

Response to the draft Harper Review into Australia's competition policy



**National Retail
Association**

Prepared by the National Retail Association

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Overview

The National Retail Association supports the majority of the Productivity Commission's draft report in its Competition Policy Review, released on October 10, 2014. The retail landscape is undergoing significant and rapid structural changes, and the NRA welcomes the Harper Review's initial findings into Australia's competition policy settings and hopes its final recommendations will lead to strong outcomes and positive results for all Australian businesses and consumers.

About the NRA

The National Retail Association (NRA) is a not-for-profit industry organisation providing professional services and critical information and advice to the retail, fast food and broader service industry throughout Australia. The NRA is Australia's largest and most representative retail industry organisation, representing more than 19,000 stores and outlets.

The NRA's membership comprises of members from all the sub-categories of retail including fashion, groceries, department stores, home wares, hardware, recreational goods, newsagents, fast food, cafes and personal services like hairdressing and beauty. It also comprises both large and small businesses, including the majority of national retail chains, as well as independent retailers and franchisees, and other service sector employers. The NRA has represented the interests of retailers and the broader service sector for almost 100 years. The NRA's aim is to help Australian retail businesses grow.

The NRA's response to the Harper Review's Draft Report into Australia's competition policy, laws and institutions

More than one in ten workers in Australia is employed in the retail sector, making it one of our nation's largest employers. The success of the retail sector therefore contributes significantly to the strength of the Australian economy, the revenues collected by governments, and the creation of jobs through growth.

The NRA welcomes the Draft Report, and intends to make responses to the following sections:

- 5 – Small business
- 6 – Retail markets
- 8.5 – Regulatory restrictions surrounding product standards and labelling
- 8.6 – Trading Hours
- 13.1 – Key retail markets - supermarkets

Response 1, referring to 5.0 Small business – access to remedies, collective bargaining, industry codes, competitive neutrality and regulatory restrictions

The NRA supports the findings and recommendations of the draft report regarding small business concerns in the area of competition policy, including in relation to access to remedies, collective bargaining, competitive neutrality and regulatory restrictions.

Response 2, referring to 6.0 Retail markets

Despite being one of Australia's largest generators of employment, the retail sector has relatively few direct regulations, compared to many other industries in Australia. There is no Government Minister for Retail or Department of Retailing, and very few specific laws applying only to this sector. Despite this lack of direct regulation – or perhaps because of it – there are few barriers to entry for new market entrants and there is generally rigorous competition, and the prospect of ongoing strong competition, right across the sector.

The Australian Bureau of Statistics maintains an industry classification (ANZSIC) in which it comprehensively divides the retail sector into a number of identified and well-defined categories of different retail businesses and product ranges. In all but one of these retail categories, there is little evidence of significant market failure nor public perceptions that the market is not performing adequately. In fact, established retail businesses in most of these categories would not have believed ten years ago that there was room in domestic markets for additional players, and many have been surprised at the capacity of the domestic market to attract and sustain large numbers of new retail stores and chains, including many multinational offshore retail brands. In the one sub-category of retail where there are public perceptions of a lack of competition – namely the supermarket category – it is noted that the market has been able to attract and retain new players over the past ten years, at least one of which has quickly gained significant market share. Furthermore, there is a long list of additional offshore multinational retailers in this category who keep a watching brief on market conditions in Australia and have the capacity to invest in a footprint of new stores and outlets at

relatively short notice, given the general lack of barriers to entry in this market. We will deal further with this subject matter later in this submission, in our response to section 13.

It should be noted that many retailers in all other categories of the sector view the competition policy focus in Australia on supermarkets as a misguided distraction, as it is often the focus of enthusiastic attention from the media, politicians and regulators, when there are more critical and compelling competition policy shortfalls in other areas of the economy, including many affecting the price of their essential inputs. Specifically, one of the greatest constraints to greater competition in the retail sector is one that is very rarely mentioned in public discussion. While the entire apparatus of competition policy and enforcement efforts are focused on some essential business inputs such as finance, property, transport and energy, one of the most significant inputs for Australian businesses is almost ignored. This is the issue of labour supply. With few exceptions, labour is the greatest cost for Australian retailers. It is the single most important factor in determining the success or failure of a very large proportion of retail businesses. Yet historically, and in this review thus far, there has been a failure to translate competition policy into enforcement and effective outcomes more broadly in the supply of labour in Australia. Therefore, apart from examining where a few isolated provisions intersect with labour laws, this review has missed a broader opportunity to examine ways to shine a light on anti-competitive labour arrangements which are one of the most significant factors impacting on business profitability, competitiveness and, ultimately, the prices paid by consumers in retail markets.

