SUBMISSION FROM WESFARMERS
TO
COMPETITION POLICY REVIEW
ISSUES PAPER

Contents

Introduction

Wesfarmers Limited (Wesfarmers), one of Australia's largest publicly listed companies, is pleased to make a submission to the Federal Government's Competition Policy Review.

Wesfarmers hopes the Harper Review will provide the impetus to lift the slow pace of economic reform in Australia, helping to provide the blueprint for the transformation of the Australian economy in a manner similar to that achieved by the Hilmer inquiry 20 years ago. We see initial written submissions as the beginning of a longer, more detailed process. Our submission, therefore, is a high-level, principles-based one in which we deal with the issues crystallised as key questions in the Review's Issues Paper.

In this paper, we address those questions we consider most directly pertinent to our company, but leave open the opportunity for supplementary submissions and broader discussion at a later time. Our Managing Director, Richard Goyder, looks forward to an opportunity to engage directly in further discussion with the Panel as the Review proceeds towards its final recommendation phase. We also point to the submission by the Wesfarmers-owned business Coles for more granular detail on supermarket and petrol retailing matters.

Australia is currently chair of the G20 and B20 where much of the policy emphasis is on removing impediments to economic growth and facilitating opportunities for free trade. Wesfarmers believes it would be inconsistent to pursue as international policy the desirability of freer trade between nations and the elimination of barriers to increased productivity and economic growth which flows from that, whilst acceding domestically to the demands heard through our history but amplified in recent times around the pressure points of the political cycle, for increased regulatory protection for particular businesses or groups of businesses. The macroeconomic and microeconomic reforms initiated in Australia in the 1980s and 1990s to reduce protectionism and restrictive practices laid the foundations for more than two decades of uninterrupted economic growth and wealth creation in this country. The demands for strengthened or additional restrictions on business activity should be viewed through that prism.

In this respect, the issue of scale needs to be seen in a new light by those seeking to comment on domestic markets and how they operate. Too often, too easily, 'big' is equated with 'bad' in the Australian discussion. In fact, size and scale bring substantial benefits through efficiencies that lead to lower prices. In particular, they deliver a real benefit to consumers in Australian regional centres, where entry is often mischaracterised as an unwanted and harmful intrusion into local communities and markets. Consumers benefit considerably when a large national chain establishes in a regional community, which is why, acting rationally, the consumers become customers of the business. State-based pricing models recently adopted by national retail chains deliver goods in stores to customers at prices equivalent to what consumers pay in bigger urban areas. It is a benefit to consumers made only possible through economies of scale and it is a perverse outcome being sought by some vested interests to deny consumers that benefit.

Without sufficient scale, many Australian businesses will find it exceedingly difficult to compete and survive against international entrants that have scale which dwarfs even the largest Australian firms in their respective sectors. In retail, for example, these international players are rapidly establishing their presence in Australia.

Pointing to the benefits of scale is not to argue for government policies to facilitate scale or restrict competition. To the contrary, it is an argument against policy interventions that inhibit competition and artificially restrict the achievement of economies of scale based on a belief that 'big is bad.'

Some barriers to commerce and trade have already been demolished by the accelerating facilitation of technology in ways hardly conceived of only a few short years ago. This has happened regardless of government policies. International providers have gate-crashed previously purely domestic arrangements. Australian consumers can now purchase many of the goods and services they desire directly from international providers, located virtually anywhere in the world, without getting out of bed in the morning. This is the real world in which many Australian businesses increasingly operate and compete. It is most obvious in the burgeoning online economy, but also in the proliferation of international retailers moving into Australian markets. This has potentially profound but seemingly overlooked ramifications for taxation receipts for government, direct and indirect employment in the domestic economy and the flow-on community benefits that can result from both. It is not an argument for protection, but a recognition our domestically based industries and businesses are subject to ever greater competition in an increasingly internationalised market and should be allowed and encouraged to compete as vigorously as possible.

The concept that a firm must have a physical presence to be a major participant in a market no longer applies in an increasing number of areas. Online customers can browse through a business's offering in everything from clothing, cosmetics and toys, to entertainment, financial services and gambling opportunities. An increasing number of businesses have no stores at all, merely distribution centres or call centres which may be located anywhere in the world. The corollary of this development is that any belief that a business establishing or maintaining a substantial physical presence in a market must therefore be exerting too much market power is increasingly redundant. In many parts of the world this virtual competition extends even as far as the market for fresh food and provisions.

