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12 February 2016

Mr Scott Rogers
Manager, Competition Policy Unit
The Treasury
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C/o competition@treasury.gov.au

Dear Mr Rogers

Woolworths Limited response to the Discussion Paper on 'Options to Strengthen the Misuse of Market Power Law'

Woolworths welcomes the opportunity to provide a response to the discussion paper, which was released on 11 December 2015. We were also grateful to have the opportunity to participate in a consultation roundtable held in Tamworth on 29 January 2016.

We strongly support the retention of the misuse of market power provisions in section 46 of the *Competition and Consumer Act* 2010 (CCA) in its current form. The core of the current legislation has been in place for 30 years and case law has developed since that time to provide clear guidance on its application. This has helped to provide certainty for business, supporting investment that has driven jobs and growth in the Australian economy.

Section 46, as part of the broad competition policy framework, has helped to foster a competitive environment in the Australian economy. As noted below, the retail sector has seen only increased competition in the period since the 2008 ACCC review into the grocery sector, which has ultimately benefited the consumer.

It is important that any proposed changes to the current laws governing competition in Australia be considered in light of how those changes will impact consumer welfare. Throughout the now two years of public debate on this matter, there has been no clear case made as to how changing section 46 will benefit consumers through ensuring lower prices, better services or increasing choice.

And with no clear articulation of the current deficiencies with section 46, it is no surprise that no consensus has been reached on what change should look like. What is clear is that there are significant costs in rewriting laws that have functioned well to date, with considerable supporting case law. Woolworths firmly believes that the uncertainty and unintended consequences that would result from amending section 46 could well stifle competition and impede innovation, which would ultimately harm consumers.

In addition to a brief recap of the high level of competition faced in the retail sector, this submission highlights the lack of a case for change and why this has resulted in no clear agreement for what change should look like. It also discusses the significant business costs associated with change and how this risks chilling business investment and stifling innovation. This brief submission should be read alongside Woolworths previous submissions to the Harper Review.

A fiercely competitive retail sector

Competition in the Australian grocery sector has never been stronger with the competitive rivalry between retailers intensifying in recent years due to the impact of technology and the entry and expansion of global retailers.

The past decade has seen many global retailers enter the Australian market including most notably, ALDI and Costco in grocery, as well as the entry of many general merchandise retailers including H&M, Uniqlo, Topshop, Williams-Sonoma, Apple and Samsung. ALDI has already had a major impact on the grocery market across the eastern seaboard and it continues to expand with the opening of its first four stores in South Australia last week.[1]

[1] Business Insider, 'Aldi opens it battle with Coles and Woolworths in South Australia', http://www.businessinsider.com.au/aldi-opens-its-battle-with-coles-and-woolworths-in-south-australia-2016-2 5 February 2016.

At the same time, incumbent 'bricks and mortar' retailers are being challenged by the growth in online retail businesses. Australian online shopping expenditure is tipped to be worth $26.9 billion by the end of 2016, with a compound annual growth rate of 14.1 per cent.[2] The online space has seen new innovative offers, from overnight delivery of fresh fruit and vegetables through to ready-made meals, helping to increase the choice available to consumers and increase competition.

This highly competitive landscape has delivered major benefits to consumers through lower prices, better access and rapid innovation. As noted in our original submission, between 2008 and 2013, the cost of a typical basket of groceries grew at just half the rate of inflation meaning that prices for food and non-alcoholic beverages fell in real terms by 7 percentage points. Since then, competition in the sector has only intensified and since July last year, Woolworths alone has itself invested over $300 million in lowering prices for our customers.

At a supplier level, the evidence also indicates that Australia has a highly competitive market. As outlined in our original submission, suppliers sell their produce into highly competitive markets. As an open economy with a strong history of agricultural export, Australia enjoys a high level of competition for agriculture production. Producers are able to sell overseas, or locally through a broad range of supermarkets; specialist retailers, such as butchers and fresh fruit and vegetable stores; restaurants and fastfood outlets. As a result, Woolworths has to compete with a large number of competitors and purchases only a relatively small percentage of Australian agricultural production, for example, approximately 15 per cent of the total Australian production of lamb, 11 per cent of fruit & vegetables and 7 per cent of beef. This is despite the fact that 96 per cent of all fresh fruit & vegetables and 100 per cent of all fresh beef and lamb sold at Woolworths is Australian grown.

