



Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

20th of June 2014

Issues Paper: Competition Policy Review

Dear Sir/Madam,

The Australian Newsagents' Federation welcomes the Competition Policy Review and this opportunity to comment on the Issues Paper. We congratulate the Minister for Small Business on its development.

Reforming Australian Competition Policy is very important for the Newsagent Industry's some 4000 small businesses. We would be very happy to comment further as part of any ongoing consultation process.

Please find attached our submission in response to the Issues Paper.

Yours faithfully,

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Australian Newsagents' Federation (ANF) COMPETITION POLICY REVIEW

INTRODUCTION

The Australian Newsagents' Federation (ANF) is the peak industry body representing newsagents in Australia. The industry is made up of some 4000+ newsagents.

The ANF is committed to protecting the interests of newsagents around Australia, to ensure that they remain sustainable businesses, and so that they can continue to contribute to the Australian community, as they have done for generations. The industry is currently going through significant structural transformation due to the changing economy and a changing market. Newsagents are adapting well to these changes and we are developing an innovative direction for its future.

Newsagents are diversifying into new markets such as parcel delivery and other e-commerce services. They are developing broader retailing capacity and are expanding their competitive offering to take back ground from competitors who compete for traditional newsagency customers.

A new digital kiosk called the Connect system is now available in 250+ newsagents around Australia and growing rapidly. It offers next day parcel delivery across Australia, Bill Payment through BPay with 44,000 billers, as well as prepaid eftpos gift cards. Another important initiative, Nparcel, also provides alternative delivery point and outbound parcel services in over 500 newsagents.

As these new networks grow, the newsagency channel will be able to offer many more new digital economy services including; larger volumes of inbound parcels from e-tailers to consumers and retail representation for other 3rd party online businesses. Newsagents can offer these partners great locations close to every home in the country, great service from attractive stores with well informed local operators and a broad range of opening

hours that often include 7 day a week service and access to our own home delivery services.

Newsagents are mostly owner operated and family run small businesses located in almost every community in Australia. Nearly all newsagents are small or micro businesses employing less than 20 staff. Newsagents are subject to a number of pressures that are distinct from those which affect large corporations and even many other small businesses. Newsagents make a significant contribution to Australia's economy and are one of the largest and most trusted independent retail channels in the country.

Newsagents are particularly vulnerable though to tough negotiations by powerful suppliers and landlords and costly changes to regulation, as they are often characterised by modest margins. Their margins are largely set externally through standard form contracts and they have a limited ability to absorb large increases in costs. Like other small businesses they also have limited resources to devote to defending their interests through the courts. Accordingly, small businesses, particularly newsagents, rely heavily upon the deterrent effect of the ordinary protections within the competition law.

It is critical to have strong competition laws in Australia that respect and understand the value of small businesses in our economy and not just the interests of our larger and louder competitors.

Competition Policy reforms are important for our industry's future and we hope that this review will make 'fair conduct' central to any new reforms. Frankly, current competition law does not help newsagents to any real degree. Our industry is subject to a large amount of control by our major suppliers. It is very important that this review considers this, and that it recognises that competition is now occurring between suppliers and "agents". Appropriate reforms must acknowledge this in the Act and ensure that no business should be able to use pressure or economic power to prescribe the actions of another business. The government, not large corporations we do business with, should regulate competition in our industry.

The ANF has highlighted issues of concern for newsagents in relation to competition policy in this submission. We have responded to some of the key questions arising from the issues paper that relate to our industry.

COMPETITION IN THE NEWSAGENT INDUSTRY

We believe that competition is crucial for our Industry but we want a level playing field so that we can be allowed to compete on the same terms as our competitors.

IBISWorld recently completed an Industry Report on the Newsagency channel. The following excerpts from that report explain the basis of competition, as well as internal/external factors on competition in our industry.

Competition in this industry is Medium and the trend is Increasing

Basis for Competition

Newsagencies have been subject to a medium level of competition over the past five years. Product range, price, store location and customer service are the key areas of competition between operators in the industry. Newsagencies also compete against each other in attracting customer traffic and on the type of promotional deals and discounting offered. In addition, newsagencies compete against other retailers that sell similar products including supermarkets, convenience stores, milk bars and stationery stores. The online market also erodes the revenue potential for operators.