Wesfarmers recognises there is unquestionably a role for government in regulating business and industry. Good governance is vital to a healthy economy, but regulation and support must serve to protect competition, not strangle it or protect uncompetitive participants. Demands for increased bureaucratic intrusion into and regulation of competitive markets will not increase national wealth; they will diminish it.

Wesfarmers profile

Wesfarmers began life as a small organisation. We have grown through commitment to innovation, entrepreneurial spirit and a willingness to compete. From our origins in 1914 as a Western Australian farmers' cooperative, Wesfarmers has become one of Australia's largest listed companies and, with more than 210,000 employees, is the nation's biggest private sector employer. Our diverse business operations cover: supermarkets; department stores; home improvement and office supplies; coal mining; insurance; chemicals, energy and fertilisers; and industrial and safety products. The primary objective of Wesfarmers is to provide a satisfactory return to its shareholders and to do so in a sustainable, ethical way.

The company aims to achieve this by:

- satisfying the needs of customers through the provision of goods and services on a competitive and professional basis;

- providing a safe and fulfilling working environment for employees, rewarding good performance and providing opportunities for advancement;

- contributing to the growth and prosperity of the communities in which it operates by conducting existing operations in an efficient manner and by seeking out opportunities for expansion;
- responding to the attitudes and expectations of the communities in which the company operates;
- placing a strong emphasis on protection of the environment; and
- behaving with integrity and honesty in dealings both inside and outside the company.

Given the breadth of our businesses, we have an interest in supporting strong and vibrant communities. We do this through the products we sell and the jobs we provide, as well as through our direct and indirect contributions to the community. Wesfarmers makes a significant contribution to the communities in which it operates by providing goods and services that have an impact on the quality of life of all our customers and by providing a large number of jobs and paying taxes.

The scale of Wesfarmers' contribution to the national economy is outlined in the table below, reproduced from the company's 2013 Sustainability Report.

Economic contribution ($ million)

Our stakeholders	FY2010	FY2011	FY2012	FY2013
Sales and operating revenue	51,827	54,875	58,080	59,832
Cost of goods, services etc	41,028	43,426	45,800	46,922
Value added by Wesfarmers[1]	10,799	11,449	12,280	12,910
Wages and salaries and other benefits	6,533	6,790	7,156	7,556
Dividends paid to shareholders	1,446	1,735	1,909	2,083
Interest paid on borrowings	616	472	445	402
Income tax and other government payments	1,130	1,287	1,499	1,591
Reinvested in the business[2]	1,036	1,111	1,212	1,249
Capital expenditure[3]	1,656	2,062	2,626	2,331
Depreciation and amortisation expense	917	923	995	1,071

[1] In addition to the value added shown above, Wesfarmers made direct community contributions of $51.2 million (included in cost of goods and services) and facilitated indirect contributions to community organisations and charities of a further $43.7 million. Source: Wesfarmers Limited Annual Reports 2010, 2011, 2012, 2013 (audited).

[2] Calculated as value added by Wesfarmers less payments made, including wages and salaries and other benefits, dividends paid to shareholders, interest paid on borrowings and income tax and other government payments.

[3] Cash paid for purchases of property, plant and equipment and intangibles.

Overview

Wesfarmers has contributed to, and endorses, the international best practice principles of competition policy set out in the Business Council of Australia's submission to this Review.

These principles are important not only to ensure the highest standard for Australia's competition framework, but also to facilitate the domestic entry of international competitors and the expansion of Australian businesses overseas through consistency in competition principles. A competition framework that is consistent with international best practice will provide efficiencies and increase competition for the benefit of Australian consumers.

The purpose of competition policy law should be to protect competition for the benefit of consumers. This is reflected in the objective of the Competition and Consumer Act 2010, at Section 2, which was inserted as an outcome of the Hilmer National Competition Policy reform process.

Competition laws should protect competition not competitors. In seeking to offer the best possible deal to customers, Wesfarmers' management considers that competition is the best guarantor of low prices, high quality, good service and reliability. As the beneficiaries of sound competition policy, consumers stand to gain from lower prices and higher quality of the goods and services they buy.

Wesfarmers endorses the Review Panel's definition of competition policy as set out in its Issues Paper:

> *"Competition policy seeks to protect, enhance and extend competition" (p. 1) and*
>
> *"Competition policy is a set of policies and laws that protects, enhances and extends competition" (p. 9).*

Further, Wesfarmers agrees with the Review Panel's view that:

> *"A modern competition policy should provide a framework with the right incentives and enabling provisions that fosters vigorous and healthy competitive processes, allowing Australia to take advantage of the opportunities an increasingly global marketplace provides" (p. 2).*

Proposed amendments to the Competition and Consumer Act 2010 should be assessed on the basis of whether they protect competition or competitors.

