

Options to strengthen the misuse of market power law

Discussion Paper

CHAMBER OF COMMERCE AND INDUSTRY QUEENSLAND SUBMISSION

12 February 2016

1.0 Introduction

- 1.1 The Chamber of Commerce and Industry Queensland (CCIQ) welcomes the opportunity to provide input to the Australian Government's *Options to strengthen the misuse of market power law Discussion Paper*.
- 1.2 Specifically, CCIQ is pleased to provide comment regarding the recommendations stemming from the Harper Review's Final Report with respect to proposed changes to section 46 of the *Competition and Consumer Act 2010* (CCA) misuse of market power provision.
- 1.3 In conducting the most comprehensive review of competition policy in the last two decades, the Harper Review Panel correctly identified the significant impediments faced by small business in the marketplace, and provided a number of recommendations to support greater choice and better competition.
- 1.4 The Review effectively considered what improvements can be made to manage the competition framework so that small businesses are not significantly disadvantaged.
- 1.5 Recommendations to establish a reinvigorated independent body tasked with advocating for continuing competition policy reform; commitments to greater transparency and accountability regarding the principles of competitive neutrality and the inclusion of an 'effects test' to accompany the misuse of market power provisions are measures welcomed by small businesses in Queensland.
- 1.6 Queensland businesses overwhelmingly support the inclusion of an 'effects test', and urge the Federal Government to implement the Harper Review Panel's recommendation in full.
- 1.7 CCIQ believes the Federal Government must embrace an 'effects test' to establish an effective, pro-business competition policy framework that reflects a level playing field for all market participants. This will guarantee that the productivity and growth ambitions of the Federal Government are achieved by ensuring all businesses are able to successfully compete.
- 1.8 CCIQ is encouraged by the Federal Government's response to the Harper Panel's recommendations to date and urges the Treasurer to underpin decision-making with respect to section 46 with strong regard for the importance of the contribution small business makes to Australia's economy.
- 1.9 The following submission puts forward a Queensland small business perspective with respect to introducing an 'effects test' for misuse of market power.

2.0 Queensland small business perspective

- 2.1 One of the most pertinent issues for competition in Queensland is the market dominance of the major supermarkets. CCIQ's membership has vocally communicated its discontent with the numerous tactics of Woolworths and Coles and its negative impact on SME's in the food retailing and supply chain sectors specifically. The commentary below illuminates the tensions between SMEs and large business in the marketplace, particularly when the practices of the latter distort the competitive process.
- 2.2 Recent statistics indicate that Woolworths and Coles have carved out an overwhelming share of the food and liquor retail market. As the two dominant players, Coles and Woolworths have also acquired a number of department style liquor retailers such as Liquor Land and Dan Murphy respectively, indicating a disturbing trend towards further entrenched market dominance.
- 2.3 Some of the negative flow-on effects of a duopoly in food and liquor retailing for smaller food and liquor retailers includes, but is not limited to: predatory pricing practices driving small and medium competition out of the market; anti-competitive conduct; and a worsening relationship with suppliers and smaller retailers resulting in them sustaining a structural disadvantage in negotiations and the market.
- 2.4 As a direct result of such practices, independent grocers are struggling to compete for consumers' discretionary income in a sector where the two major players engage in price wars to sell goods at the lowest price. Fresh food suppliers are also feeling the pinch as they face a hostile negotiating environment dealing with the two major players.
- 2.5 CCIQ consultations revealed that rural and regional businesses distrust the recent aggressive expansion tactics that Coles and Woolworths are currently engaged in outside urban centres. A familiar story, major retailers are moving into local regional town centres, charging significantly lower prices for groceries, and driving small and local businesses such as butchers and fresh food grocers out of the market.
- 2.6 CCIQ does not advocate market interference in these situations, but simply the reinstatement of a level playing field for small business competitors. CCIQ strongly believes that Queensland's economy will function optimally if guided by the principles of free market economics, allowing the economy and industry to drive investment, innovation and employment generation in an environment facilitated by government that supports economic growth.

