

25th of May 2015

General Manager
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

By Email: competition@treasury.gov.au

Dear Sir/Madam,

The Australian Newsagents' Federation has prepared the following submission on the Competition Policy Review's final recommendations.

Yours faithfully,

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National Policy Manager

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Australian Newsagents' Federation submission on the Competition Policy Review's final recommendations

The Australian Newsagents' Federation (ANF) is the peak industry body representing newsagents in Australia. The industry is made up of some 4000 small businesses whose owners and employees make a significant contribution to Australia's economy, and who form one of the largest and most trusted independent retail channels in the country.

The ANF makes this submission in response to the Competition Policy Review Final Report.

The ANF is broadly supportive of making competition law simpler, more accessible, fairer and more consistent across Australia and we appreciate the panel's considerable efforts in considering these important issues.

The ANF has participated in the full gamut of consultations during this review. Therefore we have chosen to comment on only a few recommendations made in the final report.

We have made these though, from the concerned viewpoint that the general theme in the final report is that the law should focus on damage to competition and not simply competitors. This division is not explained well in the report and the argument is very difficult for small businesses like Newsagents to understand.

We would appreciate your further consideration of this general theme, which is reflective of a fairly narrow pure economic approach to protecting competition. We feel the response to the report should equally factor in considerations very important to small businesses as competitors, such as 'fair conduct' and 'fair trading'.

On balance, a competitive and healthy small business sector is essential to maintain competitive tension in our economy, particularly with larger retailers. The government has in the budget demonstrated its strong support for small business sectors like ours, encouraging us to invest in new technology and equipment to help drive further economic growth in our sector of the economy.

A more balanced approach than the general theme that the law should focus on damage to competition, not simply competitors, is needed to achieve this aim.

We thank the government for considering our comments when formulating the response to the final report.

The ANF supports the following recommendations

- All levels of Government commercial operations to be covered by competition law. R24 - *The ANF strongly agrees this is a priority matter that all Governments should agree upon as a matter of urgency.*
- Procurement policies to be reviewed for anti-competitive elements. R18 - *The ANF strongly agrees with this recommendation.*
- Competitive neutrality rules to be strengthened and better enforcement. R15/17 - *The ANF is a longstanding supporter of the principle of competitive neutrality, we agree this is a priority matter and that more transparent processes are important.*
- Collective bargaining rules to be improved. R54 - *The ANF is strongly supportive of simplifying authorisation and notification provisions. This is very important, however it will depend ultimately on the legislation, as the initial intention when the notification regime was introduced in 2006 was largely negated by the detail of the legislation.*
- Competition, consumer and small business issues to stay with ACCC. R49 *The ANF strongly agrees with this recommendation.*
- ACCC to give better focus on small business issues. R53 - *The ANF agrees, however we are not entirely sure what is meant by this? We certainly do not support the Small Business Deputy Commissioner role being axed, we see this role as important to trade associations like ours and our members.*
- Secondary boycott law to be strengthened and more enforcement. R36 - *The ANF strongly agrees with this recommendation. The Government might even consider that in some cases it take action if the ACCC will not. This has been done in the past.*
- Anti-competitive elements in industrial agreements to be unlawful. R37 - *The ANF strongly agrees with this recommendation.*
- Authorisation processes to be simplified. R38 - *The ANF strongly agrees with this recommendation.*

- **Block exemptions R39** - *The ANF strongly agrees with this recommendation. However, it needs to be for a set time and re-assessed. Such exemptions have an impact on third parties.*
- **Act generally to be simplified R23** - *The ANF strongly agrees with this recommendation.*
- **Private action for damages as a result of anti-competitive conduct regime improved. R41** - *The ANF agrees, but what is proposed is largely relevant to coat tails action following ACCC action. It does not attack the overall problem of taking private action where the major impediment to such action is costs orders.*