Wesfarmers is a diverse group of companies that thrive on competition. Wesfarmers companies are ready and willing to compete against all comers in sensibly regulated markets and do not support competition policies that, in fact, restrict competition.
At the same time, Wesfarmers acknowledges that competition laws are essential to safeguard against businesses with a substantial degree of market power from misusing that power. Competition laws are necessary to prevent anti-competitive practices such as cartels, collusion and the misuse of market power preventing the entry of competitors into markets or substantially lessening competition.

In Wesfarmers' view, the Competition and Consumer Act generally works well in promoting and protecting competition. Nevertheless, Wesfarmers would consider on their merits any proposals to amend the Competition and Consumer Act 2010 in ways that removed impediments to competition without having unintended anti-competitive effects and which kept compliance costs to a reasonable level.

Over the years, many amendments have been proposed to Part IV of the Competition and Consumer Act 2010 and its predecessor legislation that would have the deliberate or unintended consequence of protecting businesses from competition to the detriment of consumers. More such proposals are likely to be put forward during the course of the Competition Policy Review.

Wesfarmers considers these proposals fail the principal objective of competition law, which should be to promote and protect competitive processes and behaviour for the benefit of consumers.

In this submission, Wesfarmers has responded to those questions in the Issues Paper which directly affect the company or in respect of which Wesfarmers has direct experience or strong views. In relation to other questions, Wesfarmers may have no view or have provided input into the BCA's submission rather than responding separately.

Competition Policy

Key Question:

What should be the priorities for a competition policy reform agenda to ensure that efficient businesses, large or small, can compete effectively and drive growth in productivity and living standards?

Wesfarmers' response:

Wesfarmers considers the first priority of any competition policy reform agenda should be to ensure continued promotion of competition and not the protection of businesses from competition. This must be done through the application of sensible regulation that does not discriminate against or in favour of an individual business or group of businesses.

Priority should also be given to completing COAG's unfinished business on the Seamless National Economy deregulation and competition policy agenda.

Remaining import protection should be removed and governments should refrain from any new policies that increase protection.

Regulatory impediments to competition

Key Question:

Are there unwarranted regulatory impediments to competition in any sector in Australia that should be removed or altered?

Wesfarmers' response:

Specific impediments are discussed in response to particular questions below.

Are there import restrictions, bans, tariffs or similar measures that, on balance, are adversely affecting Australians?

As a result of unilateral tariff reductions over the last quarter century, tariff on imported goods have been removed or reduced to low levels. Remaining tariffs on imports from countries with which Australia has bilateral or regional trade agreements, such as New Zealand, the United States, the

ASEAN countries and Chile, have been eliminated or are being phased out. Tariffs on imports from the world's least developed countries (LDCs) have been eliminated. The successful conclusion of negotiations for trade agreements with South Korea and Japan will lead to the elimination of tariffs on imports from these countries. It is likely that the same arrangements will apply if a trade agreement is reached with China.

It would be timely to eliminate or phase out remaining tariffs on goods from other countries. Not only would this further reduce consumer prices and business input costs, and promote competition, it would also eliminate the transactions costs to business associated with complex rules of origin, since all imports would become tariff-free irrespective of their origin.

Australia's anti-dumping laws and procedures should not be used as a form of protection against legitimate import competition. To do so would increase consumer prices and business input costs. Proposals to reverse the onus of proof, such that the importer is obliged to prove that dumping is not occurring, can have this effect and are contrary to the rules of the World Trade Organization.

The present exemption from GST of imported goods with a value of less than $1,000 is a distortion of competition that favours overseas suppliers at the expense of domestic online and 'bricks and mortar' suppliers. In recognition of the principle of competitive neutrality between overseas and domestic supplies of goods, the GST applies to imported goods whose value exceeds $1,000. The same principle should apply to goods valued at less than $1,000, while accepting that for very low-value goods the costs of administration would exceed the revenue collected. Technological advances are lowering the administrative costs of applying GST to imported goods with a value of less than $1,000. As online imports continue to grow strongly the GST revenue base will continue to erode.

Are there regulations governing the sale of goods for health and safety or environmental reasons whose purpose could be achieved in a manner more conducive to competition?

The existing restrictions on package sizes of pharmaceutical medicines that supermarkets are permitted to sell unnecessarily limit competition.

Are there occupational-based restrictions, or restrictions on when and how services can be provided, that have an unduly adverse impact on competition? Can the objectives of these restrictions be achieved in a manner more conducive to competition?

