ACAPMA
Australasian Convenience and Petroleum Marketers Association

11 February 2016

The General Manager
Market and Competition Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: competition@treasury.gov.au

Dear Sir/Madam,

Australian Government's Final Review of the Harper Review recommendations on Section 46

I refer to the Treasurer's press release of 11 December 2015 foreshadowing a 'final review' of Professor Ian Harper's recommendation for changes to be made to Australia's Competition and Consumer Act (2010), and inviting submissions from interested stakeholders.

Below please find ACAPMA's submission to the Australian Government's Final Review on the misuse of market power laws.

1. About ACAPMA

ACAPMA is the national peak body representing the interests of the petroleum distribution and petrol convenience retail industry. The scope of ACAPMA's membership extends from 'refinery gate' through to the forecourt of Australia's national network of service stations and petrol convenience outlets – including fuel haulage, fuel distribution and fuel retail businesses.

The profile of our membership varies from small Australian businesses, medium Australian-owned enterprises, to large Australian corporations – which means that ACAPMA's policy position on market competition is one of ensuring effective competition between big business and smaller enterprise (i.e. 'big AND small' and not 'big VERSUS small')

In recent years, however, the competition fabric within the retail fuel industry has been substantially reshaped by the entry of the supermarket majors.

This experience has given rise to some significant concerns about the future of effective competition in petroleum retail in Australia.

2. The changes proposed in the Harper Review already constitute a compromise by the SME lobby

ACAPMA notes the comments of the Treasurer, the Hon. Scott Morrison MP, that debate about the recommendations made by Professor Ian Harper with respect to Section 46 has become highly polarised.

ACAPMA strongly agrees with the Treasurer's observation but equally suggests that such an argument should not be solely used to advance a position that fails to adequately address the demonstrable weaknesses of the Clause 46 of the Competition and Consumer Act (CCA).

ACAPMA is firmly of the view that the recommendations made with respect to changes to Section 46 in the final report of the Harper Review constitute a significant 'walk-back' from the recommendations contained in the original draft report – recommendations which, in our view, more closely reflected the concerns of the many small to medium enterprises in Australia.

To that end, we believe that the recommendations contained in the final report of the Harper Review already constitute a significant compromise on the part of SME interests in Australia.

3. The need to balance demonstrable competition damage in the past against risk of damage

ACAPMA is aware that Professor Ian Harper was given numerous examples of situations where the actions of a large business – operating from a position of market dominance – had apparently damaged competition within a given industry.

The practice of 'land banking', where large market players pay an inflated price for a retail site as a means of removing the risk of a competitor setting up a business in direct competition to their established business, is a case in point.

Over the past 12 months, our industry has received several reports about alleged 'land banking' practice – much of it occurring in markets like Canberra, where more than 80% of all retail fuel sold is controlled by the two large companies.

This is a particularly insidious form of competition manipulation and our advice is that this practice cannot readily be addressed by Section 46 in its current state.

Our industry also recently experienced a rapid change in the fabric of competition as a result of the two supermarket chains utilising their supermarket power via the provision of 'high value shopper dockets' to incentivise consumer fuel purchases.

While it might reasonably be argued that this 'product stacking' behaviour was ultimately corrected by the companies involved vie them entering into a voluntary undertaking with the ACCC, the absence of effective legislation relating to the misuse of market power meant that that substantial damage had already occurred prior to the date of the formal undertaking.

The two examples above provide tangible examples of where the exercise of market power has created competitive anomalies in our industry and, at least in our view, provides a compelling case for the wholesale adoption of the changes to Section 46 identified in the Harper Review.

Against this background, opponents of any change appear to be arguing that the changes proposed by Harper may result in endless legal debate which, while potentially a risk, pale in significance compared with the demonstrable damage to competition that is now being observed.

Consequently, we see this issue as being a tussle between advocates of the need for change to avert competitive damage versus those that are worried about the legal complexity of addressing such damage in the future – the latter is not a valid argument for inaction on its own.

In reality, however, we believe that the proposed changes would have a significant deterrent effect in the first instance and that the issue of legal complexity would largely be resolved by the subsequent creation of legal precedent as cases are progressively brought under the new legislation.

4. <u>Failure of the ACCC to secure a successful prosecution of Section 46 is testimony of itself</u>

We note that the ACCC has not successfully prosecuted a single case under Section 46. We therefore question the value of any loss of jurisprudence associated with the introduction of an effects test (i.e. mandatory factors for investigation by a court) under this Section of the CCA.

At its most simplest, the absence of successful prosecutions for misuse of market power could mean two things.

Either, there have been no material breaches and therefore the clause is no longer necessary or that the clause – as drafted – does not provide an efficient and effective means for prosecution of such allegations.

For the reasons cited above, we are strongly of the view that the failure of the ACCC to secure a successful prosecution for breach of market power action can be solely attributed to the inadequacy of the existing legislation.

5. Summary

For the reasons cited above, ACAPMA offers the following critique on the six options canvassed in the latest Discussion Paper"

- **Options A and B** are not supported on the basis that they will not address the material concerns arising from the past decade of experience relating to the operation of the CCA's misuse of market power provisions.
- **Options C and D** are not supported in that each of these options retains the purpose only provisions of the existing clause – provisions which are nigh on impossible to prove without the assistance of a 'whistle blower' or company documents that may have been leaked (i.e. deliberately or inadvertently.
- **Option E** is supported in terms of its extension to incorporate consideration of 'purpose, effect or likely effect'. The failure to include mandatory factors for the court to consider, however, means that the parties would potentially need to engage in complex (and unbounded) economic analysis to ascertain whether the actions of a particular company actually deliver a net benefit to consumers. Nonetheless, this option would appear to be an acceptable compromise between doing nothing and full implementation of the recommendations of the Harper Review (see Option F below).
- **Option F** continues to be preferred option of ACAPMA as it both removes the 'take advantage' provisions and establishes mandatory factors for the investigation of misuse of market power allegations. That said, we openly acknowledge that this option may be considered by some stakeholders as a step too far.

ACAPMA believes that the implementation of Options E or F are required in order to protect the long term interests of consumers by creating an environment where the economic returns of innovation and capital investment can be realised by both big and small business.

Should you require any further information on this matter, or there be an opportunity to further participate in the consultative process, please contact me directly.

Yours sincerely,

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