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Master Grocers Australia Ltd

Trading as:

MGA Independent Retailers

Competition and Consumer Amendment (Misuse of Market Power) Bill 2016

Submission to

The Senate Standing Committee on Economics

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Submission by Master Grocers Australia (MGA) to the Senate Standing Committee on Economics in respect of the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016

Introduction

- MGA is making this submission in response to the release of the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016 (the draft Bill) to amend the Competition and Consumer Act 2010 (the CCA) to strengthen the prohibition of the misuse of market power by corporations and better target anti – competitive conduct (exclusionary behavior) by corporations with a substantial degree of market power**.**
- MGA welcomes the release of the draft Bill which will, if it becomes law, provide for the implementation of competition reform as recommended by the Competition Policy Review[1] 2015 led by Professor Ian Harper (the Harper Review). The draft Bill only tackles part of the reform proposals made by the Harper Review but the draft Bill represents significant changes to the law, in particular Section 46 of the CCA, for the independent supermarket and liquor retail sector resulting in positive benefits for thousands of small businesses across Australia.

About MGA

- Master Grocers Australia (MGA) is a National Employer Industry Association representing the owners and operators of Independently owned Grocery and Liquor Supermarkets in all States and Territories of Australia trading under brand names, such as, Farmer Jacks (WA), Foodland (SA), FoodWorks, Friendly Grocers, IGA and SPAR, and they range in size from small, to medium and large businesses.
- Independently owned and operated Supermarkets play a major role in the retail industry and make a substantial contribution to the communities in which they trade. In Australia there are 2,100 independently owned branded supermarkets employing over 115,000 full time, part time

[1] Competition Policy Review 2015- Final Report – March 2015

and casual staff, representing $14 billion in retail sales. Many MGA members are small family businesses, employing 25 or fewer staff.

Executive Summary

- In any competitive environment it is essential for there to be a level playing field. Unfortunately, that has not been available in Australia to all the supermarket and packaged liquor retail industry participants. The major chains, namely Coles and Woolworths, have grown their joint share of the national grocery market from about 34 per cent in 1975 to almost 80%, and in some regions, their joint market share is closer to 90 per cent. It has been difficult for smaller retailers to combat the power of the larger supermarket chains because they have the ability to engage in practices that can severely impact the survival rates of independent supermarkets and packaged liquor retailers. MGA submits that supermarket customers are entitled to the benefits of genuine competition, which will deliver cheaper grocery products, diversity in retail offers and a supply chain that makes efficient use of Australia's resources but also one which results in a more equitable distribution of the available profits. The proposed amendments in the draft Bill will provide opportunities for more robust competition in which there is greater opportunity for all parties to prosper and contribute to economic growth in Australia.

- The draft Bill proposes the introduction of amendments to Section 46 of the CCA as recommended in the Harper Review[2]. A new Section 46 will strengthen the prohibition on the misuse of market power by targeting anti – competitive unilateral conduct by any corporation with a substantial degree of market power. The draft Bill introduces the long sought after "effects test" which prohibits a corporation that has substantial market power from engaging in "exclusionary" conduct that has the purpose, effect or likely effect of substantially lessening competition in a market as defined. The removal of the "take advantage element" from the current CCA and its replacement with the new test will provide a more equitable market for all businesses to flourish, large and small. There is however, a departure from the earlier Exposure Draft in that the newly proposed draft Bill seeks to redefine the reference to "any market" in Section 46(1) which has been described in the Explanatory Memorandum to as making Section 46, "excessively broad in scope"[3]. The proposed change to the draft is likely to cause some

[2] Supra ref 1
[3] Explanatory Memorandum Competition and Consumer Amendment Bill I(Misuse of Market Power) Bill 2016 Para 1.40 Page 12

additional unwarranted complexities to the Act which could have been avoided by adopting the original amendment.