While recognising the issue of trading hours lies with state and territory jurisdictions, restrictions on retail trading hours are anti-competitive and should be removed. Queensland's restrictive liquor licensing laws require the ownership of a hotel licence as a pre-condition of owning stand-alone licences. These laws are designed to protect hotels and clubs from competition. They should be brought into line with the laws in other states.

Different licensing requirements apply among the states and territories to different occupations and trades. A strong drive for national standardisation of licensing of tradespeople and certification of occupations should be launched. This would require a reconsideration of COAG's decision to abandon a national approach to the licensing of tradespeople and an extension of COAG's work on occupational licensing.

Government-provided goods and services and competitive neutrality

Key Question:

Are government-provided goods and services delivered in a manner conducive to competition, while meeting other policy objectives?

Wesfarmers' response:

Assessments should be made on a case-by-case basis of the economic and social costs and benefits of private sector competition where governments provide goods and services. This was last done comprehensively through the Hilmer National Competition Policy Review process. As the Review Panel points out in its Issues Paper: "There has been considerable change in the Australian economy since the time of the last review and it is now time for 'Hilmer Mark II'" (p. iii).

Is there a need for further competition-related reform in infrastructure sectors with a history of heavy government involvement (such as the water, energy and transport sectors)?

Where efficiency and service delivery can be improved by exposing infrastructure sectors to further competition this should be considered.

Potential reforms in other sectors

Key Question:

Would there be a net public benefit in encouraging greater competition and choice in sectors with substantial government participation (including education, health and disability care and support)?

This question should be answered on a case-by-case basis rather than in a prescriptive manner.

Competition laws

Key Question:

Are the current competition laws working effectively to promote competitive markets, given increasing globalisation, changing market and social structures, and technological change?

Wesfarmers' response:

The competition laws are generally working well to promote competition.

Given structural changes in the economy over time, do the definitions of 'market' in the CCA operate effectively, and do they work to further the objectives of the CCA?

Wesfarmers endorses the recommendations on market definition and assessment set out in the BCA's submission to this Review.

Given structural changes in the economy over time, how should misuse of market power be dealt with under the CCA?

The misuse of market power provisions work satisfactorily, with the exception of the provision at sec 46 (1AA), which refers to predatory pricing by a corporation "with a substantial share of the market." This so-called Birdsville Amendment was inserted into the competition law in 2007.

In assessing the competitiveness of markets, it is not the number of competitors in a market but their behaviour that is relevant. A small number of competitors might be engaged in fierce competition while a larger number of competitors might be engaged in collusive behaviour. Collusive behaviour should be and is illegal, regardless of the number of businesses in a market.

Further, if a concentrated market is contestable through low barriers to entry, businesses would have strong incentives to behave competitively.

Wesfarmers agrees with the Review Panel's observation in the Issues Paper that: "Concentrated markets are not a concern if market participants are operating in a way that delivers durable and competitive outcomes; that is, trying to win business by offering consumers better products and more attractive prices than rivals" (p. 9).

Competition on price is perhaps the most valuable form of competition and provides the most tangible benefit to consumers. Any restriction on price competition should be carefully and precisely formulated to avoid unnecessarily raising prices for consumers. International economics and jurisprudence continue to clarify this critical area of competition law; the Birdsville Amendment risks obscuring it.

The OECD Review of Regulatory Reform: Competition Policy in Australia (2010) states in relation to the Birdsville Amendment that: "In its current form, the new dedicated prohibition risks causing undue and unproductive uncertainty in the business sector about pricing decisions and may even have a 'chilling' effect on competitive behaviour; in particular in light of the replacement of the 'power' element with a 'share' element in the predatory pricing prohibition. The … government should monitor this area and take advantage of future opportunities to remove at least the market share aspect of the Birdsville amendment when they arise" (p. 61).

The Birdsville Amendment has never been used by the ACCC and should be repealed.

Section 46 should not be further amended to blur the distinction between vigorous, beneficial competition and illegal predatory conduct, including by the proposed introduction of any "effects" test. These proposals are discussed separately in the attachment to this submission.

Are existing unfair and unconscionable conduct provisions working effectively to support small and medium sized business participation in markets?

It is Government policy to extend the unfair contract provisions of the Australian Consumer Law 2010 to standard-form (non-negotiated) business-to-business contracts. Some contract terms are clearly unfair on their face and should not be included in business-to-business contracts. However, where ambiguity exists, care needs to be taken to ensure, to the maximum extent possible, that the prospective parties to contracts know in advance what the lawmakers and the ACCC consider to be fair and unfair provisions. Otherwise, uncertainty could arise about the enforceability of contracts with small businesses. While this situation might be presented as an advantage to small business, it could have the undesirable effect of deterring larger businesses from entering into contracts with those smaller businesses that fall within the provisions of the unfair contracts legislation.

