

Productivity Commission

**Review of National Competition
Policy Arrangements**

**Submission by the
National Association of Retail Grocers
of Australia**

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**NARGA SUBMISSION TO THE PRODUCTIVITY
COMMISSION'S
REVIEW OF NATIONAL COMPETITION POLICY
ARRANGEMENTS**

**TOWARDS A MORE RESPONSIVE NATIONAL COMPETITION
POLICY:**

**THE IMPORTANCE OF
THE PUBLIC INTEREST TEST, SMALL BUSINESS, AND A
PROCOMPETITIVE MANDATE FOR THE NCC**

After years of promoting a big end of town agenda whereby industry deregulation is viewed only as means of allowing large and powerful corporations to use their market power to destroy smaller, often more efficient, competitors, it is time that national competition policy (NCP) is fine-tuned to make it more responsive to the existing and future needs of all Australian consumers. NCP should not be used as a cloak to destroy smaller, more efficient, competitors - competitors that provide competitive tension and diversity of choice for Australian consumers. NCP should not be a vehicle by which existing large and powerful corporations can grab market share by simply using their market power and/or financial resources to destroy competitors. NCP must be concerned to ensure that all competitors compete in a manner that benefits consumers not only in the short term, but more importantly in the longer term. NCP should be concerned to ensure that efficient smaller competitors are not eliminated or disciplined by larger and more powerful corporations that are intent on maximizing returns to shareholders.

NCP should not be used to allow large and powerful corporations to grow their market share through anti-competitive means. NCP must not only be about identifying artificial restrictions on competition, NCP must be more concerned with identifying and eliminating all forms of anti-competitive conduct. In short, NCP must be based on a *Trade Practices Act* that identifies all forms of anti-competitive conduct and deals with them in the most effective and expeditious manner possible. By focusing solely on identifying artificial restrictions on competition, NCP has conveniently allowed the big end of town and to grow their market share through the use of their market power and financial resources.

Instead, NCP should have been used to spotlight the various forms of anti-competitive conduct able to be engaged in by large and power corporations to the detriment of competition. NCP has incorrectly been premised on the proposition that big is beautiful, without any consideration of the possibility that smaller competitors may be more efficient and innovative than larger corporations. No consideration has been given to the possibility that while smaller competitors need to be efficient in order to survive in competitive markets, larger competitors can be lazy and may use their market power and/or financial resources to destroy competitors and survive in competitive markets. Those large companies can subsidize losses in those competitive markets from profits in those markets lacking competition. Smaller companies cannot cross-subsidize in this way and by necessity must be as, if not, more efficient, than the larger competitors.

To small business it is clear that NCP should be made more responsive to the public interest, rather than to economic rationalist goals aimed at promoting greater industry concentration. The public interest is not to be measured by reference simply to economic efficiency. Economic efficiency, while a key factor in a vibrant economy, is only one factor in an economy that should operate to the ultimate benefit of all Australian consumers. Australian consumers, whether they are in city or rural or regional areas, would benefit from diversity of choice and service that vigorous competition promotes. The promotion of vigorous competition is equally important in furthering the public interest. Such a pro-competitive emphasis is currently lacking from NCP. With all the emphasis on dismantling anti-competitive legislative restrictions, sight has been lost of the value of exploring ways of injecting competition into highly concentrated industries.

NCP must be given a pro-competitive mandate so as to ensure its relevance to Australian consumers wherever they may live. The increasing divide between city and rural and regional Australia can be countered by emphasizing the need to promote competition in increasingly concentrated industries and encourage the growth of small business. Small business is a key ingredient in the promotion of competition. Small business is integral to the provision of greater choice and services to Australian consumers. Small business must be able to survive in highly concentrated industries if consumers in such industries are to receive the benefits that come with vigorous competition. NCP must explore ways of assisting small business survive in highly concentrated industries. This does not call for protecting small business from competitive pressure, but rather requires the prevention of anti-competitive conduct. NCP must be given a mandate to explore – in an ongoing manner – ways of introducing and maintaining a level competitive playing field.