- The removal of the problematic words, "take advantage" and the requirement that a company with substantial market power that engages in conduct with "the purpose or effect of substantially lessening competition will transgress S 46(1) will be beneficial to the business community, The decision to remove "take advantage element" from the current law caused some concern that innovation might be stifled and pro - competitive conduct might be discouraged. However, MGA submits that the "taking advantage test" did not assist in recognizing misuse of market power. Many aspects of anti - competitive behavior or exclusionary conduct might not be concerning in respect of a small firm without market power, but similar action taken by a firm with market power and which has a greater advantage because of its size is likely to raise competition concerns.

- The introduction of mandatory factors was originally proposed in the Harper Review and they were referred to in the Exposure Draft. MGA previously submitted that the inclusion of mandatory factors requiring the Courts to address a list of matters are likely to present difficulties for both litigants and result in protracted litigation and long delays before reaching decisions. The mandatory factors were included by Professor Harper as part of the Review in 2014 but MGA opposes their retention for inclusion in the CCA.

- MGA thanks the Federal Government for the opportunity to comment on the draft Bill that will, if passed by the Australian Parliament, be a significant step forward in the reform of competition law. The amended laws will provide enormous benefits to independent retailers and thousands of other businesses. All businesses will be able to engage in healthy competition in an environment that affords opportunities to compete on a level playing field. MGA thanks the Treasurer, the Hon. Mr Scott Morrison and the Senate Standing Committee on Economics for the opportunity to comment on the draft Bill.

Comments on the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016

- MGA supports, and welcomes, the proposed amendments to the CCA in the current draft Bill which seek to strengthen section 46, by protecting the competitive process. MGA has some concerns with the proposals to widen the definition of "markets" and the retention of mandatory factors which are intended to provide guidance for the Courts in assessing whether

conduct has the purpose , effect or likely effect of substantially lessening competition. The comments on these two aspects of the draft Bill are referred to below.

- In accordance with the reforms proposed by Professor Ian Harper in the Harper Review, "the redrafting of S 46 will improve its effectiveness in targeting anti – competitive unilateral conduct." The amendments to S. 46 are intended to prevent large firms with substantial market power from using anti - competitive behavior that substantially lessens competition. The anti - competitive behavior that can be tackled as a result of the proposed amendments to competition legislation include such activities, as land banking, bundling, locking up distribution outlets, stopping the acquisition of sites and blocking out competitors.
- Section 46, in its current form has caused interpretation problems that have resulted in extensive costly litigation and legal debate.

  To overcome the difficulties posed in section 46 of the CCA, the Harper Panel recommended the removal of the words "take advantage" and redrafting to link between the words "purpose" and "ëffect" so that Section 46 could be directed to conduct that has, "the purpose or effect of harming the competitive process".

"Take Advantage"

- There has been opposition to the removal of the words "take advantage" from the Act, including concerns that the removal will stifle innovation and pro- competitive conduct. However, this opposition is without foundation and as commented upon in Australian Competition Law such "concern is overstated[4]. Under the reframed law – which focusses on harm to the competitive process and not harm to competitors –is unlikely to be found to substantially lessen competition"

- The retention of the words "take advantage" in the Act would fail to provide clarity in the Act into the future unless change is implemented. If the "take advantage" limb is removed it would more readily open up the opportunity for a small business without market power to challenge a business that is allegedly misusing its market power. An example being, where a large firm engages in deliberate predatory pricing with the intention of squeezing its competitor out of the market. The smaller firm would not have to prove that the firm was taking advantage of its

[4] Misuse of market power Bill introduced – Australian Competition Law
http//Australian Competition Law.org/blog/2016/12/01/mmp-bill-introduced

power but that the firm has used a substantial degree of power to achieve its objective and is therefore lessening competition.