Do the provisions of the CCA on cartels, horizontal agreements and primary boycotts operate effectively and do they work to further the objectives of the CCA?

Wesfarmers supports the existing prohibitions in the Competition and Consumer Act 2010 on cartels, horizontal agreements and primary boycotts and would be willing to consider, on their merits, any proposals by the Review Panel to strengthen these provisions, while avoiding any unintended consequence of stifling competition.

Should the price signalling provisions of the CCA be retained, repealed, amended or extended to cover other sectors?

Wherever possible, the Australian Competition and Consumer Act 2010 should apply to all businesses in all industries across the whole economy. Whatever recommendations the Review Panel makes about the price signalling provisions, any such recommendations should apply to all industries or to none, rather than to one or a few.

Is the code framework leading to a better marketplace, having regard both to the aims of the rules and the regulatory burden they could create?

The code framework is working satisfactorily.

What has been the experience of businesses in the use and implementation of codes of conduct?

Wesfarmers supports the enforceability of voluntary as well as mandatory codes.

Are there issues in key markets that raise competition concerns not addressed by existing anti-competitive conduct laws? If so, in which ways might they be addressed through competition-related policies?

The attachment to this submission provides a response to various proposals that have been made for amendments to Part IV of the Competition and Consumer Act 2010. These proposals include: an effects test; forced divestiture; prohibitions on price discrimination; new rules on creeping acquisitions and market caps; new predatory capacity provisions; reversal of the onus of proof; and price signalling provisions.

Administration of competition policy

Key Question:

Are competition-related institutions functioning effectively and promoting efficient outcomes for consumers and the maximum scope for industry participation?

Wesfarmers favours a consultative approach in dealings with competition-related institutions. Implementation and enforcement of competition policy law involves assessments by the regulators and judgements by the courts as to whether or not particular behaviours are lawful.

To illustrate, allegations of misuse of market power might arise in circumstances where a corporation with a substantial degree of power in a market seeks to win new customers and retain existing ones by lowering its prices. While it would need to be established that such behaviour was for the purpose of damaging a competitor or preventing the entry of a competitor into the market, care would need to be taken to ensure businesses are not deterred from engaging in vigorous competition by lowering

their prices. If concerns such as these were to arise, Wesfarmers would support a consultative approach with regulators with a view to identifying and remedying any problems.

Such an approach was adopted in the case of creeping acquisitions. Following lengthy consultation with business, the Australian Government introduced legislation in 2011 to ensure the ACCC had the power to reject acquisitions that would result in a substantial lessening of competition in any regional, state, territory or national market. In announcing these clarifications about the definition of a market, the Government also confirmed its view that acquisitions of vacant land fell within the ambit of the legislation.

This sort of consultative approach to competition policy issues, laws and interpretations is more likely to lead to sound competition policy while minimising the regulatory burden on business.

Key Question:

What institutional arrangements would best support a self-sustaining process for continual competition policy reform and review?

An annual report of the Productivity Commission, similar to its annual report on industry assistance, would support continual competition policy reform and review. The Productivity Commission could report on competition policy, its implementation and issues such as institutional structures, compliance costs and the impact of changing technologies and associated market structures on competition. The report could nominate priorities for ongoing reform.

Was the Council of Australian Governments competition agenda, with reform payments overseen by the National Competition Council, effective?

Reform payments were integral to the success of COAG in implementing National Competition Policy. When the National Competition Policy Payments, which began in 1997, were discontinued in 2006, reform slowed.

What is the experience of businesses in dealing with the ACCC, the Australian Competition Tribunal and other Federal regulatory bodies?

Wesfarmers favours a consultative approach where concerns are discussed and efforts are made to resolve problems with, of course, regulatory bodies retaining the right to pursue legal remedies and penalties in cases of breaches of the competition laws.

The Dawson Report recommended that the ACCC limit its use of the media to educate consumers and business about their rights and obligations under the trade practices law, and avoid commenting on investigations and proceedings. It recommended the ACCC develop a media code of conduct, which has not been heard of since.

Wesfarmers is concerned that the ACCC is in not always sufficiently discriminating in the exercise of its information-gathering powers; for example, imposing unnecessary costs by failing to target section 155 notices with any precision, and requiring third parties who are not the subject of any investigation to produce significant volumes of documentation.

