



RETAILCOUNCIL

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6 January 2017

Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Re: Inquiry into Competition and Consumer Amendment (Misuse of Market Power) Bill 2016.

The Retail Council appreciates the opportunity to provide feedback to the Senate Economics Legislation Committee on the *Competition and Consumer Amendment (Misuse of Market Power) Bill 2016*.

As you may be aware, the Retail Council¹ made several submissions to the Harper Review throughout the competition policy inquiry. We also participated in subsequent consultations with the Government around a way forward on Recommendation 30 from the final Harper Review Report, which related to s.46 of the *Competition and Consumer Act 2010 (CCA)*. The Retail Council also provided feedback to Treasury on the Exposure Draft for the *Competition and Consumer Amendment (Competition Policy Review) Bill 2016*.

Throughout this process, the Retail Council has remained consistently supportive of almost all the recommendations put forward by the Harper Review. Of the 52 recommendations made in the Draft report of the Harper Review, the Retail Council only expressed significant concerns about three².

We acknowledge that following feedback on the Exposure Draft for the *Competition and Consumer Amendment (Competition Policy Review) Bill 2016* the scope of the s.46 amendments have been marginally reduced. Specifically, the scope has been narrowed from any market to those markets in which the corporation's conduct is most likely to have a purpose, effect or likely effect of competition concern.

Despite these changes, the Retail Council remains concerned about the implications of the proposed changes to s.46 of the *Competition and Consumer Act 2010*. The Retail Council has consistently argued for the retention of s.46 in its current form and continues to do so, while also recognising that the Government has taken a different view.

¹ These submissions were made under the Retail Council's previous name – Australian National Retailers Association (ANRA)

² Draft recommendations 25, 29 and 42.

A so called 'effects test' has been considered many times by various competition reviews in Australia and has always been rejected. As Dawson explained in his 2003 review:

As with the introduction of an effects test, the reversal of the burden of proof would discourage corporations from engaging in competitive conduct for fear of being unable to discharge the reversed onus. It is likely that greater caution would be taken to avoid litigation under section 46, which would discourage rather than encourage competitive behaviour.³

It is this 'chilling effect' of both an effects test and the reversal of the burden of proof that underpins the Retail Council's continued concerns about the changes to s.46 as outlined in the *Competition and Consumer Amendment (Misuse of Market Power) Bill 2016*.

We continue to believe that:

- consumer wellbeing will not be enhanced over the long term;
- s.46 as it is currently interpreted by the courts demonstrates that it already protects competition rather than protecting competitors despite how it is couched in the Act;
- s.46 strikes the right balance between prohibiting anti-competitive conduct and not interfering with efficiency, innovation and entrepreneurship as evidenced by the successful cases brought by the ACCC. We remain concerned that the proposed changes to s.46 will remove this balance casting a wide net over business and capturing pro-competitive behaviour, bringing on regulatory failure;
- The proposed changes will make the law less clear, less simple and less predictable for business and end in years of costly and lengthy legal battles.

A key concern of the Retail Council remains that pro-competitive practices may inadvertently be captured in the new s.46 or, more likely, that businesses may be deterred from making what would be pro-competitive decisions that benefit consumers because they fear being accused of breaching s.46.

In summary, the Retail Council remains concerned about the changes to s.46 as proposed in *Competition and Consumer Amendment (Misuse of Market Power) Bill 2016* and urges the Government to reconsider its position and leave s.46 of the CCA unchanged.

The Retail Council thanks the Senate Economics Legislation Committee for the opportunity to provide feedback on the *Competition and Consumer Amendment (Misuse of Market Power) Bill 2016*. Should you have any further questions please contact our Sydney office on (02) 8823 3515.

Kind Regards

Steve Wright
Acting Chief Executive Officer

³ Dawson et al. (2003), *Review of the Competition Provisions of the Trade Practices Act*. p.86