- Currently, small businesses that lack market power are able to engage in business practices that may not have anti - competitive effects, but the same practices if engaged in by businesses with market power can have significant anti - competitive effects. The removal of the "take advantage element" as defined in the draft Bill will eliminate the ability of businesses with market power from having anti - competitive effects on small businesses.
- All businesses as a result of this proposed change will benefit because contrary to the view that this amendment will 'chill competition', it is more likely to diminish ambiguity and focus more effectively on potential exclusionary anti- competitive conduct.
- The argument that the removal of the take advantage element will stifle competition is unsubstantiated. MGA welcomes the proposal to remove the words "take advantage" from the CCA.

Purpose and Effects test

- The Harper Review Panel proposed that Section 46 should prohibit conduct that has the purpose or likely effect of substantially lessening competition in the marketplace.
- In its current form the CCA is out of step with other international jurisdictions. The Sherman Act in the USA supports an objective intent based on conduct and effect. In Canada there is a focus on conduct that has the effect or likely effect of substantially lessening competition and many European jurisdictions have moved towards a focus on how certain conduct of businesses can have an adverse effect on competition thereby damaging the competitive process.
- The proposed draft Bill prohibits a corporation with substantial market power from engaging in conduct that has "the purpose, effect or likely effect of substantially lessening competition". The Explanatory memorandum to the Bill[5] proposes that "The objective of section 46 is to prevent firms from engaging in unilateral conduct that harms the competitive process. This requires distinguishing between vigorous competitive activity which is desirable, and economically inefficient monopolistic practices that may exclude rivals and harm the competitive process". The clause is more reassuring than the current test as it provides for greater protection of the competitive process, as was recommended in the Harper Review.

[5] Competition and Consumer Amendment (Misuse of Market Power) Bill 2016 Explanatory Memorandum 1,13 Page 7

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- Since the 1970's there have been reviews by various Committees of Section 46 which have considered the benefits or otherwise of inserting an "effects" test into the CCA and without exception it was concluded in the Reviews that there were risks, such as regulatory error or the likelihood of uncertainty, if such a change was implemented. Consequently, each Committee systematically rejected the need for an effects test. After considerable research and detail in their Review of competition laws the Harper Review made a recommendation for the amendment to the CCA for the introduction of an "effects test" as currently defined in the draft Bill. MGA welcomes the inclusion of the effects test despite the previous skepticism that it might "chill the competitive market."

- Some opinions dictate that a business that has market power is unlikely to behave any differently in a situation where it can exercise or not exercise its power, and that by the very nature of competition if a competitor grows increasingly strong and has the ability to make significant gains by using its power, then those who fall by the wayside are simply the inevitable consequences of ruthless competition.[6] MGA has never denied that all competitors should have the right to compete to the best of their ability and they have the right to aspire to be better than their competitors. However, all competition has to be fair and every competitor should operate on a level playing field without restrictive laws that can hold some competitors back.

- MGA has argued that there is a need to focus on whether market power might be misused in some circumstances, to the detriment of the competitive process rather than an individual competitor. In reviewing the need to control the misuse of market power so as to protect the competitive process the Harper Review stated that:

"The challenge is to frame a law that captures anti-competitive unilateral behavior but does not constrain vigorous competitive conduct. Such a law must be written in clear language and state a legal test that can be reliably applied by the courts to distinguish between competitive and anti - competitive conduct."

- MGA agrees that that the proposed legislative change will bring more certainty and benefits to many businesses and stimulate economic growth.

The Market

- There is a departure in the draft Bill from the Exposure draft that could render the issue of defining the market to unnecessary problems. Section 46 in the Exposure draft referred to "prohibiting a firm that had substantial degree of power in a market from engaging in conduct

[6] Queensland Wire High Court

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with the purpose, effect or likely effect of substantially lessening competition "in any market". The former definition has been reconsidered prior to the release of the draft Bill as being previously too broad in scope, as it could require a business to consider its position in a wide range of markets, in which they may not even operate. As a result of the proposal to tighten the wording of the draft Bill there have been changes and the draft Bill now reads:

