

Standing Committee on Indigenous Affairs

ANSWERS TO QUESTIONS ON NOTICE

Inquiry into food pricing and food security in remote Indigenous communities

Agency: Australian Competition and Consumer Commission

Date: 28 August 2020

Hansard page numbers: 3, 5, 6, 9.

Questions:

CHAIR: Can you tell us which communities, which stores and what prices that you looked into? What can you tell us about that?

Ms McDonald: Those were matters of our investigation. I'm uncertain that I'm able to be specific about that. We don't normally disclose the specifics of those kinds of inquiries.

CHAIR: Can you tell me how many communities, or how many stores, or how many items you looked at?

Ms McDonald: There were a large number of items looked at. There were four stores that we made inquiries in relation to in our most recent inquiry.

CHAIR: When you say a large numbers of items, is large 20, is it 100? Is it food? If you want to take it on notice you're welcome to do so. One of the terms of reference specifically directs us to look at both the regulations and the regulators here, and I think we need to get more information about what you've actually done in order to make a recommendation in relation to this.

Ms McDonald: I might take the specifics of that question on notice, although it might be helpful for me to just generally state now that there were a wide range of different products that we sought pricing information in relation to and there were a quite a high number of products as well. As to the specific numbers, I will take that question on notice and come back to you.

CHAIR: Let me go to something else that you raised in the submission and that's the comparator. You say:

...the ACCC does not consider metropolitan pricing to be an appropriate comparator to remote community stores, given the significant difference in circumstances between a large, metropolitan retailer and an independent store in a remote community.

I have quite a degree of sympathy for that position. The states, and now the Commonwealth, are doing these 'basket of goods' surveys where they continue to compare metropolitan pricing to remote community stores. What would you say about that process? Have you had any input into the state, territory or Commonwealth basket of goods surveys?

Mr Greiss: To take the last question first, I don't think we have had input into basket of goods surveys, but I would need to take that question on notice to be absolutely sure in case there's another part of the ACCC that may have had some input. I think it's been a useful comparison to see differences between metropolitan and remote community pricing, but I don't think it really highlights any competition or consumer issues, because of the circumstances outlined in the submission. That just makes pricing a very different proposition within each of those locations.

CHAIR: Do you run any programs in relation to Indigenous specific consumer protection or focuses on Indigenous consumers at all?

Mr Greiss: We do. I'll hand over to Ms McDonald, the expert there.

Ms McDonald: We do run a number of programs focusing on our enduring priority area of conduct impacting Indigenous Australians. Firstly, it might be useful for me to outline that there are a number of ways in which we offer different channels for Indigenous consumers, particularly those in regional and remote areas, to get in contact with the ACCC or to obtain information from us. We have a dedicated Indigenous info line which is part of our info centre. We also have a Your Rights Mob Facebook page where we actively post educational information as well. We have a series of different pieces of information available on the internet and we, quite importantly, do quite a body of work in Indigenous outreach where we go into communities, largely in Queensland and the Northern Territory—when we're able to do so, of course—to help promote educational messages in terms of what the ACCC does.

CHAIR: Could you take on notice some statistics around that: which communities you visited in the 12 months prior to COVID, what sort of numbers you've had on the sites and the info line and any information as to which parts of Australia those enquiries have come from. I think that would be helpful.

Ms McDonald: Yes. We maintain all of that data and we'd be very happy to provide that

CHAIR: Have you had any cases where you've dealt with rebates and found that they've been used in an adverse fashion? And what can you tell us about those cases?

Mr Greiss: None come to mind. I would have to take that particular question on notice. It would require a little bit of a review of past cases. In a franchise context, we occasionally receive complaints about franchisors receiving rebates and not passing on the benefits of those rebates. So, obviously, there are instances where there is some dissatisfaction about the issue, but those particular examples are quite complex because they deal with the relationship between franchisee and franchisor and all sorts of other factors about the franchise agreement have to be taken into account. So there are instances such as those where we do hear complaints, but they're very fact specific as to whether there actually is a problem and where that problem falls as far as our legislation is concerned.

Ms CLAYDON: Can I just check in with Ms McDonald. You referred to the specific Indigenous info line that the ACCC has established. I understand it's one of the 1300 numbers. You would have data from that that you would be able to share with the committee. Do you have that available today or are you taking such questions on notice?

Ms McDonald: I don't have that data available with me today, but we do keep those statistics, and they will be readily provided—the contacts to the Indigenous info line and others statistics relating to our Your Rights Mod Facebook page, the outreach visits we do and the other matters that were referred to earlier.

Ms CLAYDON: Thank you. How long has the Indigenous info line been in operation for now?

Mr Greiss: A number of years. The exact start date I don't have on the top of my head, but it has been in place for a number of years now. I can get you the exact start date on notice.

Ms CLAYDON: Great. I'm interested in when it was established and the community information education campaign that went with it for remote communities to know of its existence—whether materials were produced in anything other than English, for example. That would be very helpful for us to know.

