coles

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The Secretary
Senate Standing Committee on Economics
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CANBERRA ACT 2600

Via e-mail: economics.sen@aph.gov.au

INQUIRY INTO: TRADE PRACTICES AMENDMENT (GUARANTEED LOWEST PRICES - BLACKTOWN AMENDMENT) BILL 2009

The Coles business (supermarkets, liquor and fuel) appreciates the opportunity to provide comment to the Senate's Inquiry into the Trade Practices Amendment (Guaranteed Lowest Prices - Blacktown Amendment) Bill 2009 (**"the Bill"**). Target and Kmart have reviewed this submission and requested that Coles acknowledge their endorsement of its content and Coles' position.

Coles is concerned that the Bill proscribes certain retailers from offering different prices at their sites that are within a thirty-five kilometre radius of each other on the basis that this amounts to price discrimination. Coles bases its concerns about the Bill (and some of these are applicable to any legislation that seeks to proscribe genuine price discrimination) for a number of reasons, including:

- the likelihood of unintended anti-competitive consequences.
- the lack of substantive evidence to confirm the operation of a practice sometimes referred to as "geographic price discrimination" and, consequently the need to enact legislation for its presence;
- the TPA already contains adequate provisions to address prospective behaviour of this kind (geographic price discrimination);
- the absence of any tests for market power and/or anti-competitive purpose or effect in the Bill;
- the Bill is likely to assist in perpetuating a myth that there is no legitimate reason for large retailers to offer differing prices amongst their sites; and
- the likelihood of untenable compliance burdens for retailers and regulators assigned to enforcement.

Coles recognises the importance of ensuring and preserving fair and competitive conduct in the retail sector and considers that the *Trade Practices Act 1974* plays an integral role in this process.

Unintended anti-competitive consequences

There is a risk that legislation of the proposed type will impact most adversely on consumers and all businesses by having unintended anti-competitive consequences. The current drafting of the Bill compounds this risk.

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Firstly, compliance with the Bill for medium to large businesses would be so onerous that it would create the likelihood of a general reluctance to engage in existing discounting practices. The Bill would also significantly affect the ability of retailers to respond quickly to prices offered by their competitors. Coles considers that preserving the dynamic nature of retail pricing is fundamentally important to maintaining a highly competitive retail market.

Compliance with the Bill would necessitate retailers adopting homogenised prices for identical items across most or even all of their respective sites. The likely effect of this would be that retailers would adopt price points at the upper end of their existing pricing bands. This is a result that would not be in the best interests of consumers.

Secondly, the Bill has the ability to artificially affect and manipulate markets that were never the source of the original price movement. When retailers are compelled to adjust their prices at sites up to thirty-five kilometres from the "site of origin", this has the capacity to impact most adversely on the competition and vulnerable businesses in completely different "markets".

The above issue will be amplified if sites within a thirty-five-kilometre radius of the "secondary" market will then in turn be compelled to follow suit. Coles considers the inadequacy of the current drafting does not contemplate this "domino effect".

Finally, restrictive legislation of this kind creates a disincentive for small to medium-sized businesses to achieve organic growth. As a result of the compliance burdens and difficulties associated with discounting and price matching, retailers on the cusp of expansion, to the extent that these provisions will capture them, may be reluctant to embark on that path.

Coles has only sought to identify some of the prospective anti-competitive outcomes that are likely to impact adversely on consumers, retail employment, retail suppliers, manufacturing/farming and the affected retail businesses.

Coles notes The Hon Dr Craig Emerson Minister for Competition Policy and Consumer Affairs comments that:

> "Sometimes, owing to economies of scale in production, distribution or retailing, big businesses can sell products on a sustained basis at prices below the cost of those products faced by small businesses. This is not necessarily anti-competitive behaviour and treating it as such in government legislation would result in higher prices to consumers".[1]

As you may be aware, the TPA formerly contained a "price discrimination" provision (s49). This was repealed in 1995 following significant criticism that it was anti-competitive, notwithstanding the fact that the provision required that the conduct must substantially lessen competition and offered a defence of acting in good faith (features which are not proposed in the Bill). The Hilmer report concluded, "To the extent that s.49 has had any effect it seems to have diminished price competition."[2]

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[1] The Hon Dr Craig Emerson MP, 'Labour is the competition party,' speech to the Committee for Economics Development of Australia, Canberra, 31 August 2009

[2] Report by the Independent Committee of Inquiry, National Competition Policy Review 1993 ("the Hilmer Report") at 79

Adequate existing provisions under the TPA

As a national retailer, Coles is unaware of the operation of a practice referred to as "geographic price discrimination". In the event that geographic price discrimination does occur in the Australian retail market, Coles notes that s46 effectively proscribes these types of behaviour. It also provides deterrence and, if appropriate, redress. More particularly Coles concurs with the findings of the Hilmer report in relation to price discrimination legislation: "*…price discrimination generally enhances economic efficiency, except in cases which may be dealt with by s.45 (anti-competitive agreements) or s.46 (misuse of market power).*"

Importantly, since the conclusion and the findings of the Hilmer report, further reform (s46(1AA)), has afforded small and vulnerable businesses, additional protection.