- Section 46 Misuse of market power

(*1) A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in:*
(a) that market; or
(b) any other market in which that corporation, or a body corporate that is related to that corporation:
(i) supplies goods or services, or is likely to supply goods or services; or
(ii) supplies goods or services, or is likely to supply goods or services, indirectly through one or more other persons; or
(c) any other market in which that corporation, or a body corporate that is related to that corporation:
(i) acquires goods or services, or is likely to acquire goods or services; or
(ii) acquires goods or services, or is likely to acquire goods or services, indirectly through one or more other persons.[7]

- The Government explanatory memorandum limits the scope of Section 46 to those markets in which the corporation's conduct is most likely to have a purpose, effect or likely effect of competition concern. The Memorandum explains that from a practical perspective "it is unlikely that a corporation's conduct will have a purpose, effect or likely effect of substantially lessening competition in an unrelated market without also having that purpose, effect or likely effect in one of the markets described in subsection 46(1). The provisions within subsection 46(1) limit the scope of section 46 to situations where there is an actual or likely supply or acquisition of goods or services, by the corporation or another prescribed entity" There are further sub- paragraphs in the draft Bill that refer to the supply or acquisition of goods or services or where there is an indirect supply or acquisition of goods and services or where there are indirect links between bodies corporate or franchisees or agencies. [8]

- The re- drafted Section 46(1) has attempted to limit the extent of "the markets" and whilst the amendments do not necessarily detract from the intent of the legislation to define "the markets"

[7] Draft Bill 1.39 Competition and Consumer Amendment (Misuse of Market Power) Bill 2016
[8] Explanatory Memorandum Competition and Consumer Amendment (Misuse of Market Power) Bill 2016 Page 12

the changes will result in an unnecessary complication to the Act which are likely to result in unnecessary delays in the litigation process.

Mandatory factors

- The Harper Review Panel recommended the inclusion of legislative guidance for the Courts on the operation of any newly framed Section 46 and stated that :

  "with respect to the operation of the section,. Specifically the legislation should direct the Court, when determining whether conduct has the purpose, effect or likely effect of substantially lessening competition in a market, to have regard to the extent to which the conduct

  increases competition in a market, including by enhancing efficiency, innovation, product quality or price competitiveness;

  and lessens competition in a market, including by preventing, restricting or deterring the potential for competitive conduct in a market or new entry into a market."[9]

- Whilst MGA is supportive of the Harper Review reforms generally we are of the opinion that inclusion of the mandatory factors that the Court is required to determine, will complicate the legislation unnecessarily. It should be noted that similar requirements in respect of compulsory factors are absent from SS 46 and 47 of the CCA.

- Not only do the mandatory factors complicate the Act but they place an additional burden on the Applicant who has to satisfy the Court as to matters that can only be within the knowledge of the Respondent. This onus on the Applicant will be very difficult to discharge.

- The mandatory factors will involve a balancing test of what constitutes "competitive versus anti - competitive" and the Court will need to assess these factors one against the other making the process unnecessarily complicated and protracted.

- It is the opinion of MGA that Section 46 in the draft Bill is capable of interpretation in the same way as SS 45 and 47, without the need for mandatory factors which, if they remain, are likely to cause problematic delays and misinterpretation.

Conclusion

MGA supports the amendments to the Competition and Consumer Act 2010 made in the Competition and Consumer (Misuse of Market power) Bill 2016. However, MGA does

[9]Competition Policy Review 2015 - Final Review 2016 Page 61

have some concerns in respect of the additional definitions of "any other markets" which are likely to cause unnecessary legal complications and also the inclusion of mandatory factors which are likely to result in protracted litigation.

MGA welcomes the other reforms that have been proposed in the draft Bill and we thank the Hon Treasurer, Mr. Scott Morrison for releasing the draft Bill for comment and for the opportunity to make this submission. MGA would be pleased to discuss any aspect of this submission further.

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