The ANF has some reservations with the following recommendation

- **Section 46 (misuse of market power) an “effects” test to be added but the conduct to be prohibited must substantially lessen competition. Prohibition on predatory pricing to go, conduct aimed at competitors to be deleted. R30** – *The ANF is of the view that this is of limited assistance to small business. Predatory conduct directly aimed at small business will in most cases not substantially lessen competition in a market. However, we see some benefit to some changes to section 46. We would be much happier and more accepting of the proposed section 46 if the policy design for the extension of Unfair Contract Terms protections to small businesses was improved, to increase thresholds and thus capture more conduct that concerns us. It is our view that where effects is added, some detail of the conduct targeted needs to be in the legislation.*
- **A new form of national competition policy be re-introduced. R8/43** – *The ANF’s view is that at time this happened (Hilmer) small business was a loser. Any COAG action needs to factor in small business detriment, e.g. Taxis, retail trading hours, pharmacies, liquor retailing. The new oversight body should have small business representation and hence more than 5 members.*
- **Joint ventures. R27** - *The ANF agrees with the exemption for some joint ventures, however the draft that was part of the Report seems to go further than is warranted, especially in relation to joint marketing arrangements.*

- **Split ACCC. R50** - *The ANF feels this recommendation needs to be well thought out. Much of what is seen as regulatory is really CCA adjudication. Also, there is a need for cross membership between ACCC and any new agency.*

The ANF does not support the following recommendations

- **Resale price maintenance is now per se unlawful, proposal is to weaken the prohibition and allow resale price maintenance in some situations. R34**
The ANF does not support this recommendation. It has been evaluated through the lens of competition law. However, there is an equally valid way of considering the prohibition– namely that it promotes freedom of contract. This will bring back old issues that will be imposed more on small businesses than large ones.
- **Third line forcing- is now unlawful, proposal is to weaken the prohibition. R32**
The ANF does not support this recommendation. Again, it has been evaluated through the lens of competition law. There is an equally valid way of considering the prohibition– namely that it promotes freedom of contract.
- **Exclusive dealing- law to be either abolished or weakened substantially. It is said that it is no longer necessary. R28/33** - *The ANF does not support this recommendation. We have heard this before in relation to section 49 (Price discrimination) and we would prefer the law was left as is until it is very clear that it is redundant. Small business is often the victim of exclusive dealing conduct.*
- **Dispute resolution- little in the report to assist small business- a major weakness. R53**
- *The ANF does not support this recommendation as is. It seems that the main idea is for the ACCC to be a referral agency. Then what? There is not coverage in all jurisdictions. There needs to be a holistic approach to this issue. The ANF feels strongly that the Panel should have been able to put forward more substantive recommendations in relation to this issue.*

Informal mechanisms of justice, such as ADR are very important to our members. In some states it is much harder to access these than in others though. We would be supportive of a specific dispute resolution scheme for small business for matters covered by the CCA. We do feel however that the focus of the discussion must also be on how to provide small businesses with better access to justice. Small businesses are as willing as larger businesses in pursuing their legal rights through

courts and tribunals. Unfortunately, the costs of pursuing those rights are often cost prohibitive.

A first step is to try to identify ways in which small businesses can assert their legal rights in courts and tribunals in the most cost effective ways.

One novel solution may be to explore the possibility of state and territory Tribunals being given the jurisdiction to adjudicate in relation to simple competition law matters. Currently, many small businesses pursue ACL issues, including unconscionable conduct allegations, through state tribunals such as the NCAT, QCAT and VCAT, with some measure of success.

There is no reason in principle why a small business would not be able to pursue a complaint involving less complex competition law issues through a state tribunal. For example, it seems that a small business which was the subject of a third line forcing arrangement or a resale price maintenance arrangement should be able to pursue that issue through a tribunal by seeking an order that the relevant agreement was void and unenforceable. Small businesses could also have the right to seek compensation from the Tribunal in relation to such conduct.

We feel that it would be feasible for tribunals to be called upon to adjudicate on small business complaints involving other types of exclusive dealing arrangements. In these matters, the small business would be required to demonstrate on the balance of probabilities that the particular conduct was likely to substantially lessen competition. The main concern is that most tribunals may not have sufficient expertise with CCA provisions or concepts. However, these issues could be overcome by providing additional training.

As stated above, other options for improving small business access to justice would include encouraging the ACCC to pursue both pecuniary penalties and compensation as part of its CCA cases. Section 79B would then come into play with the Court being required to give preference to compensation for victims of the anticompetitive conduct.

Other options which could be explored include the introduction of US-style incentives for private actions, such as a right to treble damages awards and changes to the

usual cost orders in for competition law private actions – ie costs to be borne by each party rather than costs following the event.