Ms HAMMOND: Okay. Thank you. My last question is probably one to take on notice. In your final paragraph on page 4 you state:

While the ACCC has examined a number of complaints regarding excessive pricing, it has yet to uncover any evidence ... Rather, in its assessment of specific pricing complaints ...

I'm questioning whether it would be possible for the ACCC to submit—it might need to be done on a confidential basis—your reports. You refer there to your assessment of specific pricing complaints. If you could potentially give us two to three that have been undertaken in the last five years—the nature of the complaint, the information that you've looked at and access to the files—so that we can get an understanding in more detail of what you're outlining here as a reason for the higher price that would be good.

Mr Greiss: I think we took a question on notice related to that, if I recall correctly.

Ms HAMMOND: We can clarify that after.

Mr Greiss: It's probably a good opportunity to phrase this, though. We undertook—and I don't think we've done this previously—relatively recently a limited review, as Ms McDonald outlined. We did that on a voluntary basis because we wouldn't have been able to use our compulsory powers. Everything Ms McDonald said earlier was true, but it's worth the committee being aware that we were being provided information on a voluntary basis without access to compulsory powers and the sanctions that come with those.

Ms HAMMOND: I'm actually looking specifically in relation to when you've addressed complaints, which is in the final paragraph of your submission. I think the previous question was in relation to the limited review. This is in relation to specific complaints that were raised that you investigated.

Mr Greiss: I understand. Yes, we'll certainly take that on notice.

Answers:

ACCC assessment of community stores pricing

The ACCC considered 70 different products as part of our assessment of store pricing in remote Indigenous communities. . The products included 63 food items and 7 non-food items.

Basket of goods surveys

The ACCC has not had involvement in any State, Territory or Commonwealth basket of goods surveys. However, the ACCC has engagement with the National Indigenous Australians Agency (NIAA) about the NIAA's efforts to undertake such surveys. The NIAA sought advice from the ACCC on whether we had any experience in undertaking such surveys. We advised the NIAA:

- we did not have such experience
- the NIAA may wish to seek advice or assistance from the Australian Bureau of Statistics (which the NIAA advised it was already doing) and CHOICE, and
- it would also be important to consider the wholesale pricing that retailers in remote communities are able to obtain, and these retailers' other operating costs.

Statistics on ACCC work in engagement with Indigenous communities and consumers

During March 2019 to March 2020:

- the ACCC visited 21 Indigenous communities where information on a range of consumer law issues was provided in addition to receiving enquires on various topics from Indigenous consumers. Communities visited were:
 - Alice Springs NT
 - Belyuen NT
 - Hermannsburg NT
 - Knuckey Lagoon NT
 - Palmerston Indigenous Village NT
 - Santa Teresa NT
 - Tiwi Islands NT
 - Bamaga QLD
 - Cherbourg QLD
 - Doomadgee QLD
 - Minjerribah QLD
 - Mornington Island QLD
 - Palm Island QLD
 - Thursday Island QLD
 - Yarrabah QLD
 - Anangu Pitjantjatjara Yankunytjatjara (APY) Lands SA
 - Amata
 - Mimili
 - Indulkana
 - Umawa

- Pukatja
 - Fregon
- the Indigenous specific page on the ACCC's website (www.accc.gov.au/focus-areas/information-for/indigenous-consumers) was visited 1,582 times.

Data in respect of the number of contacts to the ACCC's Indigenous Infoline is maintained on a financial year basis. During the 2019/2020 financial year, the ACCC's Indigenous Infoline specifically received 458 contacts. During the 2019/2020 financial year, the ACCC received a total of 798 contacts (excluding contacts about scams) from people who identified as Indigenous.

In respect of the ACCC's Your Rights Mob Facebook page, as at 17 September 2020, the Facebook page has 5,164 'followers' and is 'liked' by 5,035 people.

Rebates

Businesses are generally free to set their own sales promotions and strategies, including the use of rebates. Rebates usually do not harm competition. In many cases, rebates are an example of the benefits of the competitive process, incentivising retailers to promote their supplier's products and the resultant competition between those retailers then reducing the overall price consumers pay for goods and services. Retailers may also use the revenue generated from such rebates to lower the prices of the goods and services they supply to end consumers.

However, in limited circumstances a firm with a substantial degree of market power offering rebates can substantially lessen competition in a market, which could be a contravention of the *Competition and Consumer Act 2010 (Cth)* (CCA). This is most likely to occur where a rebate is conditional on a retailer meeting certain targets. For instance, where a firm offers its retail customers volume rebates which are conditional on the retailer purchasing a large proportion of its requirements from the firm (loyalty rebates). Such conditions can have the effect of preventing retailers from purchasing from competing suppliers. Where a rebate simply reduces the price of an item with no additional conditions placed on the retailer, it is unlikely to raise concerns of substantially lessening competition.