The credibility of NCP in the minds of small business and rural and regional Australia is vitally linked to the National Competition Council (NCC) and Governments placing appropriate weight on small business concerns, social welfare and equity considerations when assessing the public interest. With the NCC placing undue weight on economic efficiency when assessing the public interest, the NCC currently fails to assess the impact of a particular course of action on the ability of the small business/independent sector of an industry to compete with vertically integrated monopolists, duopolists or oligopolists within that industry. The ability of the small business/independent sector to compete vigorously is often a key factor in the promotion of competition.

In relation to legislation review, the NCC is solely focused on dismantling restrictions – perceived or otherwise - on competition. At no time does the NCC place appropriate (or any) emphasis on injecting competition or promoting competition in a pro-active manner. The NCC (were it to continue) must ask what can be done to ensure that there is a level competitive playing field where large and powerful corporations cannot use their market power and/or financial resources to destroy competition. How can new forms of anti-competitive conduct be identified and stamped out on a regular and ongoing basis? What reforms can be made to the *Trade Practices Act* to ensure that all efficient competitors can compete vigorously with firms with market power and/or financial resources? It is easy to identify perceived restrictions on competition; it is much harder to identify pro-active ways of promoting or injecting competition. The NCC (if it is to continue) must be challenged to identify reforms that can create a level competitive playing field.

Similarly, social welfare and equity considerations are often given little or no weight as economic rationalist perspectives are given undue preference in policy advice said to be in the public interest. In the circumstances, the NCC's failure to look beyond economic rationalist perspectives justifies the insertion of a specific power under the *Trade Practices Act* and *Competition Principles Agreement* to enable the Federal, State or Territory Governments to direct the NCC to take into account specific factors in considering whether a course of action is in the public interest. Councillors must be appointed with a proven ability to identify ways of promoting a level competitive playing field.

Importantly, the NCC and Governments should, when considering the public interest, be expressly required to determine alternative courses of action that would reduce concentration within industries. The NCC has not to date focussed on ways of injecting competitive pressures into highly concentrated industry sectors such as the retail grocery industry or any industry where four or less players control more than 75% of the market. The NCC should also have a pro-competitive mandate as part of its NCP brief. A specific Councillor with trade

practices experience within a small business context must be appointed to the NCC. Alternatively, the Federal, State or Territory Governments may, where faced with a NCC that continues to be unresponsive to the true scope of the public interest, choose to transfer some or all of the NCC's functions to another body.

NARGA Proposals:

- (1) Strengthening the Public Interest Test;**
- (2) Greater recognition of community values within NCP - a key priority for rural and regional Australia;**
- (3) Greater emphasis on orderly industry re-structuring and financial compensation;**
- (4) Effective Competition Laws need to be at the heart of NCP;**
- (5) Pro-competitive mandate for NCC;**
- (6) NCC Small Business Appointment;**
- (7) Beyond the NCC - Is it time to abolish the NCC and reassign its remaining functions to either the ACCC or Productivity Commission? and,**
- (8) Regular reviews of NCP and the *Trade Practices Act*.**

(1) Strengthening the Public Interest Test

Part IIA of the *Trade Practices Act* (the Part of the Act governing the operation of the NCC) needs to be amended to expressly require the NCC to consider and specifically report on the possible impact that a particular recommended course of action will have on small business. The preparation of a small business impact study should not only be a requirement for the NCC, but should also be required whenever any legislation review is undertaken at any level of government. A specific requirement should also be imposed on the NCC to identify alternative mechanisms by which competition may be promoted.

A further amendment is required to specifically include the promotion of small business as a key competitive force in the application of the public interest test. The present list of factors – as found in clause 1 of the *Competition Principles Agreement* – is limited in scope, particularly as it does not include reference to small business's contribution to competition and the economy. A more expansive definition of the 'public interest' with specific reference to the promotion of small business as a pro-competitive force should be inserted into the *Trade Practices Act* and *Competition Principles Agreement*.