COMMENTS ON PROPOSED AMENDMENTS TO PART IV OF THE COMPETITION AND CONSUMER ACT 2010

An effects test

Much has been written on this subject and we would urge the panel to consider the views articulated in the excellent treatises on this subject by Sir Daryl Dawson and his colleagues in the Dawson Report (April 2003) and the more recent analysis by Dr Alexandra Merrett and her colleagues on their web-based The State of Competition Report (issue 14, November 13). Both recommend against inserting an effects test into Section 46 of the Act. In rejecting a submission from the ACCC for an effects test (recommendation 3.1, box 3.2), Sir Daryl Dawson provided the table reproduced below:

History of the effects test

In 1976, the Trade Practices Act Review Committee (the Swanson Committee) recommended that the section should only prohibit abuses by a monopolist that involve a proscribed purpose.

In 1979, the Trade Practices Consultative Committee (the Blunt Review) rejected an effects test because it would give the section too wide an application, bringing within its ambit much legitimate business conduct.

The 1984 Green Paper, *The Trade Practices Act Proposals for Change*, recommended the introduction of an effects test because of difficulty in establishing purpose.

In 1989, the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Griffiths Committee) concluded that there was insufficient evidence to justify the introduction of an effects test into section 46.

In 1991, the Senate Standing Committee on Legal and Constitutional Affairs (the Cooney Committee) concluded that an effects test might unduly broaden the scope of conduct captured by section 46 and challenge the competitive process itself.

In 1993, the Independent Committee of Inquiry into Competition Policy in Australia (the Hilmer Committee) rejected an effects test because it would not adequately distinguish between socially detrimental and socially beneficial conduct.

In 1997, the House of Representatives Standing Committee on Industry, Science and Technology (the Reid Committee) noted the effects test and the views of the Hilmer Committee, but did not recommend its introduction.

In 1999, the Joint Select Committee on the Retailing Sector (the Baird Committee) rejected an effects test on the basis that such a far reaching change to the law may create much uncertainty in issues dealing with misuse of market power.

In 2001, the House of Representatives Standing Committee on Economics, Finance and Public Administration (the Hawker Committee) noted significant opposition to an effects test and that five inquiries since 1989 had not recommended its introduction. The Committee expressed a preference to await the outcome of further cases on section 46 before considering any change to the law.

Dr Merrett and her colleagues have made the point:

> *"To date, no-one has come forward with a real-life example of conduct which should be caught by s46 but escapes because of purpose …. Agitators for an effects test tend to provide examples where competitors or even competition are adversely affected, but where there has been no use of market power." (The State of Competition Report issue 14, November 2013, p. 8)*

Under an effects test, Section 46 of the Competition and Consumer Act 2010 relating to the misuse of market power would be amended so that a corporation with a substantial degree of power in a market must not take advantage of that power not only with the purpose of but with the effect or likely effect of eliminating or substantially damaging a rival, preventing the entry of a rival into a market or preventing a rival from engaging in competitive conduct in that market or any other market.

It has been argued that since such an effects test is included in other sections of the Competition and Consumer Act 2010 it should be readily capable of being included in Section 46. An effects test is included in Section 45 relating to contracts, arrangements or understandings that restrict dealings or affect competition, in Section 47 relating to exclusive dealing, in Section 49 relating to dual listed companies and in Section 50 prohibiting mergers and acquisitions that would result in a substantial lessening of competition. Section 50, which also covers so-called creeping acquisitions, was amended in 2011 to clarify that it related not just to a market, but to any market, whether national, state or regional.

In the operation of Section 50, a company proposing to buy a store or a vacant site can choose to advise the ACCC in advance. If the ACCC does not raise concerns that the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market, the company at least has some level of comfort that the proposed acquisition is unlikely to breach the law. If the company chooses not to advise the ACCC in advance, it runs a greater risk that, in some cases, the ACCC might subsequently find that, after the transaction has been completed, the acquisition breaches the Act. Coles, within the Wesfarmers group, has adopted the practice of notifying the ACCC in advance of proposed acquisitions of stores and vacant sites.

However, it does not follow that, since an effects test is included in Section 50 and other sections of the Act, it can be inserted seamlessly into Section 46 with clearly pro-competitive consequences.

A business that competes hard on price, to the benefit of consumers, can damage or eliminate a rival, or make it uncommercial for a potential rival to enter a market. Since the competitively behaving business cannot know in advance what effect its competitive behaviour might have on an actual rival or on a potential rival that is not even in the market at the time, it could breach the law by behaving competitively.