- 2.7 In any instance where these majors are found to contravene the *Competition and Consumer Act 2010*, the Australian Competition and Consumer Commission (ACCC) should rigorously prosecute to the fullest extent of their resources.
- 2.8 The Turnbull Government has made explicit reference to the importance of ensuring small business operators are able to effectively compete in the new economy, and the current market distortion in this sector is hampering these outcomes.
- 2.9 In light of this, much of the merit of a market-based economy rests in the notion of competition. The duopoly of Woolworths and Coles undermines this critical component of a functional market economy. The effects of the duopoly are felt in very real and practical terms across rural, regional, and urban Queensland by small and medium enterprise in the food-retailing sector.
- 2.10 With respect to the above arguments, the Chamber supports in full the proposed amendments to the misuse of market power and acquisition provisions of the *Competition and Consumer Act 2010* to go some way in alleviating the pressures on small business in this sector i.e. the inclusion of an 'effects test' to accompany the misuse of market power provisions are measures welcomed by small businesses in Queensland.

3.0 Harper Review's findings

- 3.1 CCIQ strongly supports draft recommendation 30 which suggests the inclusion of an 'effects test' to current misuse of market power provisions as per section 46 of the CCA.
- 3.2 Based on the abovementioned arguments, CCIQ agrees with the Harper Panel that the current provision is not fit for purpose, as it is not reliably enforceable and permits conduct that undermines the competitive process.
- 3.3 CCIQ agrees with all five elements of the recommendation in that their intention and effect will better distinguish pro-competitive conduct from anti-competitive conduct.

The main elements of the recommendation are:

1. Remove the 'take advantage' test;
2. Move from a 'purpose' to 'purpose, effect or likely effect' test;
3. Move from a focus on 'damage to a competitor' to a focus on the competitive process ('substantially lessening competition');
4. Introduce mandatory factors that courts must take into account; and
5. Additional measures to reduce uncertainty

- 3.4 The Chamber is of the view that the inclusion of an 'effects test' will allow for more scrutiny of businesses that purposefully damage their competitors, many of who are smaller firms.
- 3.5 An 'effects test' will also offer greater protection to smaller operators from the predatory pricing practices of larger companies, and will go a long way in protecting small business against the monopolistic actions of powerful market operators.
- 3.6 Business applauds the greater focus from the Harper Review placed on protecting competition rather than protecting competitors and sees strong merit in all key elements of the recommendation to introduce changes to misuse of market power as a key pillar of competition policy reform.
- 3.7 Similarly, the Chamber supports courts being granted powers to order the divesture of assets by a firm found to have misused market power, and believes this will act as an effective deterrent against anti-competitive behaviour of the market majors.
- 3.8 The duopoly of Woolworths and Coles undermines the notion of competition as a central component of a functional market economy. The effects of the duopoly are felt in very real and practical terms across rural, regional, and urban Queensland by small and medium enterprise in the food-retailing sector.
- 3.9 The Federal Government must give effect to the Harper Review recommendations in order to more closely align with the misuse of market power provisions in comparable overseas jurisdiction, including the European Union, Britain, and Canada.
- 3.10 This also goes to the important issue of certainty for business, as foreign companies seeking to conduct business in Australia have identified Australia's out of date misuse of market power provisions as a key barrier to entry.
- 3.11 Overall, this is a question of balance of power in Australia's economy. Despite the controversy of section 46, the recommended changes will introduce greater certainty to legal tests within the legislation to ensure small and big businesses are better placed to ascertain their rights and responsibilities with respect to market power.
- 3.12 Most importantly however, introducing an 'effects test' will act to curb exclusionary and predatory behaviour by incumbents attempting to fortify their market position, which in turn discourages investment and innovation by local and international businesses in Australia's economy.

4.0 Conclusion

- 4.1 Market power is not a crime in itself; however the misuse of that power to drive out smaller competitors must be significantly curbed to ensure a level playing field for all businesses.
- 4.2 CCIQ commends the Harper Review Panel for making the bold recommendations required to ensure larger companies compete with smaller firms on an equal footing.
- 4.3 CCIQ implores the Federal Government to resist calls from the big business lobby to delay and/or back away from adopting the misuse of market power recommendation as per the Harper Review.
- 4.4 In giving effect to the Harper Review recommendation with respect to section 46, the Federal Government will be promoting a more dynamic, competitive and well-functioning marketplace to serve Australia's future growth and prosperity.