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Mr Ben Dolman
General Manager
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
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Email: competition@treasury.gov.au

Dear Mr Dolman

Woolworths Limited response to the Competition Policy Review Final Report

Woolworths welcomes the opportunity to further contribute to the Government's consideration of Australia's competition policy.

We have provided two comprehensive submissions to the Harper review and ask that these be taken into account in the Government's further consideration of these issues. To assist, I have attached copies of both.

In light of these previous submissions, we have limited our comments here and in the appendix to the key issues for our business and sought to focus on the opportunities we believe that the Government has to support greater competition and consumer choice.

Woolworths welcomes the findings in the Competition Policy Review's Final Report that a robust competition policy framework is essential to support growth and wellbeing. In our own sector, Woolworths has seen vibrant and unprecedented competition in recent years, with new entrants, greater consumer choice, the emergence of online offers and consistent falls in real prices at the cash register.

Woolworths strongly supports the broad direction of the Report and its focus on providing a substantial microeconomic reform agenda to drive the future of the Australian economy. Many of the report's findings build on a strong body of evidence for reform over many years and represent a clear consensus for reform.

We believe the Government should act first where this clear and long held policy consensus for reform exists, and where reforms will provide a boost to economic growth and jobs in Australia. The removal of anti-competitive barriers, such as deregulation of retail trading hours, will stimulate continued innovation, economic growth and job creation.

Deregulation of trading hours has been a feature of every major competition review since the early 1990s. Where trading hours have been deregulated, we have seen the creation of jobs and increased consumer choice for shoppers. Most recently, in the two years following the introduction of Sunday trading in Perth over 20,000 jobs have been created in the retail sector, which represents a more than 15 per cent increase in retail jobs. This is at a time when the rest of Australia saw retail jobs growth of less than 5 per cent and when the Western Australian economy was facing headwinds from the subsiding mining boom.

In addition to removing restrictions on trading hours, the Panel recommends removing regulations that impose planning and zoning and parallel import restrictions. These recommendations echo the findings of many previous reports and should now be heeded. We also strongly support the Panel's call for each jurisdiction to remove other regulations that restrict competition unless they meet a public interest test.

Given the policy consensus for reforms such as trading hours and the long string of reports calling for deregulation, it is now time for the Government to implement these reforms without further delays or further reviews.

That is why we welcome the Panel's establishment of a roadmap and timeline to drive implementation of its recommendations. The associated economic benefits will only be realised if federal, state and territory governments work together to implement this reform agenda. The economy cannot afford any further delays in removing unnecessary regulation and red tape.

While Woolworths is highly supportive of the vast majority of the Panel's recommendations, we are concerned that some measures proposed in the Final Report risk chilling competition as well as deterring business investment and innovation. These changes do not represent a clear policy consensus and as such we do not support their implementation at this time.

We do not support the proposed changes to the misuse of market power provisions in section 46 of the *Competition and Consumer Act 2010* (CCA). The Panel has recommended a new legal test be inserted into the CCA but has not established a case to support the change, particularly given the considerable uncertainty this will impose on business. We remain very concerned that the proposed changes will run counter to the Panel's stated aim of ensuring competition law is clear, simple and predictable.

This introduction of a so called 'effects test' has been considered and rejected in 11 separate reviews since the 1970's, including most notably by the Harper Review's most recent predecessors, the Hilmer and Dawson Reviews.

There is still no consensus on the need for change to this part of the law, with no clear explanation put forward as to the failure of the current legislation.

There remains even less consensus on the proposed legislative change. We note that the Harper Review itself has shifted its thinking on this issue from the Draft to the Final Report, having now put forward two alternative legal tests.

The only certainty that will come from this legislative change is uncertainty before the law. At a time of rising unemployment and when the economy is facing considerable headwinds, the proposed effects test would only add to uncertainty for business, stifle investment and innovation and likely drive up prices for consumers.

As such, we do not support the counterproductive proposed changes to the misuse of market power provisions. We urge the Government to focus its efforts in areas that will undoubtedly enhance competition, increase consumer choice and support jobs growth in Australia.

If you have any further questions, please feel free to contact Mr Andrew Thomas, Head of Government Relations and Industry, on (02) 8885 0219.