In addition, to ensuring that appropriate weight is given to social, equity and small business factors within the NCP framework, a specific power needs to be inserted into the *Trade Practices Act* and *Competition Principles Agreement* to enable the Federal, State or Territory Governments where appropriate to direct the NCC to expressly take into account such factors when considering whether a course of action is in the public interest. A power of direction will ensure that the NCC better understands what the community expects of it and NCP. NCP must be driven by community expectations – not by the expectations of unelected Councillors having no regard to elected members of Parliament. The NCP, as must the NCC, be accountable to the elected members of Parliament and the community generally.

There is presently a lack of confidence in the NCP and NCC being able to adequately recognize and respond to the needs of the Australian community. The NCC, in particular, sees itself as having the power to tell Governments to formulate policy having regard to economic rationalist arguments rather than by community expectations. The NCC views itself as above the community rather than as part of it. The NCC must act solely in the interests of the wider community rather than those who see higher industry concentration as the way forward. The community expects vigorous competition – choice in price and services – not more market concentration. The NCC must have the ability and strength to identify anti-competitive conduct in whatever form it may take. It must not be solely focused on legislative restrictions. Let it identify reforms to

the *Trade Practices Act* that will lessen the negative economic impact of greater industry concentration.

(2) Greater recognition of community values within NCP – a key priority for rural and regional Australia

While economic efficiency is an important objective, it must not be pursued over-zealously for there is a real danger that economic factors come to override social and community values in every instance. NCP requires a balancing of economic and social and community values, not an emphasis on economic factors to the exclusion of all else. Social and community values require that attention be given to the survival of smaller rural communities when considering industry deregulation. While such industry deregulation may allow large and powerful corporations to artificially drive down prices in a large regional centre, there is a real danger that smaller competitors in surrounding rural communities are driven out of business by the ability of the large and powerful corporations to cross-subsidize the lower prices at the regional centre through higher prices at other less competitive centres. In this way, cross-subsidization can be used by large and powerful corporations in a devastating manner to destroy smaller rural competitors and, in turn, the small communities that they help keep alive. NCP must not allow cross-subsidization to be used by large and powerful corporations to destroy rural communities. The survival of rural communities has an intrinsic value beyond that which is placed on them by an economic rationalist view of the world. While the economic rationalist would have all Australians live in major capital cities because that is the 'efficient' way of doing things, the wider Australian community knows the social value of rural communities. It is time NCP and the NCC were also appreciative of the intrinsic value of rural communities.

(3) Greater emphasis on orderly industry re-structuring and financial compensation

Where legislative restrictions have operated in an industry over a period of time, it is clear that the removal of those restrictions will have an impact on all those that have arranged their business affairs as allowed by those restrictions. Having been allowed to arrange their affairs in a particular way by the legislative framework at the time they started their business, it is harsh to expect that an individual can simply come to terms with overnight changes to that legislative framework. People need time to adjust. NCP must be more responsive to the need to give people who have structured their affairs in a way allowed by legislation time to adjust where that legislation is to be changed or repealed.

People cannot adjust overnight: they require a period of years to reorder their business activities to comply with a new legislative regime.

NCP must also recognize that adjusting to a new legislation regime may require financial assistance. While the States and Territories have been compensated for losses of revenue attributed to NCP reforms, small businesses that have suffered revenue losses because of the need to restructure their business, or worse because they have gone out of business because of NCP reforms have not generally been compensated. NCP in the future must provide adequate time for the orderly restructure of businesses and make financial provision for the retraining and compensation of those small businesses affected adversely by NCP reforms.