Issues involving the use of rebates have been considered from time to time under the CCA (which also incorporates the Australian Consumer Law (ACL)), or its predecessor, the *Trade Practices Act 1974 (Cth)* (TPA). Three notable cases were in relation to [Baxter Healthcare Pty Ltd](#), [Pfizer Australia Pty Ltd](#), and [Coles Supermarkets Australia Pty Ltd](#).

In *ACCC v Baxter Healthcare Pty Ltd*, the Full Federal Court found that Baxter had breached the misuse of market power and the exclusive dealing provisions of the TPA when it entered long term contracts with state purchasing authorities. The contracts related to bundling the supply of sterile fluids with peritoneal dialysis products used by people with kidney failure.

The Court found that Baxter, which is the sole supplier of sterile fluids, had taken advantage of its market power in sterile fluids to structure the terms on which it offered to enter into contracts for the supply of these products to various state purchasing authorities.

Baxter required the authorities to also purchase peritoneal dialysis products (a market in which Baxter faced competition) if they wished to have the benefit of significantly lower prices across both sterile fluids and peritoneal dialysis products.

The Court found that this conduct raised substantial lessening of competition concerns and was engaged in to deter or prevent Baxter's competitors from competing.

In *ACCC v Pfizer Australia Pty Ltd*, the Full Federal Court dismissed an appeal by the ACCC, finding that Pfizer did not breach the misuse of market power or exclusive dealing provisions of the CCA in relation to its conduct in the market for the supply of atorvastatin (a cholesterol lowering drug) to pharmacies.

Pfizer was the patent holder of atorvastatin and supplied its originator brand of atorvastatin, Lipitor, and its own generic atorvastatin product to pharmacies. It offered significant discounts and the payment of rebates previously accrued on sales of Pfizer's Lipitor, conditional on pharmacies acquiring a minimum volume of Pfizer's generic atorvastatin product and agreeing to restrict their re-supply of competing generic atorvastatin products. The Full Court did not consider that Pfizer had acted for the purpose of substantially lessening competition or deterring or preventing competitors from competing.

The High Court subsequently dismissed the ACCC's application for special leave to appeal the Full Court's decision.

In *ACCC v Coles Supermarkets Australia Pty Ltd*, the Federal Court declared, by consent, that Coles engaged in unconscionable conduct in its dealings with certain suppliers in relation to Coles' Active Retail Collaboration (ARC) program. The ACCC alleged that the ARC program was developed in 2011 to improve Coles' earnings by the introduction of continuing rebates into the trading terms of its suppliers based on purported benefits to suppliers that Coles asserted had resulted from changes Coles had made to its supply chain. The Court made declarations that Coles engaged in unconscionable conduct in the implementation of the ARC program in respect of certain suppliers by threatening certain adverse commercial consequences when those suppliers declined to make payment of the ARC rebate, in circumstances where Coles had a greater bargaining position relative to the supplier, and applied pressure to the suppliers' decision making process.

ACCC Indigenous Infoline

The ACCC's Indigenous Infoline was publicly announced on 26 May 2000. Since that time, the ACCC has completed a number of initiatives to promote the Indigenous Infoline to Indigenous consumers, including producing and distributing promotional materials such as magnets, publications, videos, drink bottles and shopping bags that display the Indigenous Infoline number. The Indigenous Infoline number is also promoted on the ACCC's Your Rights Mob Facebook page, and is displayed on shirts that staff wear when conducting outreach or attending Indigenous specific events.

The ACCC also partners with communities and Queensland Office of Fair Trading on the 'Do Not Knock informed' project, which involves the installation of prominent road side signage at the entrances to communities to remind door-to-door traders of their obligations under the Australian Consumer Law. The signage also aims to empower community members to understand and enforce their rights under the Australian Consumer Law. Those signs also display the Indigenous Infoline contact number. As at 17 September 2020, there are six Do Not Knock informed communities: Wujal Wujal, Hope Vale, Yarrabah, Palm Island, Woorabinda and Cherbourg.

As at 17 September 2020, all material has been produced in English.

Reports received by the ACCC regarding excessive pricing in Indigenous communities

On 25 August 2015, the ACCC received a complaint about pricing and quality of food in Indigenous communities generally. The complaint was considered by the ACCC and was not considered to raise concerns under the Australian Consumer Law.

As the Committee is aware, on 4 March 2019, the ACCC received a complaint from North Australia Aboriginal Corporation (NAAC) raising a number of concerns about Outback Stores' operation of a number of stores in remote Indigenous communities, including raising excessive pricing issues. The ACCC carefully examined all the allegations, but considered that the conduct would not be likely to constitute contraventions of the ACL or the CCA more broadly. The ACCC has brought this matter to the attention of the Department of the Prime Minister and Cabinet as it is best placed to deal with the remaining allegations in the complaint which fell outside our jurisdiction.