In this respect, this submission refers to the first attribute identified by the Panel in its draft report - focusing on making markets work in the long-term interests of consumers. A more comprehensive approach to ensuring that the full array of competition policies and enforcement mechanisms are applied in the area labour supply arrangements is one of the most critical and urgent areas for review and one that is likely to yield far greater consumer benefits in the long term than some of the industry specific priorities identified in the review thus far.

Response 3, referring to 8.5 Regulatory restrictions surrounding product standards and labelling

Product compliance is one of the biggest 'red tape' issues for the Australian retail sector. The retail industry is littered with examples of packaging and signage requirements which at best can be described as unnecessary or overbearing. Many of these examples spread across a range of government agencies – customs and imports, weights and measures, standards, health and consumer agencies, to name just a few. The result is a complex and confusing web of regulations and rules which apply to different businesses depending on their different circumstances.

For example, in the fast food sector some states require energy consumption information to be displayed at the point of sale, with no national consistency on this approach. Some states go so far as to stipulate the font and size of in-store sign-writing, but these requirements vary, creating significant administrative expense for businesses. In relation to packaging and product labelling, states are also able to regulate individually on textile labelling (such as fibre content) and care information. This kind of information is also dealt with under the Australian Consumer Law, and – in the case of imported goods – Customs import regulations. And in the case of electrical goods, there

is an entirely different approvals regime which varies from state to state, despite recent attempts at harmonisation.

The current, multi-layered and potentially contradictory regime with multiple regulators creates a minefield for retailers – not only in terms of legal compliance but simply in meeting their own desire to give their customers the right information. Some of the regulations for product compliance for domestic sales include:

- Customs laws;
- Trade measurements;
- Australian Consumer Law;
- Therapeutic Goods Administration;
- Australian Pesticides and Veterinary Medicines Authority
- Electrical regulators in each state; and
- The Australian Communications and Media Authority.

In circumstances where the retail sector has been undergoing a significant structural upheaval, following advancements in technology, digitalisation and online shopping, it is important for governments to understand that these changes have led to new consumer behaviours, new retailing models and increased competition through effective globalisation of retail markets. The structural shifts have brought about significant changes in the retail sector in a short period of time, with both challenges and opportunities for retailers.

The effective globalisation of consumer product markets has significant impacts for agencies and regulators seeking to administer or enforce Australian product regulations. Australian consumers are no longer forced to purchase products from retail businesses located within the country. Online and offshore options abound. In turn, in order to remain competitive, a significant number of Australian retailers are increasingly sourcing products from overseas markets where goods are manufactured specifically to be compliant with the product regulations of the world's major consumer markets such as the European Union and North America.

To the extent that Australia's product regulations are harmonised with those of other major consumer markets, Australian retailers are easily able to adapt and compete for the business of Australian consumers. To the extent that Australia's product regulations are different to those in the EU or North America, Australian retailers must repackage, relabel or alter goods in order to sell to Australian consumers. This will obviously add costs to supplying those products, making Australian retailers less competitive in the global consumer marketplace and leading Australian consumers to consider purchasing from offshore or online competitors that are probably not cognisant or compliant with divergent Australian requirements. The outcome in these instances is that the Australian consumer receives a non-compliant product, the offshore supplier is generally immune from effective enforcement of Australia's regulations, and the Australian retail industry achieved lower turnover than it otherwise would have, sending economic activity, jobs and capital offshore.

The key question is whether Australian product regulations must be different to those of other comparable countries that are major consumer markets. In some instances Australia's unique conditions mandate a different approach. However, for many generic products, it is unnecessary for Australia to have product regulations that diverge from other major consumer markets, especially

when there is little suggestion that the product regulations in the EU or North America are in any way deficient or lacking.

Notable examples where Australia's product regulations are divergent from those in other major product markets include:

- Volumetric labelling, such as for cosmetics. Australia's regulations require volumetric labelling to be front of box, when other major consumer markets around the world allow labelling on the back of the package. This difference requires Australian retailers to repackage or relabel or sticker over the products they are sourcing from overseas, which adds unnecessary costs to the supply chain and ultimately means Australian consumers pay more than they otherwise would have;
- The strict requirements (and outrageously high punitive fines) around some very minor formatting requirements in Australia are difficult to reconcile with the approaches of other regulators and agencies within Australia and around the world. Fines in the thousands of dollars for having incorrect capitalisation of the letter k in kg, or for having a measurement written in cm instead of metres, are unable to be justified on public interest grounds, can rarely be linked to any consumer detriment, and ultimately undermine the faith of stakeholders in the priorities and mechanisms of government; and
- Federal regulations for cosmetics that specify information that must be included on the front of a package. If that product is imported, with the correct information on the rear of the package, it must be repackaged or relabelled in Australia to comply with local laws, which require certain information to be displayed on the front of the package.