IBISWorld Industry Report OD5495 Newsagencies in Australia December 2013 p.18

Internal competition

Product range is the main basis of competition between operators and this influences the ability of newsagencies to attract customer traffic and convert browsers into store shoppers. In fact, the difference between a business growing or contracting over the past five years can be attributed to its ability to broaden its product range and appeal to a wider range of consumer groups. Demand for products is affected by the price of these goods. While the cost of newspapers, magazines, greeting cards and lottery products is determined by the supplier, other categories such as stationery, plush goods, toys, gifts and party items offer newsagencies an opportunity to remain competitive while maximising product margins. Store location is crucial to attracting passing consumer traffic and impulse shoppers. Much like other retail businesses, customer service holds the key to transforming shoppers into loyal customers. Discounting and promotional deals are also used by newsagencies to attract consumer traffic and offer a point of difference to shoppers.

IBISWorld Industry Report OD5495 Newsagencies in Australia December 2013 p.19

External competition

Newsagencies face competition from a number of external operators, but their influence is varied. Growth in online content and a shift in the reading habits of consumers have influenced sales of newspapers over the past five years. Operators such as supermarkets and convenience stores offer consumers an alternative retail medium for their magazine purchases. However, they do not greatly affect sales. Gift stores and stationery retailers are key competitors for their respective product segments. The industry also competes against Australia Post, which has expanded its product line into traditional newsagency segments including ink, books, cards and gift lines.

IBISWorld Industry Report OD5495 Newsagencies in Australia December 2013 p.19

Another important factor and big challenge for newsagents, is where competition is occurring but our businesses are unable to compete fairly. This is not healthy for our small businesses or for the country.

Newsagents already compete with a range of other businesses; on the high street, in shopping centres and online and we welcome this, but of recent times our competitors also include our own suppliers. These suppliers through standard form contracts often have significant control over the range of products newsagents have access to, the markets they have access to, the way they can sell products, the training and shop fit standards required of them and the quantity of product they have available to sell. While not universal, this can make it very hard for newsagents to compete fairly with those same suppliers who may compete with them directly for customers online, or who may provide more preferential supply agreements to larger retailers. This limits newsagent's capacity to both compete equitably and to innovate.

Here are some examples of this issue that have a bearing on this review:

Lottery sales - Sales of lottery products are a major traffic driver in many retail newsagency businesses. While the margins are not large, these customers are important to enable newsagents to make secondary sales and to improve basket depth. The sale of lottery products online is growing significantly, from 2.2% of sales in 2006 to 8.2% in 2013 (source Tatts Group – Annual Reports) and now from all reports accounting for close to 10% of overall lottery sales for the major lottery

operator. This growth will impact sales in retail businesses over time, this would be ok for retailers like newsagents if they had access to market these products online to their own customers but they don't. Newsagents as franchisees promote both the retail product in their outlets but also through standardized marketing and player loyalty programs, they promote the online product of the major lottery operator as well. Newsagents as franchisees get no benefit from growing operator only online sales. Direct marketing by the operator to our regular retail lottery customers with loyalty cards is also occurring, to achieve new online sales customers and to offer services to customers, which are not available in the retail outlet. The ACCC has considered this issue and told industry bodies that, in assessing this against the CCA that they do not recognize that any competition actually occurs between the retailer and the franchisor, or that there is a competitive relationship, as no title of goods changes hands between the franchisor and retailers. The ACCC views this all as a single market, when clearly to the retailer and even to the consumer, competition is occurring for customers business between the two distinct channels. **Retailers have to compete directly with the lottery operator for customers or they risk losing them to online.**

Newspaper Retailers - The range of retailers of newspapers, which is one of the traditional identifying factors for a newsagent, is increasing. Publishers are either supplying direct or requesting newsagents to supply more sub-agents. More outlets retailing newspapers does not necessarily mean more competition; some might equate number of outlets with competition. However, there is almost a maximum level of competition in the newspaper industry currently between newsagents, other direct supply outlets, online subscriptions & apps, publisher subscriptions and more. In many areas subscriber accounts have now been migrated back to the publisher and so subscription customers no longer have a reason to have a relationship with or visit their newsagent to pay their bill or change their supply, despite newsagents being contracted to provide the distribution task for a set fee. Publishers are now in direct competition with newsagents. That being the case and as this change continues, changes to how newsagents are directed to supply outlets differently, or where the publisher provides direct supply to new outlets, may affect the current balance of market power.

Domination by major retailers

Another issue for newsagents is the increasing domination of the marketplace by major retailers. This affects newsagents businesses in a range of ways. One aspect of this is how it influences the relationship small businesses like newsagents have with their major suppliers. The major retailers have significant market power and influence over their own supply chain. Predominantly our major suppliers only other route to market is through the major retailers. Pressure will build on these suppliers to provide products and marketing support at a price, and in the way that major retailers want it, as has occurred with other sectors. This will have a knock on effect as to how those same suppliers then treat and supply the newsagent industries 4000 small businesses.

