AUSTRALIAN RETAILERS ASSOCIATION

REVIEW OF THE COMPETITION PROVISIONS OF THE TRADE PRACTICES ACT 1974

SUBMISSION BY
AUSTRALIAN RETAILERS ASSOCIATION
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1. INTRODUCTION

The Australian Retailers Association "the ARA" appreciates the opportunity to participate in the Dawson Committee review of the Trade Practices Act, by way of this submission.

In the interests of brevity and confining the submission to matters of relevance, the ARA has chosen to confine its comments to those areas where the ARA and its members have a specific issue to raise or wish to impart the benefit of their practical knowledge and experience of the industry.

2. THE ARA AND ITS MEMBERS

The ARA has 12,000 members, the vast majority of which are small retailers. Its membership transacts approximately 75% of the nation's retail sales and employs about three quarters of the retail workforce.

ARA members operate approximately 40,000 retail outlets across the nation.

Close to 11400, or around 95%, of the association's members are small businesses (i.e. employ less than 20 staff) operating only in one state. The balance of ARA members are medium multi state or larger retailers .

It is estimated that around 18,000 or 45% of all tenancies in shopping centres are operated by ARA members.

The quantum and profile of its members make the ARA the most representative body of retailers, small and large-across Australia.

3. RETAILERS AND COMPETION

Competition, according to the Macquarie Dictionary, is defined as "rivalry between two or more business enterprises to secure the patronage of prospective buyers."

The Report by the Independent Committee of Inquiry into National Competition Policy in August 1993, noted that ***Competition*** may be defined as the "striving or potential striving of two or more persons or organisations against one another for the same or related objects."

The relationship between competition and community welfare can be considered in terms of the impact of competition on economic efficiency and on other social goals.

Economic efficiency plays a vital role in enhancing community welfare because it increases the productive base of the economy, providing higher returns to producers in aggregate, and higher real wages. Economic efficiency also helps ensure that consumers are offered, over time, new and better products and existing products at lower cost. Because it spurs innovation and invention, competition helps create new jobs and new industries. The retail industry is the most competitive industry sector in the Australian economy. This is born-out by the findings of the Productivity Commission Report on the Wholesale and Retail Industry in Australia (October 2002).

The ARA view is in line with the generally held economic view in that where a free market exists, then competitive forces should be allowed to prevail. To do otherwise reduces economic efficiency, stifles innovation and provides a second best option to consumers.

The Productivity Commission's research paper, "Productivity in Australia's Wholesale and Retail Trade", noted the importance of the wholesale and retail sector of the economy with this sector contributing around 11 per cent of gross domestic product in 1998-99.

This report went on to say that wholesale and retail trade have the lowest profit margins of Australian industry sectors (retail trade: 3.4% average profit margin), and technological change, such as scanning and computerisation, enhanced retail productivity.

Technology has allowed precise and timely data on retail operations and has allowed firms to better assess store productivity and to examine productivity at the individual task level. Further, the supply chain has become more integrated. This has led to productivity improvements, with competition as the catalyst and technology as the enabler.

Consumers are the ultimate beneficiary of competition in the retail industry. Both large and small retailers compete for the consumer's business and key drivers include price, service, quality of merchandise, the shopping experience, convenience, and variety. This competitive environment provides the consumer with choice which can be by way of direct comparisons such as price, or other factors which are complementary. Such a competitive environment provides a balanced and healthy retail sector of the economy and which is flexible and able to respond to consumer demand.

The Australian retail industry operates in a sparsely populated and large country which is unique and to compare the Australian retail industry operating environment to that of overseas environments is potentially erroneous. Despite a relatively small population which is spread across a large continent, Australian consumers have access to a wide range of products and services at competitive prices when compared to overseas market based economics such as USA, UK and Europe.

The regulatory environment in Australia needs to differentiate the retail industry operating environment from that of overseas. The current regulation in Australia of competition and unfair practices has provided the environment for the retail sector to innovate, to compete and to provide the consumer with a World standard offer.

4. THE PROPOSED AMENDMENTS TO PART IV OF THE TRADE PRACTICE ACT

The Australian Retailers Association position is that the current Part IV provisions of the Trade Practices Act be retained without amendment.

4.1 Misuse of Market Power Provisions (s.46 Trade Practices Act)

In competitive environments, where competition is by its very nature fierce, and therefore players can be harmed, there are always tensions between competitors and between suppliers and consumers. From time to time this leads some businesses to allege the misuse or inappropriate use of market power.

To establish that a business has misused its market power, it must be proven that it did so for a proscribed purpose (for example, to eliminate a competitor or to prevent entry to a market).

