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Senate Standing Committees on Economics
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Re: Inquiry into Competition and Consumer Amendment (Misuse of Market Power) Bill 2014

I write to outline the Australian National Retailers' Association (ANRA) views on the Competition and Consumer Amendment (Misuse of Market Power) Bill 2014. ANRA is not supportive of the Bill. Forced divestiture in a small and dispersed market such as Australia would undermine value and choice for consumers, and jeopardise jobs and investment in the retail sector, including in regional communities.

This Bill is the latest attempt by the anti-supermarket lobby to prevent Australian families from having continued access to a wide range of groceries at affordable prices in convenient locations. The nature of Australia's small population across a large geographic area means there are many industries that may only have two or three firms operating at scale. None of these sectors have been subjected to the same barrage of false claims and myth-making that major supermarkets have endured.

In just the past few years there have been repeated inquiries launched by those claiming supermarkets display anti-competitive behaviours. All of these have come to the same conclusion – competition in the sector is vibrant and vigorous.

The 2008 ACCC Grocery Inquiry found there is “workable competition” in Australia's grocery sector and that there is no evidence of “anything that is fundamentally wrong with the grocery supply chain”. During this inquiry the ACCC expressed concern about the prevalence in the public debate of inaccurate statements about the lack of competition in the grocery market.

In August, 2011, Justice Emmett, who presided over the Metcash merger case, stated: “It is reasonable to conclude that the scale and intensity of retail competition is extreme and is increasing. Volume is the key to success for the major supermarket chains, independent retailers and Metcash alike.”

Frequent commentary about a so-called “duopoly” ignores the actual market structure, the potential for consumers and producers to switch consumption and production decisions, and the increasing prevalence and importance in Australia of global retailers.

A lack of evidence, however, is no barrier to those that oppose supermarkets. This Bill represents another attempt at disruptive government intervention in a sector that employs hundreds of thousands of Australians, in communities across the country, delivering quality, value and choice to tens of millions of customers each week.

Specific objections to the provisions of the Bill

According to the Explanatory Note for the Bill:

The aim of this Bill is to provide the Court with the power to give directions to order a corporation to reduce its market share, where the corporation has been found to have contravened subsections 46(1) or 46(1AA) of the Competition and Consumer Act 2010. These subsections contain the Act's provisions relating to the misuse of market power.

ANRA makes the following specific observations about this Bill:

- **There are already existing penalties** - There are already penalties imposed for contraventions of subsections 46(1) or 46(1AA) of the Competition and Consumer Act 2010. These include fines of up to \$10 million or three times the gain made by the breach or 10% of the annual turnover of the convicted company. There is no demonstrated evidence that Australian Courts have had insufficient remedies available to address misuse of market power. Indeed, in the last five years there have been few successful cases under subsections 46(1) or 46(1AA) of the Competition and Consumer Act 2010 – none of these involved the major supermarkets.
- **The argument for more penalties is based on false assertions** - The Explanatory Note to this Bill claims:
There are significant concerns that the lack of competition in these markets is leading to higher prices for consumers and putting producers under increasing financial strain.

As already discussed, the supermarket sector is one of the most studied sectors when it comes to competition policy and no substantive evidence has been provided to support the claims that there is a lack of competition in Australia or that there is market failure in the grocery supply-chain. Indeed, the continued growth in international operators such as Costco and Aldi points to an increasingly competitive market.

Retail prices are making only a modest contribution to inflation currently. The 2.9% rise in the CPI in the year to March 2014 is significantly higher than the 2.2% rise in food and non-alcoholic beverage prices. Consumers have been benefiting from this trend since September, 2009, and it reflects intense competition imposing downward pressure on food prices. From June, 2009, to June, 2013, the Consumer Price Index in Australia increased 10.7%¹. Over that same period, customers at Coles actually paid 4% less for food and liquor.²

- **Divestiture without proof of misuse of market power** – The Bill claims to be only focused on penalties for breaches of subsections 46(1) or 46(1AA) of the Competition and Consumer Act 2010. But then includes a clause (subsection 80AD(4)) that gives a Court the ability to force divestiture even without a prosecution under subsections 46(1) or 46(1AA) of the Competition and Consumer Act 2010. Indeed, this alarming proposal provides no details of the grounds on which a Court could make such a significant decision.