The competitive business could be deterred from keeping its prices low, from finding efficiencies that enabled it to drive prices lower and possibly even from offering quality and service that had the effect or likely effect of damaging a rival or preventing a potential rival from entering a market. The offering by a supermarket of a private-labelled product could have the effect of damaging a competitor, including the manufacturer of a branded product, or preventing the entry of a competitor into that or any other market. Opening a new Bunnings store could increase competition in the home improvement market in an area, provide a great outcome for consumers in range and value, but also have the eventual effect of seeing an existing competitor hardware business close.

Boards and managers of businesses with a substantial degree of market power could be breaching the law by competing hard on price, and possibly also on quality and service. However, they would not know at the time they were making these decisions whether they were acting unlawfully, since under an effects test it could depend on the response of actual or potential competitors, including rivals that might not even exist at the time management decisions were made. Management of a business may be reluctant to put itself in such a position, with a consequent lessening, not strengthening, of competition.

Management could conceivably seek some sort of indication or authorisation from the ACCC for pricing, promotional and branding decisions prior to making any such decisions. Numerous decisions are made every year by businesses with a substantial degree of power in a market about pricing, discounting, branding and offerings under loyalty programs. Seeking prior guidance or authorisation of these would insert the ACCC into the day-to-day or at least the weekly decisions of company management. Apart from the question of whether a regulator should be so involved in such decision-making, ACCC delays in responding would be inevitable.

Rather than promoting competition, the inclusion of such an effects test in Section 46 could easily stifle competition, causing consumer prices to be higher than necessary, as management and boards sought to comply with the law.

It is sometimes claimed that purpose is difficult to prove, and that Australia is unique in adopting a purpose test for misuse of market power. But purpose is a familiar concept across Australia's competition law, and proscribed purposes have been found by the courts in many cases. Where section 46 cases have failed, it has rarely been on the element of purpose. Further, although the primary competition instruments of some other jurisdictions do not refer explicitly to purpose, an element of purpose, intent or wilfulness has frequently been applied by courts and regulators in these jurisdictions.

Forced divestiture

It has been proposed in the Competition and Consumer Amendment (Misuse of Market Power) Bill 2014 circulated by Senator Xenophon that the Court be given the power to order a corporation to reduce its market share through divestiture for breaches of Section 46 relating to the misuse of market power. Under the existing Act, divestiture can be ordered where a corporation has contravened Section 50 relating to the prohibition of acquisitions that would result in a substantial lessening of competition. The proposed amendment would extend the divestiture power to cases of corporations being found to have used their market power for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a business into a market or preventing a business from engaging in competitive conduct in that or any other market. The Bill would also provide for divestiture powers in proven cases of predatory pricing.

Divestiture is an appropriate remedy for a breach of section 50 because there is a clear connection between the breach and the remedy—acquisition and divestiture—and a recent merger can easily be undone. In the case of a section 46 misuse of market power, it would be impossible to meaningfully connect the relevant conduct with any particular assets to divest. Any divestiture remedy would be arbitrary and would very likely cause disproportionate harm to the business by splitting it along arbitrary lines.

The Griffiths and Cooney Reports both recommended against divestiture due to its unpredictable results, including the risk of leaving the target substantially less productive, efficient, profitable or even viable—and so reducing consumer welfare. The Hilmer Report also noted that a general divestiture remedy would be arbitrary, would often remove efficiencies, would disrupt entire

industries, and would be ineffective in cases where industries evolved faster than divestiture could be implemented. The Dawson Report agreed that "divestiture is inappropriate in this context because there is no clear nexus between the assets to be divested and the contravening conduct" and that any identification of assets would be "difficult at best and arbitrary at worst."

Internationally, jurisdictions with a general divestiture power rarely use it, noting the severity, disruptiveness and unpredictability of the remedy, preferring to address market power by taking measures to lower barriers to entry in the relevant market.

Advocates of extending divestiture powers to Section 46 also support the inclusion of an effects test in that section. For the reasons set out in the discussion of an effects test above, the application of an effects test to Section 46 could easily have anti-competitive consequences. The inclusion of divestiture powers could only exacerbate these problems. It would not of itself remedy any behaviour that might be found to have breached Section 46 but would be an extra penalty designed to reduce the company's market share. It is one of an array of proposals designed to achieve an effective market cap. This is evident from the operation of the proposed amendment such that not only the ACCC but also 'any other person' could apply to the Court to direct that divestiture occur.

Prohibition on price discrimination

A section prohibiting price discrimination was inserted into Australia's competition laws in 1974 but repealed in 1995. Proposals have been made for the re-insertion of clauses prohibiting price discrimination.