This highly competitive retail market will only intensify further in coming years and competitive pressures will lead to lower prices for consumers, better access and continued innovation. We expect this to continue without the need for regulatory change.

No case for change to section 46

While there is plenty of evidence of a highly competitive Australian retail market, there has been no clear case established to highlight that changing section 46 will lead to better outcomes for consumers. As a result, Woolworths does not support the Harper Review Panel's recommended changes or any of the options outlined in the discussion paper.

Throughout the Harper Review process and this subsequent consultation period, no evidence has been provided to show that the current provision prevents action being taken

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[2] PWC, *Australian online shopping market and digital insights*, July 2012, p3.

against anti-competitive behaviour. In fact, we contend that section 46 is working well and is an effective means of prohibiting firms misusing their market power.

The ACCC has demonstrated that it has been able to prosecute bona fide cases of misuse of market power under the current provision. In fact, analysis shows that since the *Queensland Wire* case in 1987 it has brought 20 cases under section 46, winning 12 cases on a section 46 basis and an additional five cases on other provisions of the CCA. Over the same period, the US Department of Justice only brought ten cases under its equivalent provisions.

Further, some of the supposed problems with the current section 46 put forward are already covered by the existing misuse of market power provisions or other parts of the CCA. For example, some have suggested that the ACCC cannot take action to prevent land banking of retail sites. However, this would be actionable under section 50 of the CCA and the ACCC can act to prevent acquisitions or require divestment of sites if it believes there is a substantial lessening of competition.

Many of the proponents of changing section 46 believe that it should be a "catch all" for the particular competitive or economic challenge faced by a particular competitor or industry. This is a fundamental misunderstanding of what this section is designed to do - that is, to ensure a business does not abuse its market power to insulate itself from legitimate competition and ultimately cause harm to the customer.

No Clear Consensus on New Wording

Given the lack of clarity of what the problem trying to be addressed is, it is little wonder that it has been difficult for the supporters of change to section 46 to reach a consensus on what elements should be included in any proposed reform option.

In many cases the protections being sought by proponents for change fall well outside the intended remit of section 46 and would be much more appropriately addressed through other arms of policy. Section 46 was always intended to only regulate the misuse of market power, through exclusionary conduct. Instead, some stakeholders are advocating section 46 should cover behaviour more appropriately addressed through other parts of the competition policy framework, such as unconscionable conduct and cartel offences, or through industry policy.

In this context, it is not surprising that each proponent of changes to section 46 appears to nominate not only different problems with the existing provision but offers up different suggestions on how to address them. This is dangerous given the lack of consensus means any proposed option will likely result in greater uncertainty and regulatory risk.

This is illustrated in how the Harper Review panel even recommended multiple reform options as part of its consideration of section 46. In its draft report, the Panel recommended re-framing section 46 based on a "substantial lessening of competition" test but with the creation of a two-limbed defence to ensure that pro-competitive conduct would not be captured.

After widespread criticism of this approach in follow up submissions, the Panel dropped the proposed defences from its final recommended model and instead inserted some legislated factors to be considered by a court in considering section 46 cases. The Panel also subsequently recommended, in an attempt to overcome concerns about potential overreach under its proposed new test, that authorisation should be made available for business and that the ACCC be required to issue guidelines for its enforcement of section 46 matters. These guidelines would not provide sufficient certainty for business given that ultimately, they would still need to be interpreted by the courts and are subject to change.

Subsequent to consideration by the Harper Review, we now have the menu of possible changes to section 46 put forward in the Treasury discussion paper. This all goes to highlight the lack of problem identification and therefore lack of clarity on the solution.

