that a proposed assignment, or refit, or relocation, will not be approved while a dispute is current – regardless of whether or not the dispute concerns the assignment, refit or relocation!

These problems also occur with small business operators that do not have the protection of a dispute resolution procedure or the Franchising Code of Conduct's dispute resolution coverage. In the Postal Industry the most prominent examples of lack of dispute resolution coverage are mail contractors. POAAL has had to deal with situations where Australia Post has required mail contractors to:-

- i. absorb additional costs outside of those specified in their agreed contract;
  - ii. deliver to more points and over greater distances than specified in tender documents; and
  - iii. bear the cost of fuel increases even though the contract provides for adjustment.
- e. Mail Contractors have a limited dispute resolution procedure in the General Conditions of their contract with Australia Post. No mediation is available, only discussion with Australia Post and if this is unsuccessful, the only remaining option is arbitration. This option is not pursued by Contractors because of cost and the fear of being labelled a "trouble-maker". It is also virtually impossible for the Mail Contractor to have time away from their business to attend to resolving disputes with Australia Post.
- f. **Sale of products in competition with its own agents.** An example in this area is the sale of Postpak, a proprietary brand of packing material. Australia Post sells this product in bulk directly to customers at the same price it sells it to Licensees, putting Licensees, who have had to order, pay for and store the product, at a huge disadvantage.
- g. **Transfer of business.** Clients secured and serviced at an LPO are sometimes transferred by Australia Post managers to its corporate operations. This is often accompanied by an additional discount to lure the client into dealing directly with Australia Post rather than continuing to be provided with products and services through the LPO. (It must be noted that Australia Post prevents Licensees from offering any discounts to customers.) Having established the business, the Licensee then loses the business, the commissions and possibly flow-on business. This can also be to the detriment of the customer, who may find that certain conditions apply under a new agreement with Australia Post.
- h. **Misleading information.** An example would be the provision of incorrect information in mail service tender documentation. There have been instances where the information provided by Australia



Post on the number of delivery points or distances to be travelled to perform the mail service have been incorrect to Australia Post's advantage. This results in the contractor underpricing the service at tender and then either performing the contract at a loss or surrendering the contract to the financial distress of the operator.

19. The above list is not exhaustive and indicates that a range of actions by large corporations can have a series deleterious effect on small business operators.

### **Some comments on predatory pricing**

20. The vast majority of businesses in Australia are small businesses – this includes Licensed Post Offices. Not only are they small businesses, but they represent about 80% of Australia Post's retail network. In many parts of Australia, especially rural and remote areas, LPOs are the principal point of access to Australia Post's retail and mail services.
21. As small businesses, LPOs can suffer loss of business due to predatory pricing on the part of a larger competitor. This can happen against a wide variety of products and services offered at LPOs.
22. POAAL believes that the effects test must include the effect of acting to the detriment of small businesses. This is a broader test than just offering goods or services at unreasonably low prices, with the purpose or effect of substantially lessening competition. Many actions other than the introduction of artificially low prices can have this effect.
23. It should be noted that predatory pricing is not limited to actions between obvious competitors. In franchising-type situations, where a franchisee has built up a business or nurtured a business customer, the franchisee must be protected from predatory actions taken by the franchisor. Predatory actions in these cases could take the form of transferring business from the franchisee to the franchisor (with or without any compensation) or by offering the customer discounted services, which the franchisee is unable to offer by virtue of their contract with the franchisor.

## **Federal Magistrates Court**

24. POAAL supports any amendments to the Act which result in lower costs to small businesses in relation to Section 46, ie referral of jurisdiction to the Federal Magistrates Court.
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## **Glossary of Terms Used**

ACCC	Australian Competition and Consumer Commission
AP	Australia Post
GBE	Government Business Enterprise
CMA	Community Mail Agent/Agency
CPA	Community Postal Agent/Agency
LPO	Licensed Post Office
POAAL	Post Office Agents Association Limited

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