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21 July 2008

Mr John Hawkins  
Committee Secretary  
Senate Economics Committee  
The Australian Parliament  
Canberra

[economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

Dear Mr Hawkins

## **Trade Practices Legislation Amendment Bill 2008**

NARGA represents the independent retail grocery sector.

We use this submission to support the need to address the issue of predatory pricing and to give power to the ACCC to investigate breaches of the Act beyond the time when the ACCC applies for an interim injunction.

In relation to predatory pricing, the proposed amendments clarify the conditions under which pricing is regarded as predatory, make it clear that recoupment is not a necessary condition in the determination of predatory behaviour and clarify the meaning of 'take advantage'. These changes are supported.

However, we have the following comments:

- The new wording refers to the fact that firms that have 'a substantial degree of market power' are subject to the provisions of the sections dealing with predatory pricing. It is noted that this terminology matches the wording used in other parts of Section 46.

The question arises as to whether there is sufficient case law to clearly define the meaning of the term 'a substantial degree of market power' given that several terms used in the phrase are open to interpretation. Unless that is so, there is the potential for each case taken by the ACCC or another party to be appealed up to the High Court, delaying a resolution and imposing significant costs on the parties, most importantly the party offended against.

One way of addressing this issue is for the regulator to provide a greater guidance on what is meant by the term. The term 'sustained period' faces similar hurdles. It should be noted here that the period of time needed to irreparably damage a competitor may be very short.

- The term 'market' is assumed to have the same meaning as it has in other parts of Section 46. It might be useful to also give the term 'market' the meaning it has under Section 50 of the Act to make it clear that predatory behaviour can be quite localised – as in the case of a major grocery retailer targeting a local independent.
- The proposed amendments also allow parties to use the simpler and less costly jurisdiction of the Federal Magistrates Court (FMC) in matters arising out of Section 46. Whilst this is a welcome development, we note that the decisions of the FMC can be appealed all the way up to the High Court – reimposing the cost or threat of cost (and time delay) on the party wanting to take action under the Act.

It is the high cost of litigation and the time taken to resolve any matter that is a significant barrier to any small business taking legal action under Section 46.

One way of resolving the problem would be to limit the ability to appeal a relatively straightforward (proven) case. Another would be to require the ACCC to support the affected party in any appeal of the FMC decision or to give the minister the discretionary power to require the ACCC to provide such support.

- A significant difficulty that arises in the case of a predatory pricing action is the determination of the price being paid by the 'predatory' competitor – the relevant cost. Whilst the ACCC has the power to investigate and determine what may be the relevant cost, a private litigant has no ability to do that and therefore cannot determine up front whether he has a case or whether it is likely to succeed. All he knows is that his business is being damaged.

Whilst this litigant knows what he is paying for the goods in question, or for similar goods, he, in the absence of a prohibition on price discrimination, cannot make any valid assumptions as to the price being paid by his competitor. This uncertainty makes it less likely for an affected entity to risk taking action against a predator.

One way around this is to reframe the law in terms of an 'intent' or 'effects' test, as is the case in the UK.

Another way that the position of the potential litigant could be made more certain is to introduce a price discrimination prohibition into the Act. This would provide a relatively level playing field in the supply of goods to both parties and puts the affected party in a position where he is better able to judge whether a competitor's unusually low price is below the relevant cost.

A third approach would be the establishment of a defined complaints mechanism (in law or through administrative means) which triggers an ACCC investigation after an initial complaint.

- It is noted that the Act may not cover predatory behaviour against an entity taken in concert between two or more unrelated entities, although there may be other ways of addressing such behaviour if there is collusion.
- Whilst it is important to strengthen the Act and give the ACCC power to investigate and take action, it is equally important to ensure that the relevant administrative guidelines and procedures are in place to ensure that appropriate action can and will be taken by the regulator on the receipt of a complaint. Too often in the past have

complaints about predatory pricing been swept aside – most often on the basis that the complainant did not have any evidence of or knowledge of the price being paid by his predatory competitor for the goods in question. Clear guidelines issued by the regulator on the types of behaviour it is prepared to investigate and act upon could help further discourage predatory behaviour.

We trust that the Committee find these comments helpful.

Yours sincerely

Ken Henrick  
**Chief Executive Officer**