Another issue is the potential for more lottery products to be sold through major retailer outlets instead of through small businesses like newsagents, as has traditionally occurred. There is currently a trial underway in Victoria to test the market for this with a major retailer. Sales of lottery products currently are either by lottery operators and their re-sellers directly online, or by "agents" in retail outlets. The products, the price and the choice of product are largely the same. Outlets are widespread and include online. Apart from lottery operators own online sales the sellers are almost all small businesses.

Our contention is that allowing major retailers to enter the market will not necessarily benefit consumers or have any pro-competitive benefits when there is already significant competition between outlets and the operator, but it will damage small businesses who will not have access to similarly reduced requirements and costs of mandatory lottery shop fits, or access to lower costs of mandatory lottery training.

The development of new Greenfield sites by the major retailers is also an enormous issue for many newsagents. Where this occurs, it can have a devastating affect on the culture of small communities, as division is created between different sectors of communities and this often plays out in small businesses who are supporting the community, like newsagents. If the voice of those communities is not heard or given a strong enough weight against that of the major retailers and developers, we will see less innovation and a lot more small businesses close under the enormous pressure that is put on them to either move to the new center, often at huge cost to them, or to face direct new

competitors. This completely changes the culture of these communities and it is questionable if it is either good for competition or the country.

QUESTIONS & ANSWERS

Q. What should be the priorities for a competition policy reform agenda to ensure that efficient businesses, large or small, can compete effectively and drive growth in productivity and living standards?

The ANF is broadly supportive of making competition law simpler, more accessible, fairer and more consistent across Australia. We feel that the CCA needs to be simplified and that 'fair conduct' should be central to this. Small business issues need to rate higher in the mix. A healthy and competitive small business sector is essential to maintain competitive tension in the economy with major retailers in particular.

Q. Are there unwarranted regulatory impediments to competition in any sector in Australia that should be removed or altered?

Any proposed removal of regulatory impediments as a result of this review, should be subject to first outlining openly any adverse impact on small business of eliminating those impediments, followed by further consultation.

Q. Are government-provided goods and services delivered in a manner conducive to competition, while meeting other policy objectives?

The Australian Newsagents' Federation strongly advocates the principle of competitive neutrality with an effective set of rules capable of identifying and obviating such practices as part of the national competition policy regime.

The principle of competitive neutrality requires that government business activities should not enjoy net competitive advantages over their private sector competitors simply by virtue of public sector ownership.

Specifically, competitive neutrality requires that governments should not use their legislative or fiscal powers to advantage their own businesses over the private sector.

If governments do advantage their businesses in this way, it distorts the competitive process and reduces efficiency, the more so if the government businesses are technically less efficient than their private sector competitors.

Examples where a lack of competitive neutrality is particularly inequitable occur in instances where an entity by virtue of its government owned status, receives:

- Favourable taxation treatment,
- Borrowing cost advantages,
- Favourable treatment or relief from regulatory compliance, and
- Advantage in respect of below market required rates of return or dividend expectations.

Where competitive neutrality arrangements are not in place, resource allocation distortions occur because prices charged by significant government businesses need not fully reflect resource costs.

Consequently, this can distort decisions on production and consumption, for example where to purchase goods and services, and the mix of goods and services provided by the government sector. It can also distort investment and other decisions of private sector competitors.

Competitive neutrality does not imply that government businesses cannot be successful in competition with private businesses. Government businesses can achieve success as a result of their own merits and intrinsic strengths, but not as a consequence of unfair advantages flowing from government ownership.

The ANF supports transparency and a private right of action should be allowed to enable investigation and policing of instances where for example, potential breaches of the Government's competitive neutrality policy may impact on the newsagent industry.

We are of the view that the competitive activities of Government businesses should be reviewed as part of this process. Government businesses shouldn't be

immune from competition law, such as Australia Post, who are a direct competitor to our industry, being exempt from some aspects of the CCA.

Q. Is there a need for further competition-related reform in infrastructure sectors with a history of heavy government involvement (such as the water, energy and transport sectors)?

The role of price surveillance/control in a concentrated economy is very important. The ANF would support more price surveillance in markets such as petrol, energy & telecommunications.

Q. Would there be a public benefit in encouraging greater competition and choice in sectors with substantial government participation (including education, health and disability care and support)?