Some businesses mistakenly seek a "strengthening" of Section 46 of the Trade Practices Act by adding an "effects test" provision, in an attempt to address concerns about grossly unfair conduct. However the ARA view is that grossly unfair conduct cannot be addressed by an "effects test" - unfair practices are able to be dealt with under section 51AC of the Act.

The ARA view is that an "effects test" provision is ill founded.

Competition by its very nature can harm a competitor. Firms aim to increase their market share (and can do that without misusing their market power) and as a result of that process some smaller competitors may exit the market. This is a natural function of a competitive market, but under an "effects test", the sheer operation of a competitive market could be construed as breaching an "effects test" provision. That is, should a business or businesses exit the market, then is this considered evidence that a business has misused its market power? This is clearly an oversimplification of the many factors which may cause a business to exit.

Adding an "effects test" will stifle effective competition and thus reduce the incentive for firms to invest and be innovative, i.e. an "effects test" is anti-competitive.

A situation could also be contemplated where a small retailer by national standards but large in a local or regional market could be charged with misusing its market power, simply by adding trading hours, enhancing its product range or offering new service, if the effect was that an even smaller competitor was harmed.

Further, to allow inefficient retailers who are unable to compete in the dynamic retail sector to use a law such as an "effects test", not only protects and condones inefficiency, but creates an environment where consumers would be forced to pay for these inefficiencies. Potentially higher prices and less choice for consumers, a lack of innovation and differentiation, and an inefficient and tardy retail sector could well be the outcomes from the imposition of an "effects test" and therefore it could be argued that it is not in the best interests of the "public" and Australian economy.

4.2 "Cease and Desist" Orders

It is claimed that 'cease and desist' orders would enable the Commission to get faster results by stopping anti-competitive conduct before a matter is finally determined.

The ARA does not agree with the introduction of such a power for various reasons.

The existing regime is sufficient. Interim court orders and injunctions can already be sought by the Commission. Furthermore, the Commission, through its fast track system already effects similar practical outcomes as those envisaged in the "cease and desist" orders.

Importantly, cease and desist orders are contrary to the principles of natural justice. Allowing the Commission to issue 'cease and desist' orders to companies will effectively require companies to prove their innocence – when the basis of our legal system is 'innocent until proved guilty'.

5. ADMINISTRATION OF THE TRADE PRACTICES ACT

The terms of reference require the Committee to identify improvements to the Act, its administration and/or additional measures to achieve a more efficient, fair, timely and accessible framework for competition law. The Treasurer has asked that the Inquiry consider whether the ACCC deals fairly with the affairs of individual companies, and has requested that this is to be a forward looking assessment of the law under which the ACCC operates and the process it adopts, rather than reviewing its conduct in past individual cases.

Given these criteria and the disparate views on the governance of the ACCC, there needs to be found a process that meets the desired outcomes of the administration of the Act and which meets the efficiency, fairness, timeliness and accessibility framework.

Current views may range from those of some consumer groups fully supporting the current ACCC approach to the administration of the Act to some groups claiming that the ACCC is out-of-control.

Our view is that the ACCC administration of the Act is like the Curate's Egg. On some matters we feel that the ACCC has been over zealous, as was the case around the introduction of the GST, and the "name and shame" approach on some matters. Our members have concerns about powers and actions of the ACCC based on their experience with the *Price Exploitation Guidelines*, monitoring and the introduction of the New Tax System (GST).

However, there are areas where we feel that the ACCC has not pursued matters with sufficient vigor and the new Section 51AC provisions of "unconscionable conduct" and retail tenancy is one such area. Whilst there have been some cases, it is important for the ACCC to pursue actions under Section 51AC to provide clarity and support for the operation of this section.

We are aware that some business groups will be offering various solutions such as the establishment of a Joint Parliamentary Committee to Oversight the ACCC. The ACCC is already subject to the Senate Estimates process and the House of Representatives Standing Committee on Economics, Finance and Public Administration reviews the ACCC's Annual Report.

Another position that has been espoused is that of a Small Business Ombudsman which could investigate bodies such as the ACCC. Such agencies are likely to be expensive to adequately resource and there is already a Commonwealth Ombudsman. The ACCC has had appointed a Small Business Commissioner which is supported by the ARA.

The above positions on the governance of the ACCC, especially the extremes of these positions, reflects a frustration that business has with the administration of the Act and the governance of the ACCC. Our view is that consideration be given to the establishment of a body that has policy oversight, activity oversight and the provision of guidance on priorities for the ACCC. Such a body would need to be appointed from the community, including the business community.