Yours sincerely

Grant O'Brien
Managing Director and Chief Executive Officer

WOOLWORTHS COMMENTS ON SPECIFIC RECOMMENDATIONS

A FIERCELY COMPETITIVE RETAIL SECTOR

Woolworths supports the finding in the Final Report that competition in the Australian grocery sector is intensifying with the entry and expansion of new global retailers like ALDI and Costco. This competitive rivalry is driving innovation and price competition as retailers need to fight harder than ever to win customers.

The Panel has noted that few concerns have been raised about prices charged to consumers by supermarkets - an obvious indicator that markets are indeed working in the interests of consumers.

DRIVING COMPETITION AND CUTTING RED TAPE

Woolworths strongly supports the Report's recommendations that are focused on completing the "unfinished agenda" of previous reviews. At a time of economic instability, the Panel has outlined a comprehensive reform agenda that would increase the international competitiveness of Australian business and its capacity to compete in the global economy.

We believe that in removing a range of regulatory impediments, the Government can foster even more competition in the retail sector, which will help to deliver the benefits of innovation and lower prices for Australian consumers.

Time for reform

The challenge for the Government is to provide leadership and drive implementation of the competition reform agenda. As stated above, many of these reforms have been recommended in past competition and economic reviews but have not been delivered.

Woolworths strongly supports the Panel's establishment of a roadmap and timeline to drive implementation of its recommendations. The associated economic benefits will only be realised if all levels of government coordinate their response. The economy simply cannot afford any further delays in removing unnecessary regulation and red tape.

In particular, we stress the importance of the swift implementation of following reforms:

- Deregulation of retail trading hour restrictions (Recommendation 12)
- Competition principles inserted into planning and zoning legislation (Recommendation 9)
- Public interest test to apply to regulation (Recommendation 8), and
- Removing all remaining parallel import restrictions (Recommendation 13).

Deregulation of retail trading hour restrictions - Recommendation 12

Woolworths strongly supports recommendation 12 that the "remaining restrictions on retail trading hours should be removed", with the exception of Christmas Day, Good Friday and the morning of ANZAC Day. The Panel has identified this as an area of immediate reform.

In our previous submissions, we provided detailed information on how the complex maze of different trading hour restrictions across the jurisdictions of Western Australia, South Australia, Queensland and New South Wales represent an ongoing impediment to competition in the retail sector. We outlined how the current restrictions impact on competition by:

- impeding retailers' ability to meet consumer demand
- discriminating against retailers on the basis of factors such as products sold, number of employees or location of retailer
- imposing costs on consumers through inconvenience and congestion, and
- creating compliance costs for business given the often complex nature of the rules.

The benefits of immediate deregulation of retail trading hours would be widespread and significant. In 2013, the Queensland Competition Authority estimated the net potential benefit to that state of removing the current restrictions was as much as $200 million per annum noting the "potential benefits of reform include an increase in retail productivity, more shopping convenience for the broader community and lower prices". This would be replicated in other jurisdictions like South Australia and Western Australia, which still retain extensive restrictions.

Deregulation would also create additional employment. In late 2012, the Western Australian Government allowed limited Sunday trading between 11am and 5pm for retail stores in Perth. According to Australian Bureau of Statistics data, since this partial deregulation over 20,000 jobs have been created in the retail sector, which represents a more than 15 per cent increase in retail jobs. This was at a time when the rest of Australia saw retail jobs growth of less than 5 per cent and when the local economy was facing headwinds from the subsiding mining boom.

Competition principles inserted into planning and zoning legislation - Recommendation 9

Woolworths supports the Panel's recommendation 9 that seeks to bring about a more modern, best practice and efficient planning system to promote competition. We have had significant concerns over planning, zoning and other land development regulatory restrictions that impede our ability to roll out new stores.

The Panel has recommended that planning restrictions should be removed unless they meet a public interest test. It also calls for a number of competition principles to be inserted into planning and zoning legislation, such as competition between individual businesses to not be deemed a relevant planning consideration. We believe that incorporation of these factors will help to alleviate some of the issues faced by business and ultimately benefit consumers.

Removing all remaining parallel import restrictions - Recommendation 13

Woolworths supports the removal of all remaining parallel import restrictions, as this would provide business with more extensive sourcing options and potentially offer greater value to consumers. The Panel has identified this as an area for immediate reform.