Government, particularly in its commercial operations such as purchasing, should be exposed to the CCA.

Q. Are the current competition laws working effectively to promote competitive markets, given increasing globalisation, changing market and social structures, and technological change?

The ANF is supportive of making competition law simpler, more accessible, fairer and more consistent across Australia. 'Fair conduct' should be central to this. The CCA imposes many obligations on small business but provides them with very few enforceable rights. We have outlined a few aspects of competition law that require change to work more effectively for small businesses like newsagents.

Definition of market- should be a question of fact and not definition. With the growth in online sales, competition is now occurring between franchisors or suppliers, and their "agents" (retailers) even though no title of goods may have changed hands. We feel that the CCA needs to better reflect this new reality that has come about partly through technological change.

Misuse of market power- The ANF supports a change to this section of the CCA to add a competition and effects test and to remove the requirement to prove taking advantage. The competition test should not be SLC but a lower effect threshold. A suggested approach is, *“A corporation with a substantial degree of market power shall not engage in conduct with the purpose or effect or likely effect of restricting competition in a market in Australia.”* If section 46 is to be changed to take out impact on competitors this shouldn't happen until unfair contracts law is introduced.

Unfair and unconscionable conduct - Unfair contracts legislation is critical to small businesses such as newsagents who are subject to many standard form contracts. However we will comment on those changes appropriately in the separate issues paper now available on this topic. The application of unconscionable conduct laws available in the CCA has been disappointing for many small businesses. The lack of a clear definition of unconscionable conduct has made this ineffective. This needs to be better defined so that there can be clarity for small businesses as to what may constitute hard commercial bargaining versus harsh treatment of businesses? The introduction or extension of unfair contract laws that are currently available to consumers, to small businesses, may bring into question how unconscionable conduct law should develop in the CCA. It is vital however that this does not create a legislative gap as one talks of conduct and the other of unfair contract terms.

Agency- this is a legal point of some importance to the Newsagent Industry. The ACCC and the Courts in some cases have taken the view that businesses in an agency relationship to a supplier are not in competition with that supplier and hence some of the CCA prohibitions do not apply. This is not the way “agents” would see the market dynamics and this issue needs to be clarified. There is an appeal by the ACCC to the Full Federal Court that hopefully will clarify the issue.

Collective bargaining - This should be simplified under the Act or small business collective bargaining and even boycotts should be removed from being an offence. The collective bargaining regime undertaken by most small business groups is unlikely to have a substantial impact on competition in those respective markets. Changes to the Act or Commission processes should be considered to enhance timeliness and cost. The changes could include:



- A presumption that collective bargaining by small business is a public benefit unless the Commission considers otherwise.
- Interim authorisation to collective bargaining applications should be automatic within 14 days (in line with current third line forcing exclusive dealing notifications) unless ACCC decides otherwise.
- Collective bargaining applications being deemed authorised/exempted within 28 days unless ACCC decides the application is against the public interest.
- ACCC should initially grant immunity for 5 years and any subsequent re authorisation to be for 10 years, unless in the view of the ACCC there are special reasons not to do so.
- A presumption in favour of the ability to collective boycott upon re-authorisation if the target party failed to conduct collective negotiation in good faith during the previous authorisation period.
- ACCC to publish guidance note on when collective bargaining and other agreements involving small businesses would substantially lessen competition (eg. providing guidance on monetary or market share 'safe harbour' thresholds, as it did in Merger Guidelines)

Codes of Conduct - The ANF is strongly supportive of mandatory industry codes of conduct. These can be important in setting standards of appropriate conduct by large and powerful companies towards small businesses. In South Australia we have been very supportive of the introduction there by the SA Small Business Commissioner of the 'Newsagency Industry Dispute Resolution Code'. Such codes of conduct can play a vital role in promoting transparency and alternative dispute-resolution processes in relationships where small businesses like newsagents may be vulnerable to abuses of contractual power by a larger and more powerful company. All too often there are information asymmetries whereby the larger and more powerful company may possess information that is not being disclosed to the small business despite that information being critical to the ability of the small business to make an informed decision.

Similarly, mandatory industry codes of conduct can assist in setting out processes for the resolution of disputes in a timely and low-cost manner, without recourse to expensive legal action by a small business. Such processes can include

mediation, arbitration or expert determination. There may also be scope to appoint an industry ombudsman.

The detailed provisions in the CCA about voluntary codes are of limited use. The ACCC may give informal advice but should not get involved in great detail unless the parties to a code seek authorisation. Parties should take their own advice and if need be seek a code developed on a self-regulatory basis and authorisation sought from the ACCC for any anti-competitive elements of the code.

