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17 November 2014

Competition Policy Review Secretariat
The Treasury
Layton Crescent
PARKES ACT 2600

Dear Sir/Madam

Submission – Competition Policy Review

The following submission is being made by the Central Markets Association of Australia, on behalf of the owners of Australia's six Central Markets, the primary wholesale marketing and distribution hub for fresh fruit and vegetables and flowers in Australia, with a combined throughput value in excess of \$7 billion.

Central Markets are the main wholesale fresh fruit and vegetable markets serving a state or region. They provide an efficient and effective wholesale marketing and distribution hub ensuring customers have ready access to fresh fruit and vegetables.

Central Markets exist in Brisbane, Sydney, Newcastle, Melbourne, Adelaide and Perth. Central Market based businesses are servicing over 10,000 business customers which include retailers, secondary wholesalers, foodservice businesses, providores and exporters with fresh produce sourced from in excess of 15,000 fruit and vegetable growers nationally.

The CMAA is restricting its comments in relation to the draft Competition Policy Review Report document to the following areas:

- Draft Recommendation 1 – Competition Principles;
- Draft Recommendation 11 – Regulation Review;
- Draft Recommendation 25 – Misuse of Market Power; and
- Codes of Conduct.

1. Draft Recommendation 1 – Competition Principles

Draft Recommendation 1 on page 24 of the report, details a range of principals to guide Commonwealth, State and Territory local governments in implementing competition policy.

The most contentious is likely to be the first dot point which states:

- Legislative frameworks and government policies binding the public or private sectors should not restrict competition.

While only being a "principle", it is inevitable that government policies do restrict competition, and they can do so in an anti-competitive and pervasive manner. Furthermore, the application of existing principles which seek to infer that the application of Government Regulations are done in an environment of competitive neutrality has at times been deliberately ignored by successive State and Federal Governments.

An example relates to the Mandatory Horticulture Code of Conduct. This regulation was controversially introduced without full and proper consultation with industry, it only applied to one sector of the industry, its existence has not demonstrated public benefit, and it works to restrict competition and diversity within the fresh fruit and vegetable industry.

One point which needs to be highlighted is the need for these “principles” to be followed by the Government and Government agencies.

A converse argument that many consumer and community advocates propose is that some level of restriction on competition is justified when it will work to retain longer term choice and competition within an industry. What they are arguing for is the application of competition policy in a manner which works to provide resistance to the ongoing and relentless rationalisation of an industry over time. The longer term outcome of Government policies failing to recognise there are industry sectors which end up devoid of diversity and competition as a direct result of government policies which refuse to recognise the longer term negative impact of industry domination by a small number of players.

2. Draft Recommendation 11 – Regulation Review

This recommendation seeks to ensure the application of a “public interest” test. This is appropriate but any public interest test must consider both short term and long term consequences. It can be easy to argue that for example, the ongoing act of predatory pricing may be justified because it results in cheaper prices for consumers however, any “public interest” test needs to recognise that short term financial gains which result from potential discounting/predatory pricing needs to be assessed against the longer term rationalisation and loss of competition that can result.

3. Draft Recommendation 25 – Misuse of Market Power

There is a clear justification and need to make the existing market power provisions meaningful and workable.

This organisation supports the proposal to prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the proposed conduct has purpose, or would be likely to have the effect of substantially lessening competition in that, or any other market.

We do not support the proposal for the inclusion of a defence, as this would obviously be used extensively to the substantial detriment of the proposed provision.

It is hard to contemplate how the “effects” test would have “unintended” consequences and rather than specify specific defences which could be used to construct defences so as to render the test as meaningless (as the existing provisions of the Act), it would appear more worthwhile to establish meaningful and enforceable provisions which can work to ensure ongoing fair competition and exist as a meaningful barrier to the ongoing misuse of market power as a mechanism to assist rationalisation.



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4. Codes of Conduct

The use of Codes of Conduct by the Federal Government has not been consistent, with the process clearly politicised, when it suits them.

The use of Codes should be to promote good commercial practice, and/or prohibit other specific practices unique to an industry sector. Codes should not however, exist to restrict competition, reduce commercial feasibility and/or establish an unintended commercial bias against one part of an industry (when justified).

As has been clearly documented, the existence of the Mandatory Horticulture Code of Conduct is an example of an unworkable Code which exists as an anticompetitive imposition on just one part of an industry.

The Code imposes no commercial requirements on growers or retailers, it does not promote good commercial practice, it reduces flexibility in dealings between growers and wholesalers and it seeks to impose requirements which the majority of growers and wholesalers are unable to comply with in their ordinary day to day dealings.

The Code was imposed on the industry without full and proper consultation and against the advice of peak bodies within the fruit and vegetable wholesaling sector which argued that the Code was unworkable.

By way of contrast, the existing Produce Retail and Grocery Industry Code of Conduct is a voluntary Code with few meaningful requirements. The proposed Grocery Code, currently under consideration by the Federal Government, was drafted by retailers and is again likely to be voluntary.

In terms of the application of the industry codes, the real inequity comes in respect of an investigation by the ACCC. The CMAA is aware of a situation whereby an investigation required the company being investigated to incur staff and legal fees of in excess of \$40,000 despite the ACCC finally determining to not proceed with any subsequent enforcement action. A \$40,000 expense for a company with a gross sales of what might be \$10-\$40 million annually as a small business operating under the Horticulture Code of Conduct, is a very significant expense.

There is little/no relativity applied when large national/multi-national businesses are investigated or even penalised where a cost of what might be several hundred thousand dollars is incurred by a company with a multi-billion dollar turnover.

Accordingly, we are seeking the urgent review of the Horticulture Code of Conduct and the adoption of policies in relation to Industry Codes of Conduct which ensure they service a specific purpose, that they are workable and that they continue to allow parties covered by the Code to work together commercially as required and/or contract out of provisions which otherwise impose operational restrictions.

A list of CMAA's members and their contact details is attached for your reference.

Yours faithfully

A handwritten signature in black ink, appearing to read 'A. Young', is written over a white background.

Andrew Young
CMAA Spokesperson



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