¹ ABS (2013) Consumer Price Index 6401.0

² Coles quarterly sales announcements

- **Lack of detail about extent of divestiture** – The Bill makes no mention of the size of the divestiture penalty that would be imposed. There are no limits placed on the extent the Court could force a company to divest. Combining the lack of a divestiture limit with the lack of a need to get a prosecution under subsections 46(1) or 46(1AA), this proposed Bill could result in Courts delivering arbitrary decisions that result in the end of all multi-store chains in Australia, with only single store operators allowed to exist.

Impact of divestiture on jobs, communities and broader economy

Divestiture is a serious penalty to impose on any firm and would not be consistent with the concept of a proportional penalty being imposed for breaches of competition law. Not least because of the widespread impact any forced divestiture would have on shareholders, employees, customers and the broader community. The most likely beneficiaries would be global retail chains.

- **Shareholders** – divestiture unambiguously destroys shareholder wealth; indeed, the mere threat of such a penalty could have an impact on shareholder value. Millions of Australians, through superannuation funds, have investments in prominent and successful Australian-owned companies such as Wesfarmers and Woolworths. Artificial and arbitrary limits set on market share in the sector would most likely mean ownership would be taken up by new entrants from overseas, with profits going offshore.
- **Employees** – disruption to existing employment would be significant and severe if major supermarkets were forced to close stores to reduce their market share. There is no guarantee the business model of any new entrants to the sector would replicate the jobs currently provided by the major supermarkets, or that existing retail outlets would necessarily be bought up. Divestiture forces sales; it cannot compel purchases.

Indeed, the nature of the grocery sector in Australia suggests that smaller regional stores would probably be sold first, and would be more unlikely to be purchased by any new entrants. The two current international operators in the grocery sector have existing store networks that are focused on larger population centres. They would not automatically be interested in purchasing stores in more isolated regional communities which have higher transport costs and lower turnover.

The impact would be particularly felt by younger employees who have historically had their first work experience in supermarkets. Indeed, every day 87 young Australians commence their first day of work at a Woolworths store. The reduced number of stores would result in a reduced number of employment opportunities.

- **Customers** – forced store sales would leave customers with a reduced offering of stores available, and less product choice. For regional communities this could result in the need to travel long distances to do the weekly grocery shopping, with a risk of paying significantly higher prices for a reduced range of goods, at small independently run stores.

- **Communities** – Apart from the risk to jobs and investment, and the likelihood of a more expensive weekly shop, there would be wider impacts on communities, especially regional towns. Local farmers and manufacturers could lose supply contracts. International operators have a much lower Australia made/grown/manufactured share of their product lines than the major supermarkets.

Divestiture is available as a remedy for misuse of market power in some other jurisdictions, including the US, Canada and EU. However, it is rarely used (in fact has never been applied in Canadian Courts or by the EU Commission, and has only been applied a handful of times by US Courts), given it is an extreme and drastic remedy, and may be disproportionate to the original harm.

Another key practical problem with the proposed use of divestiture is that the ACCC and the Courts have no experience in how to split up companies. Divestiture can result in significant economic harm through the loss of economies of scale and scope, which in turn could flow through to consumers in the form of higher prices. It can impose significant losses on investors, and jeopardise jobs and wage levels. There is a real risk that the outcomes of forced divestiture would be at the worst end of the scale for shareholders, employees, customers and communities.

In summary, ANRA urges the Committee to recommend this Bill does not proceed on the grounds of objections to the specific provisions of the Bill as well as the broader economic cost that forced divestiture would inflict on shareholders, employees, customers and communities.

Should you have any questions regarding this please contact Mr Russell Goss, Deputy Chief, at our Sydney office

Sincerely,

Margy Osmond
Chief Executive