6. AREAS FOR INTERVENTION

The ARA and its constituents have argued against regulations which inhibit a freer, competitive market eg trading hours legislation, the labour market and liquor laws. The ARA will continue to do so, as the interests of consumers and hence retailers are best served by a competitive market.

Whilst there are business practices that are beyond the bounds of fair competition and are opposed by business generally, excessive, heavy-handed and generic regulation is not the solution. Where such practices are identified they should be dealt with individually through legislation. The aim should be to reduce regulation to the greatest extent possible whilst ensuring that any action is directed at genuine problems that can be corrected through legislation. Should the focus be on a generic approach to regulation, then there is a real risk of regulatory failure and the consequences of such failure is likely to be much greater than no regulation at all.

A clear case of a specific problem that is being addressed via specific legislation is the of retail tenancy.

The Retailers Association support a sensible regulatory environment in which competition is allowed to flourish. However, in the case of the shopping centre industry which the ARA considers to not be a competitive market, it has actively campaigned for checks and balances to protect small tenants from potential anti competitive behaviour.

To that end, the ARA is pleased to see the recent changes to the Trade Practices Act increasing the transaction limit in cases of unconscionable conduct from $1million to $3million. The ARA continues to campaign for uniform state tenancy legislation for a more transparent set of rules covering landlord behaviour in respect of their tenants.. The ARA has argued successfully for these measures because in many cases local government regulations create anti-competitive mechanisms (eg restrictive land zoning) which provides monopolistic conditions to the benefit of shopping centre owners which need to be balanced by other regulatory intervention.

6. RETAIL TENANCIES

A clear example of market failure that requires specific legislation to address the lack of competition in the provision of a particular service or supply is that of shopping centre tenancies. This is an area where the specific problems need to be addressed through specific legislation.

The ARA's view is that while the ACCC has been very visible and active in taking on cases of anti-competitive behaviour, its focus has been clearly slanted to perceived high profile 'big-company" issues.

However there are areas of the Australian economy, in which businesses are consumers, but in respect of which the ACCC seems to give only scant attention. While the ACCC has taken on a handful of 'unconscionable conduct' cases in respect of retail tenancy matters, the number of these and the enthusiasm with which ACCC seems to be investigating such matters is at odds with its normal zealous manner in other areas.

The ARA's specific interest relates to retailers as customers (tenants) of shopping centres.

An Overview of the Impact of an Anti-competitive Shopping Centre Industry Market

- Government planning laws, in restricting the development of shopping centres, create anti-competitive 'franchises' for shopping centre owners/developers. While such laws have been assumed to be for the public benefit, their resultant 'franchises' are jealously held and fiercely defended by the shopping centre owners holding the 'franchises'.

- The anti-competitive forces characteristic of the 'franchises' impact negatively on small and specialty retail tenants' businesses in those centres.

- High and escalating occupancy costs (for many small and specialty retailers, now their largest operating cost ahead of retailing's traditionally largest operating cost, labour) and other practices brought about by those anti-competitive forces have reduced the proportion of funds deployed on labour by those tenants and hampered their ongoing capacity to employ.

- Particularly in respect of regional shopping centres, the planning laws have restricted development now to expansion of existing centres rather than any further greenfield sites. Such expansions have resulted in a lower sales per square metre in such centres, reducing tenants gross profits and further exacerbating their capacity to employ.

- The anti-competitive forces result in the following symptoms:

- rents which are in excess of tenants' capacity to pay and which ignore the principle that rent is the economic surplus remaining after all costs and profit have been taken into account
- landlords able to invade the privacy of a tenant's financial affairs and misuse the tenant's turnover figures to squeeze the last drop of rent out of them on the ruse that the turnover information is required for other purposes
- outgoings are treated as profit items rather than cost-recovery
- withholding of information to valuers relevant to proper determination of a fair market rent eg incentives, rent free periods and fit-outs

- disturbance of tenant's right to 'quiet enjoyment' eg casual tenants, demands re fit out etc
- expropriation of goodwill in unreasonably refusing to renew a lease, or holding tenant to ransom at lease end
- non –disclosure of details of outgoings such as 'management fees'
- demanding of fixed formula rent increases eg 5% pa or CPI +1.5%, while all other economic indicators grow at a far lower rate.

Specific issues have been identified and these can be addressed via specific legislation, including the draw-down of Section 51AC into State and Territory Retail tenancy laws. It is critical for the development of this specific legislation and its provisions that the ACCC pursue cases of breaches of Section 51AC.

The issue of retail tenancy is a clear example of developing specific legislation to deal with an identified specific problem without impacting on the wider competitive environment such as that which the Trade Practices Act is designed to enhance.

It is the ARA's view that such specific treatment would more effectively address the challenges faced by small business.