In relation to their ostensible concerns, (which seem to relate only to the retail petroleum industry) Senators Xenophon and Joyce's second reading speeches did not describe any types of alleged behaviours (in that retail sector) that could not be addressed under existing provisions of s46.[3]

The scope of section 46(1) is consistent with the aims of the Senators, as it precludes a corporation that has a substantial degree of power in the market from:

- substantially damaging or eliminating a competitor;
- substantially damaging or eliminating competitors generally;
- substantially damaging or eliminating a class of competitors;
- substantially damaging or eliminating a particular competitor/s; and
- preventing or deterring anyone from engaging in competitive conduct in any market.

Tests for anti-competitive intent and market power

The Bill does not discern for the presence of market power, nor its misuse if present; consequently, it is incongruous with the spirit and intent of s46 more generally. It is most concerning that the Bill presupposes that any type of selling price reduction, other than those expressly excluded in section 46C(3), are for an anti-competitive purpose.

In relation to the drafting of the Bill, the exclusion of businesses that have five or fewer sites trading under the same name, also suggests that there is no contemplation that these retailers could possess market power in any market (and consequently by implication) misuse market power.

Retail sites' pricing differentials

As a national retailer, Coles is disappointed with commentary that contribute to a suggestion that there is something clandestine about a multi-site retailer, offering the same product at different selling prices amongst its sites. In reality there are many factors that contribute to,

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[3] Trade Practices Amendment (Guaranteed Lowest Prices - Blacktown Amendment) Bill 2009 (Second Reading Speech) 24 June 2009 et 13 August 2009

and necessitate these pricing differentials. This practice is also fundamental to a healthy and, most importantly, to a competitive retail market.

Coles considers such commentary to be both unproductive and perpetuate a misunderstanding amongst consumers as to the reasoning for this practice.

In addition to costs that necessitate pricing differentials between sites, from time to time Coles' sites match the selling prices on some similar or identical products of their local competitors.

Naturally this practice necessitates some pricing differentials between its sites. In relation to these price reductions Coles wishes it noted that it generally matches the price of a local competitor and does not generally seek to sell items below that selling price. Nor would Coles be willing to sell items below their relative cost price for a sustained period of time.

The following is a non-exhaustive list of some of the general costs of doing business and other factors that can contribute to different pricing at Coles' different sites:

- freight costs vary in transporting products to different sites;
- rental tenancy agreements can vary from site to site;
- products delivered directly to sites or to the Coles' distribution centres, commonly have different wholesale prices in different regions;
- products may be chosen for promotion in some sites but not others due to popularity within the relevant demographics of given areas;
- fresh products may have subtle quality distinctions based on their sourcing origins and this is often reflected in minor price variations;
- utility and other rates vary at different sites; and the
- staffing levels and wage differentials that exist between sites.

Compliance burdens and regulatory compliance and enforcement burdens

Coles' supermarkets range over twenty-seven thousand products between their respective sites. To that end, an enactment of the Bill would create an inconceivable monitoring and enforcement burden for regulators.

Ensuring pricing integrity in accordance with the Bill would necessitate retailers undertaking a costly review of pricing strategies as well as all existing retail computer operating systems.

Conclusion

There is nothing of itself anti-competitive in nature for retailers to have the same offerings at different prices at their respective sites. In fact, the ability to rapidly respond to competitors' pricing in the market is fundamental to the preservation of competitive markets.

There are adequate provisions in the TPA to address alleged geographic price discrimination. Additionally there is very compelling evidence to suggest that legislation that proscribes price discrimination, to the extent that it is likely to have any effect, is prone to reduce price competition. More particularly, Coles submit that the design and effect of this Bill, if enacted would lead to a number of unintended anti-competitive consequences.

Coles also remains deeply concerned that the Bill has no test for market power, nor is it concerned with an anti-competitive purpose and effect. Consequently, in addition to the untenable burden it would likely impose on retailers and regulators alike, its enactment would be an inappropriate and ill-conceived restriction of legitimate existing trading practices.

Should you require any clarification or further information please contact Rody Hall, Strategic Compliance Advisor on (03) 9829 3843.

Yours faithfully

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