Parallel import arrangements not only helps business to deliver lower price products to consumers but also assists business to negotiate more efficient local sourcing options. Appropriate regulation can ensure that the incoming products meet all relevant quality and safety standards.

Regulation review & public interest test - Recommendation 8

Woolworths supports the call for each jurisdiction to remove any anti-competitive regulations unless they meet a public interest test. Under this proposal, anti-competitive regulations would only be retained if the benefits of a competitive restriction to the community outweigh the cost.

This reform would be an obvious means of reducing the significant compliance and regulatory burden imposed on business by a range of inconsistent and unnecessary regulations at all levels of government. This red tape imposes significant costs on businesses that operate across multiple state and territory jurisdictions.

The ethanol mandate in New South Wales is a prime example of a regulatory restriction that harms competition. The limiting of the mandate to only those retailers that operate 20 or more service stations in the state means the regulation is highly anti-competitive. An exemption regime based on the number of sites controlled by an operator is not appropriate. For example, the existing site numbers exemption means that Costco, a multi-billion dollar global retailer, is exempt from the mandate and its associated administration, reporting requirements and red tape. Woolworths does not believe that the ethanol mandate, in its current form, would survive a public interest test.

IMPROVING THE COMPETITION POLICY FRAMEWORK

Woolworths has consistently argued that as competition in the retail sector has been working well and delivering for consumers, only minor changes to the competition policy framework are required. We welcome the Panel's view that the overarching competition policy and legal framework, including the central concepts, prohibitions and structure of the *Competition and Consumer Act* 2010 (CCA), should be retained.

We support a number of the recommendations relating to the CCA that are contained in the Report, which will protect and improve the competition law framework. Further detail on our comments on these recommendations is contained in our previous submissions (attached).

However, we do have significant concerns about two of the Panel's proposed changes to the CCA:

- introducing a new test for misuse of market power into section 46 of the CCA (Recommendation 30), and

- extending section 45 of the CCA to cover "concerted practices" (Recommendation 29).

Misuse of Market Power - Recommendation 30

The Harper Review panel has proposed a radical overhaul of the misuse of market power provisions in the CCA. It wants to introduce an "effects test" into section 46, remove the "take advantage" element and replace specific categories of exclusionary conduct with an overall "lessening of competition" standard.

The new provision would require a business to somehow balance a range of pro-competitive and anti-competitive purposes and effects in making its day to day business decisions. In a dynamic and competitive market environment, a large-scale business will be expected to run every decision through an expensive and time consuming maze of lawyers. The ensuing legal unpredictability undermines the Panel's stated objective of simplifying and clarifying competition law for the benefit of consumers.

Our concerns regarding the proposed changes are outlined as follows:

- the case for change has not been made
- no clear solution with unintended consequences, and
- the resulting uncertainty will chill competition and business investment.

The case for change has not been made

As we stated in our previous submissions, given the significant nature of these suggested changes and their economic consequences, it is imperative those proposing these amendments to section 46 make the case that they are necessary and bear the onus of demonstrating that the benefits outweigh the detriments.

Before such changes can be accepted, they must be capable of careful testing and scrutiny such that stakeholders can be satisfied. However, the Report does not provide clear or compelling evidence that the current system is broken or that the potential interference with entrepreneurship, innovation and competition is justified and in the interests of consumers.

As the Panel notes in its analysis, an exhaustive history of reviews stretching back to 1979 have examined misuse of market power and section 46 of the CCA in detail. Some form of an "effects test" has been considered by every major review in that time, including the Hilmer and Dawson Reviews, and it has been rejected each time on the basis that it would risk capturing pro-competitive behaviour and chill competition.

Despite having numerous opportunities throughout this process, neither the Panel nor supporters of change like the ACCC have been able to identify how the lack of an effects test prevents cases being taken. In fact, the jurisprudence is contrary to such a view. Since 1989, the ACCC has brought eighteen cases under section 46, compared to the US Department of Justice bringing ten cases under

its market power provisions in an exponentially larger geographic market. Further, the ACCC has never lost a case based on the "purpose" element.

