WA INDEPENDENT GROCERS ASSOCIATION (INC.)

November 2014

COMPETITION POLICY REVIEW: SUBMISSION TO THE DRAFT REPORT

WAIGA is extremely disappointed that the Review Committee has in its Draft Report rejected the introduction of a specific prohibition on Anti-Competitive Price Discrimination as there is in the United States, Canada, the UK and European competition law.

The Draft Report gives no recognition of the reasons behind having such a prohibition and case studies supplied by WAIGA showing anti-competitive price discrimination activity that is taking place in Australia today.

The Draft Report does state:-

"Price discrimination should only be unlawful where it substantially lessens competition. The Panel agrees with the conclusions of previous reviews that anti-competitive price discrimination is best addressed under section 46."

This was not the conclusion of Trade Minister John Howard when he did not accept the Blunt review of 1979 recommendation and ordered that s49 remained.

WAIGA put forward that the prohibition should only be on anti-competitive price discrimination and believes that the only way it could be classed as anti-competitive would be if it lessened competition.

Anti-competitive price discrimination is one of the core bases of the Robinson Patman Act in the US and the UK, Canada and Europe competition law borrow strongly from this act.

As we included in our submission to the Review Panel Congressman Wright Patman summarised the issue thus:

If we had to provide a single statement as to the economic tests of an objectionable price discrimination, we would have to say that it is a discrimination that has a substantial tendency to divide the market shares in ways different from the division that would take place if efficiency were the sole determinant of this question.

We do not believe that section 46 adequately covers any prohibition on anti-competitive price discrimination. We also included in our submission an example of anti-competitive price discrimination in the liquor industry and that the advice from the then Chairman of the ACCC Graeme Samuel and one of the ACCC senior council informed the complainant that there was nothing in the act that prevented such. How by adding an effects test will this reverse the belief of the regulator that such an activity is not covered by the Act?

WAIGA strongly believes that National Competition Policy needs to have as a minimum a direct reference to anti-competitive price discrimination and at the least there should be a direct reference to anti-competitive price discrimination in section 46.

We believe that any form of inquiry or body set up to regulate the grocery sector such as a Supermarket Ombudsman or similar would have to include anti-competitive price discrimination as one of the first activities that should be prohibited.

In regard to Draft Recommendation 25 – Misuse of market power

WAIGA believes that an effects test will give greater clarity and certainty to the section 46 but do not understand why the Panel is suggesting that there needs to be a defence to the activity. Surely if conduct that will have the effect or is likely to have the effect, of substantially lessening competition is found to be anti-competitive conduct it should cease. Is that not the purpose of Competition Law.

The panel states concerns in over capture. Has the panel examples of over capture in competition law in Australia, we cannot point to any over capture.

John Cummings

President