Small business, enforcing its own rights - Small businesses like newsagents often feel that they are disenfranchised in terms of the CCA. In most cases when a small business or their industry body raises issues with the ACCC the response is that there is not a breach of the Act or it is outside priorities. In most cases the ACCC response is understandable. In many cases the ACCC response takes months or even years. Small business cannot rely on the ACCC for help. The various Small Business Commissioners are excellent but not enough and are not available at the same level in every jurisdiction. In our experience it is only the small business or their trade association, like the ANF, that have the incentive to resolve issues. Small business is fearful of court action but should be helped to do so where possible. Trade associations like our own need to be able to act more easily for our members including taking court action as a last resort. A solution is to empower trade associations like ours by giving them standing in courts and tribunals and some public and maybe business funding to handle such matters. This will also allow settlements of disputes on a compromise basis, something publicly funded bodies are not properly equipped to do.

Q. Are competition-related institutions functioning effectively and promoting efficient outcomes for consumers and the maximum scope for industry participation?

The Australian Competition and Consumer Commission - The ANF feels that the ACCC is a vital agency. However it is time that its functions, structure and processes were reviewed. Much of this is dictated by legislation and that legislation is subject to this review.

Some issues we would like the review to consider are,

Does the ACCC have too many roles? - We feel that it has too much to do.

The ACCC should focus on market conduct and not become a policy player. There is a good case for taking the purely regulatory role away from the ACCC and to have a specialist national regulator for issues such as energy, communications, water, ports and other utilities and networks. However if that happens two ACCC Commissioners should be appointed to the new body to maintain a competition culture.

Should it have an express complaint-handling role? - We would argue that Small Business Commissioners if they were in place in all states & territories could better fulfill this role.

Should Commissioners be more removed from staff roles? - Yes, there is a conflict between Commissioners sitting as adjudicators etc. and being part of the investigating body. Commissioners can guide investigations but should not be part of them. The Act could be amended to clarify the role of Commissioners.

Should there be more Associates? - Yes and these must be able to be appointed quickly and for special purposes. Neither is possible at the moment. Associates are a difficult logistical exercise but bring valuable insights and contact.

Should the ACCC have a regular role of market studies? - No, this diverts resources for uncertain outcomes; it gets the ACCC into economic advocacy and into political fights. Also there are potential conflicts between what the ACCC says in a study and what it may have to do in an enforcement role. An example of this is when the ACCC sought to oppose a tugboat merger in the Courts, the Judge depended on a price surveillance report by the price surveillance section of the ACCC to refuse the ACCC application.

Should there be post evaluation of major ACCC decisions? - Yes. This was in fact promised to various Parliamentary committees over the years but was not factored into ACCC programs. We would query whether these should be carried out by the ACCC? We would suggest that independent bodies do them.

The protection of witnesses - Getting cooperation from industry is a constant problem for the ACCC and the ACT. Devices such as friendly section 155 notices are utilized but more is needed. Much more if the goals of a competition statute are to be realized.

Should there be some time limits on ACCC investigations? - This should be considered and parties being investigated should not be left in limbo. The ACCC should be required to tell parties under investigation each month what is happening including the likelihood of ACCC action.

Should the ACCC be liable for the cost of section 155 Notices in some circumstances? - The ACCC now has the practice of using section 155 Notices as a matter of course; in the past they were only used as a backup tool. In some circumstances parties subject to section 155 Notices should be able to demand that the ACCC pay expenses, including legal costs. If the ACCC refuses, the parties should be able to go to an arbitrator for a ruling. The ACCC might be liable for costs if it imposed unreasonable costs on the parties, the ACCC investigation is of doubtful probity, and the ACCC investigation was unlikely to lead to any breaches of the CCA to be proven.

Does the ACCC spend too much on the legal costs of its cases? - Past assessments have shown that the ACCC cases are more costly than similar cases in NZ, Canada and the US. This is not just an ACCC issue but also one of the legal and Courts system. The ACCC should be able to be the solicitor on the record in Federal Court cases, similar to the ATO and ASIC. Further the constant use of senior barristers can be questioned for many of the ACCC cases. There may need to be greater transparency on ACCC litigation costs and in the Annual Report the costs of completed cases could be listed plus what was received back in costs in successful cases.

National Competition Council - NCC should return to its original roles of legislative review and access assessment and be merged with the State and Territory Competition, pricing and access agencies. The previous NCC/COAG roles, with compensation payments, were largely effective.