No clear solution with unintended consequences

The past 11 competition reviews have considered and rejected a myriad of proposals for an 'effects test'. Throughout the current review yet more options have been put forward. The Harper Panel itself has put forward two different options in the Draft and Final Reports. Yet there is still debate as to the how changes to section 46 might be crafted.

The lack of consensus on the need for change and what that change might be should cause pause for any government seeking to instil confidence and certainty into Australia's competition laws and the business community more broadly. It also highlights the difficulty in redrafting the law without creating significant uncertainty and therefore costs to the economy.

This version of the legal test for section 46 proposed in the Final Report poses a significant risk to consumers and the economy. In removing two key elements of the current test, namely the "purpose" and "taking advantage" elements, the Panel risks blurring the line between what is considered competitive and anti-competitive business conduct.

Woolworths is very concerned that the Panel has not adequately addressed this risk. While in the Draft Report it recommended a specific defence, it has now instead provided a number of legislative factors that must be considered in determining whether activity lessens competition.

The way in which these factors, such as efficiency and innovation, are weighed against the prevention or restriction of competition by a regulator or court is extremely unclear. We also doubt that any ACCC guidelines regarding its approach to the new test would provide sufficient certainty for business. As noted in the commentary thus far, these guidelines would not prevent private parties from commencing section 46 cases against a business and would not bind courts.

Uncertainty will chill competition

The Panel's proposal creates inherent uncertainty for business as it overturns the well understood legal concepts underpinning section 46 developed by courts over the past 40 years. It is not surprising that the proposal has already divided competition lawyers, economists, academics and current and former commissioners of the ACCC.

The Panel acknowledges that there will be uncertainty for business due to its proposal. But it profoundly underestimates how damaging this may be to the economy given that business will not know whether conduct that is legal today because it has a genuine competitive purpose will fall foul of the new prohibition. As we know with any major legal change, it will take many years and many expensive court cases before these concepts are fully defined by the courts.

Business needs certainty to thrive and deliver the best results for consumers. Clear, consistent legal frameworks are an essential precursor for innovation and introducing unknown and untested legal

reforms risks investment. Companies will be hamstrung by having lawyers and economists assess every major business decision. It will result in less responsive, less innovative and more conservative decisions by businesses that may be considered to have market power. This ultimately harms consumers.

Concerted practices - Recommendation 29

The Panel has also proposed a significant broadening of the general prohibition on anti-competitive agreements in section 45 of the CCA. It suggests that the prohibition should be extended to cover "concerted practices" that substantially lessen competition.

Woolworths does not believe that there is a clear problem that justifies the creation of this "new" prohibition on conduct, which Australian courts have been reluctant so far to accept. It would effectively allow a breach of section 45 to be found based on circumstantial evidence of exchanges of price and/or strategic information between competitors. This change may limit the ability of business to provide vital information to consumers on pricing and business initiatives, and inadvertently penalise independent commercial conduct in a market, in the absence of any collusion.

Those advocating for change have argued that Australian courts have interpreted the requirement of the existing prohibition (i.e., establishing an "agreement" or "understanding") narrowly. However, that is questionable on the following grounds:

- the failure to establish an "understanding" in these cases is usually due to a failure to produce the evidence required to establish the allegation, despite the ACCC having already being given significantly expanded evidence-gathering powers, and
- the Federal Court has recently accepted a more expansive approach to the question - in *Norcast S.ar.L v Bradken Limited (No 2) [2013] FCA 235,* an "arrangement" was found even though it was informal and unenforceable

The concept of a 'concerted practice' is imported from European law. The policy is to prohibit co-operation between firms which prevents or restricts competition. Article 101 of the European Treaty refers to "agreements, decisions or concerted practices". It is far from clear that "contracts, arrangements or understandings" captures a lesser field of cooperative conduct.

It can be dangerous to infer coordinated conduct from circumstantial evidence such as parallel conduct in a market. It may be that firms act in parallel not because of coordinated conduct but because their individual appreciation of market conditions tells them that failure to match a rival's strategy could be damaging or disastrous.

A concerted practice in European law is understood in the jurisprudence to be a knowing substitution or practical co-operation that risks competition. This is captured by the existing terms, "arrangement and understanding", which do not feature in Article 101. It is simply false to suggest the scope of section 45 of the CCA is inadequate to catch illegal and anti-competitive coordinated conduct in a market.