(4) Effective Competition Laws need to be at the heart of NCP

With the growing concentration of key industry sectors such as retail grocery, it is critical that effective competition laws are in place to deter anti-competitive conduct by large and powerful corporations. If competition law is about protecting competition, then effective competition laws must be the heart of NCP. NCP should not be simply about removing legislative restrictions, but should be more concerned to inject competition into highly concentrated industries. NCP will not be generally respected by the wider community in the absence of effective competition laws. All that the wider community now sees is that NCP has been used as a convenient vehicle to expand the market share of large and powerful corporations more interested in maximizing shareholder wealth than the interests of Australian consumers. Until there are effective, world's best competition laws in Australia, NCP will be seen as big end of town mantra designed to allow large and powerful corporations to destroy smaller, more efficient, competitors. NCP must be balanced and mindful of the very important need to stamp out anti-competitive conduct by large and powerful corporations.

(5) Pro-competitive mandate for NCC

The NCC should be required to progressively inquire into and report on how competition may be promoted in highly concentrated industries. The NCC should not only be required to review legislation that restricts competition, but also to consider mechanisms (whether legislative or non-legislative) for injecting competition into those industries in which a small number of players (namely 4 or less) collectively control more than 75% of a market. In considering pro-competitive mechanisms, the NCC would be specifically required to investigate

and report on (revenue-neutral) ways in which the small business/independent sector could be assisted in competing vigorously with large and powerful corporations. These pro-competitive investigations could easily be included in the NCC's work program.

(6) NCC Small Business Appointment

In keeping with the Federal Government's recognition of the importance of appointing small business representatives to regulatory bodies (see for example appointments made to the ACCC), a small business appointment with appropriate trade practices and competition law expertise needs to be made to the NCC. As currently there is no deputy president of the NCC, a small business appointment could be made at this level to demonstrate the importance of efficient small business to the promotion of competition. The suggestion of a deputy president with small business credentials is of course subject to consideration of the very real issue of whether the NCC should be abolished.

(7) Beyond the NCC - Is it time to abolish the NCC and reassign its remaining functions to either the ACCC or Productivity Commission?

Where appropriate weight is given to social, equity and small business factors, and greater emphasis is placed on finding ways to reduce concentration in key industry sectors such as the grocery industry, the NCC will gain support as a truly pro-competitive force. In the absence of such support, the rationale for the NCC's existence will continue to be questioned by regional and rural communities and small business generally. In the face of such questioning it may be worth exploring the possibility of hiving off all legislative review policy aspects from the NCC to the Productivity Commission and giving NCP a clear pro-competitive mandate requiring the investigation of anti-competitive legislation and ways that competitive pressures can be injected into highly concentrated industries.

With the NCC's legislative review policy aspects transferred to the Productivity Commission, the NCC's functions under Part IIIA (Access to services) could be conveniently transferred to the ACCC. In view of the ACCC's considerable experience in relation to access matters, the ACCC would be well placed to take on the NCC's existing role in recommending whether or not a service should be declared under Part IIIA. Transferring the NCC's Part IIIA functions over to the ACCC would be particularly efficient as the one body - the ACCC - would consider all issues in relation to access to services, rather than the existing inefficient situation where both the ACCC and NCC are involved in access

matters. Whatever may have been the original thinking behind splitting the functions under Part IIIA between the NCC and the ACCC, the relative little use made of Part IIIA in seeking access to the essential services means that the present split cannot be justified on economic efficiency grounds as in future the one body - the ACCC - could quite easily perform the different functions under Part IIIA now being performed by two bodies. Needless to say, the abolition of the NCC would bring with it considerable cost savings as with relatively little additional funding, the ACCC and Productivity Commission could perform the functions now being undertaken by the NCC. Such a scenario would be subject to whether the NCC could be reinvigorated with a new pro-competitive mandate allowing the NCC to serve a valuable role.

(8) Regular reviews of NCP and the *Trade Practices Act*

In the meantime, it is imperative that the NCC, NCP and the *Trade Practices Act* be subject to ongoing independent reviews. Such reviews must be undertaken at least every five years, or sooner if material changes have occurred to cast doubt on the effectiveness of the NCC (or its successor body), NCP and the *Trade Practices Act* in promoting competition or deterring anti-competitive conduct by large and powerful corporations. Needless to say, such a review process should for, the sake of completeness, also extend to the ACCC. To have wide community support, such reviews must be conducted in public and be fully transparent.