High cost of change

While there is not a compelling case for change, we do know that there will be significant costs associated with the adoption of a new section. Amending the current misuse of market power provisions contained in section 46 could come at a significant cost to business and the wider community. This is because the current law is well understood by the business community and there is an extensive body of case law from which it can draw guidance.

These proposed options for amending section 46 would inevitably cause significant uncertainty for business as we wait for the courts to interpret the changes and provide guidance through case law. While this has been acknowledged and it has been suggested that ACCC guidance notes could help to mitigate this, nothing replaces case law for providing certainty as to the court's interpretation of new legislation. There is a danger that boards and executive teams will need to secure clear legal advice on every significant commercial decision, which are made on a daily basis, to determine the impact those decisions will have on their competitors.

There is inherent risk in tinkering with well understood law and imposing uncertain regulation across the economy. The use of market power, which of itself is not illegal, by definition involves competitors looking to innovate, to invest in a better service for a customer or to offer a lower price. Putting this at risk could mean driving up the costs of doing business and deferring investment decisions.

While these costs to business would be significant, the chilling impact change would have on investment and innovation is of far greater concern. Business thrives on certainty. Without it, businesses cannot invest with confidence and they will be discouraged from innovating to bring new products to market.

We are also concerned about the possible unintended consequences of the proposed change. For example, some of the proposals put forward could endanger Woolworths state based pricing policy, which sees the same prices charged at our NSW regional stores as in our Sydney Town Hall store. While this pricing policy is made for legitimate business reasons, including to allow statewide marketing and keep faith with our customers regardless of where they shop in the State, some would argue that it could fall foul of some of the proposed amendments to section 46. In fact, at the round table hosted in Tamworth, some proponents for change stated that such national or state based pricing regimes should be deemed illegal.

"Take advantage" element key to section 46

Since the beginning of the current debate on section 46, a much greater focus on the importance of the "take advantage" element has emerged. We are particularly concerned that every option outlined in the discussion paper, other than making no change, contemplates the removal of this vital part of the section 46 test.

Woolworths believes that the "take advantage" limb is critical in the operation of section 46 as it is crucial in differentiating between legitimate competitive activity and anti-competitive conduct. The possession, and even use, of substantial market power in and of itself is not a problem but it is the "take advantage" of that power for one of the proscribed anti-competitive purposes that damages competition.

Under the current test, a business with substantial market power only breaches the law if it engages in conduct that depends on that power. This provides an important protection for competition as it does not deter businesses from engaging in pro-competitive behaviour, such as selling better products at lower prices, for fear of harming less efficient competitors.

Those supporting removal of the "take advantage" limb are effectively arguing that the test should no longer require a causal connection between the conduct in question and the market power. This would be a radical departure from the intent of the original section and would put Australian law out of step with international best practice in equivalent jurisdictions.

Conclusion

As we have outlined, Woolworths believes that Australia enjoys a highly competitive business environment, that has only increased in the case of the retail sector in recent years. This has been well served by Australia's competition laws, including section 46.

With no clear case for changing section 46 and no clear consensus on a new test, Woolworths believes the risks of change are too great. Any change will bring uncertainty and will have a chilling effect on investment and innovation as the market place comes to terms with the new provision and subsequent case law is developed.

Woolworths remains disappointed that so much focus has been given to this part of Australia's competition framework, at the expense of focus in other areas. While there has been no clear case put forward of how changes to section 46 would benefit consumers, create jobs or help grow the economy, we do know that other reforms proposed in the Harper Review would undoubtedly deliver significant benefit.

Just one is removing restrictions on retail trading hours to allow retailers to meet changing consumer demands to shop at night and on weekends. The Queensland Competition Authority found that deregulation of retail trading hours in that state would generate as much as $200 million per annum. While in the two years post the introduction of Sunday trading in Perth, 20,000 retail jobs were created, at a rate three times the national average.

It is a shame that the same energy and time devoted to debates around section 46 have not been put into delivering reforms that have undisputed economic benefits, such as removing retail trading hours restrictions.

If you have any further questions, please feel free to contact Justin Mining, Government Relations Manager or myself on (02) 8885 0219.

Yours sincerely

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