One such proposal, by Master Grocers Australia, would prohibit a corporation with a substantial share of a market from discriminating between purchasers of goods of like quality or grade in relation to prices charged for the goods, discounts, allowances, rebates or credits, if the discrimination has the purpose or effect or likely effect of substantially lessening competition.

This would prevent businesses from charging different prices to different customers for the same good or service if it has the purpose, effect or likely effect of substantially lessening competition in a market.

The proposal is designed to make shopper dockets unlawful. Its reach would extend to any business with a substantial share of a market charging different prices for like goods or services anywhere in Australia.

An earlier version of this proposal was the Blacktown Amendment introduced into the Senate in 2009, which would have required a major supermarket or fuel retailing business to charge the same price at each of its outlets within a radius of 35km (the distance from Blacktown to the Sydney CBD). The Blacktown Amendment did not pass the Senate.

Any major business offering different prices, discounts, allowances, rebates or credits to different customers could be at risk of breaching an amendment dealing with price discrimination, depending on the detail of such an amendment. This could call into question the lawfulness of loyalty programs including frequent flyer point schemes. Other businesses potentially affected by a price discrimination amendment include cinemas and tourism operators offering discounts for children, low-income earners and pensioners, if those discounts are judged to have the effect or likely effect of substantially lessening competition.

While these restrictions might benefit some competitor businesses they would be to the detriment of consumers.

Creeping acquisitions and market caps

Various legislative proposals would effectively impose caps on the share of a market that one or more corporations are permitted to have.

A recent proposal by Master Grocers Australia is to prohibit a corporation with a substantial share of a market from acquiring an existing retail outlet or opening a new outlet in any market where it already has a 'reasonable degree' of retail representation if that acquisition or store opening would have the effect or be likely to have the effect of eliminating or substantially damaging a competitor, preventing the entry of a competitor into that market or any other market, or deterring a competitor from engaging in competitive conduct in that market or any other market.

Since the opening of a new store or the acquisition of an existing store must deter or prevent someone else from engaging in competitive conduct in that market, given the finite space available for stores in shopping precincts, the proposed prohibition is effectively a market cap on any retail business with a substantial share of a market. Master Grocers Australia explicitly states that "the definition attributed to 'reasonable degree' would inevitably capture the individual market power of Coles and Woolworths" (p. 11).

Guaranteeing some businesses a minimum share of a market by prohibiting larger, well-established businesses from building new stores or acquiring existing stores would protect those other businesses from competition at the expense of consumers.

It would also disadvantage landowners and existing storeowners wishing to sell their businesses, limiting the number of eligible bidders with the likely consequence of depressing the prices vendors could expect to receive.

Reversal of the onus of proof

It has been proposed by Master Grocers Australia that Section 46 be amended to oblige major supermarkets to prove that the acquisition of an existing store or a vacant site would not substantially lessen competition in any market. Supermarkets would be obliged to prove that an acquisition would not prevent the entry of another business into that market or deter a business from engaging in competitive conduct in the market or in any other market. Since this can never be proven, the proposed reversal of the onus of proof is effectively a market cap.

Price signalling

The Competition and Consumer Act 2010 was amended with effect from June 2012 to prohibit price signalling by banks. The amendments prohibit both the private disclosure of pricing or other information to a competitor, and the general disclosure of information where the purpose of the disclosure is to substantially lessen competition in a market.

At the time, the Federal Government considered applying these amendments generally but decided against doing so. In particular, consideration was given to the circumstances of fuel retailing and the role of Informed Sources, a subscription-based service that makes retail petrol prices available to subscribers in real time.

An ACCC inquiry found that Informed Sources played an important role in the fuel price cycle. Proposals such as Fuel Watch have been developed to dampen the fuel price cycle.

One effect of doing so would be to increase average fuel prices for price-sensitive motorists (who tend to buy fuel when the price is low), and to reduce fuel prices for fuel-card holders (who tend to be more affluent or have their fuel purchased by employers).

If services such as Informed Sources were prohibited by amendments to the price signalling provisions, information on the prices being charged by rivals would still be collected, but through non-electronic means such as visits to nearby service stations.

Further contact

We will be pleased to further engage the Review panel directly on the issues raised here, particularly as they relate to the detail of potential impacts on individual Wesfarmers businesses. Should you wish to clarify any particular issue raised in our submission, please contact Wesfarmers' Executive General Manager - Corporate Affairs, Alan Carpenter acarpenter@wesfarmers.com.au (08) 9327 4267.