Another initiative which could be explored is the creation of a pro-bono law firm panel for the provision of competition and consumer law advice to small businesses. The idea would be for particular firms with expertise in competition and consumer law matters to be appointed to a pro-bono panel for the purpose of providing small businesses with initial free advice in relation to competition and consumer law issues. Through this process, many small businesses would be able to understand the reasons why their particular complaint may not raise an actionable breach of competition or consumer laws.

If on the other hand the small business complaint had merit, the pro-bono law firm could either:

- (1) provide free legal advice to the small business about how to draft a complaint letter to the ACCC; or*
- (2) be engaged by the small business to provide a draft of an initial complaint letter to the ACCC raising the allegations.*

This pro-bono panel could also be extended to providing free legal advice to small businesses which had become the subject of an ACCC investigation or ACCC litigation. The pro-bono firm would be expected to provide the small business with advice on such issues as the ACCC investigation, particularly in relation to their legal obligations in responding to statutory notices and the legal implications of entering into a section 87B undertaking. Other areas of advice could include substantiation notices, infringement notices and public warning notices.

The pro-bono law firms could be called upon to give free advice to small businesses which become involved in ACCC investigations or litigation either as a witness or as a recipient of an ACCC statutory notice or subpoena.

In relation to access to justice through mediation, the various Small Business Commissioners have been providing a valuable mediation function to Newsagents. We believe that these initiatives should be supported and if possible extended.

We do not support the ACCC having a mediation role in small business disputes. Such a role would invariably create conflicts of interests which would blur the ACCC's role as an enforcement agency. They need to do more than being a referral agency though.

Some other options that might be considered for disputes between businesses that are not suitable for litigation are:

- 1. Trade associations could filter complaints and seek to resolve matters. (some funding could be allocated to approved trade associations to complete this).*
- 2. Small business Commissioner- seeks to mediate /arbitrate dispute.*

ACCC/ASIC - referrals from trade association / small business commissioner where enforcement action might be warranted. Neither ACCC nor ASIC currently seek to resolve complaints as such and probably should not unless there is a major rejigging of their role.

Private litigation/ADR - always available to business. Trade associations should be given standing in relevant Courts and Tribunals to represent business plaintiffs.

Disputes that warrant private litigation

The major impediment to such action is costs orders. It is suggested that consideration be given to prevent such orders in CCA actions, unless they are vexatious. There are precedents for such a regime.

At the start of the TPA its self-enforcing nature was seen as a major innovation but that did not eventuate in the competition provisions.

- No prohibition on price discrimination. R31 - The ANF does not support this recommendation. It is said to be covered by the new 46. We submit that both regimes are required; one that focuses on competition and one that covers competitors.*
- ACCC Governance. ACCC Deputy positions, including small business to be abolished. R51 – The ANF does not support this recommendation. It appears incongruous if the ACCC is to focus more on small business. The targeted roles of some Commissioners helps those areas getting some priority. The Commissioners do not represent small business or consumers but help bring in relevant issues into ACCC decisions. The ACCC is so broad that not all Commissioners can be across*

everything. In any case, the ACCC needs a Deputy, failure to have one in the past was a problem if the Chair was absent.

Half of the ACCC Commissioners to be part time. R51 – The ANF does not support this recommendation. The ACCC needs to have a good mix of full time Commissioners and associate members (not part time). There should be up to 5 full time and a panel of associates to bring in wider community input. Such a panel should be representative of various regions of Australia. The roles and function of the ACCC do not facilitate part time members. There is too much scope for conflict and the Commissioner jobs are full time. There is a part time regime in NZ but that has had its problems where members with real skills in some areas are conflicted on particular matters.

- **Retail trading hours to be liberalised - R12** - *The ANF is strongly of the view that retail trading hours have already been freed up considerably and that any new changes are likely to have a particularly negative effect on existing retailers, the vast majority of which are small and medium sized businesses like Newsagents.*
- **Town planning rules to be liberalised - R9** - *The primary reasons that governments have preserved restrictions on planning and zoning laws is because of their concern that the removal of such laws may have a particularly devastating effect on various small business sectors. Our strong view is that any minor benefits to competition will most significantly be at the expense of many small businesses.*

Thank you for considering our comments.

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