The NRA recently achieved some success in changing regulations in the area of packaging and labelling. Previous regulations had specified that a pre-packaged towel or bed linen or other fabric sheet, with dimensions of, say, 80cm x 104cm, must instead be labelled as 80cm x 1.04m - with fines potentially applying to any retailer who labelled their product as "104cm" long. Following representations from the NRA and our members, the National Measurement Institute (NMI), to its credit, has listened and has ordered some changes to its regulations to give retailers the freedom to use centimetres to describe these types of products.

While this has now been changed, it is just one of many hundreds of such onerous and unnecessary regulations impacting on retail trade. In our view, these have led to a regime where many small retailers survive on a system of non-compliance and non-enforcement. This is by no means the universal position of retail businesses, but it is without doubt that some operate outside the strict letter of the law because they simply do not understand their obligations, while others simply cannot comply with their obligations.

A small business owner simply does not have the time or resources to constantly stay abreast of the latest changes in this space on top of all other areas of operations and regulations. And while industry associations such as the NRA are able to advise our members on these requirements, not all small businesses are members of an industry association, and in any event there is a clear cost impost to businesses that could be reduced through simplification of these rules.

In a similar way to the packaging standards, the laws governing product technical and safety standards can be a tangle of bureaucratic red tape. It would be hard to conceive that a child car capsule or a bicycle safety helmet that is approved for use in Germany, for example, would not be fit for use in Australia. However, having such a product certified as safe or approved for use in Australia can be a costly and time-consuming process. If the most common safety and technical

standards applicable in Australia were harmonised with our major trading partners, the compliance costs for wholesalers and retailers would be significantly lower.

For the reasons above, this submission supports recommendations such as draft recommendation 12 in the draft report. Furthermore, the comments in this submission are not intended to detract from proper administration or enforcement of Australia's consumer protection systems, rather they are directed at sustaining the efficacy and relevance of the system in a new and quickly evolving global marketplace. While these issues are not always entirely within the mandate of the Federal Government, the cross-border inconsistencies can only be solved with a genuine national regime, and it is within the Federal Government's power to lead discussions on such a regime.

Response 4, referring to 8.6 Trading Hours

The NRA has long campaigned for greater harmonisation of state trading hours laws. The current rules make business operations difficult for retailers who trade across state borders, oftentimes also for those operating between different regions within a state, and in some cases for those operating within close proximity to each other.

For example, the state of Queensland has 98 pages of legislation, regulations and instruments, containing more than 180 legal obligations and prohibitions, and 50 different trading hours zones, each with its own different rules. A more flexible set of hours which simplifies and consolidates the rules for weekdays and Saturdays is clearly warranted, at least in South East Queensland, to allow non-exempt retailers to better service their markets, respond to changing consumer preferences, reduce red tape and compliance costs for retail businesses, create a significant number of new retail jobs, enhance consumer choice and reduce consumer travel and transaction costs in order to better service the needs of an expanding tourist industry.

Australia-wide, different legislation requirements are problematic for businesses as well as consumers, as they do not take into account the complex and often eclectic needs within each community. The NRA believes it is not in retailers' best interests to be forced to operate under closely-regulated trading hours and that it is the retailers themselves who should be given the chance to participate in this conversation, as they are best-placed to truly understand their consumers' needs, rather than government agencies.

The current regulations are a major cost impost on Australian retailers and a major obstacle to job creation and prosperity. That is not to say that full deregulation is automatically the only way forward. There are strong grounds for retaining some public holiday restrictions on community interest grounds and most States do so. In those States which still apply trading hours restrictions on Sundays or at certain times of the day or in certain geographic zones, there are often immediate steps that can be taken, which do not necessarily amount to full deregulation, that can unlock substantial economic benefits. In those situations, incremental reform with a focus on simplifying and harmonising the rules is often the best way forwards, so that retailers can be included in the changes and any harm to individual businesses from structural adjustments can be minimised by allowing sufficient lead times for businesses to adapt.

Response 5, referring to 13.1 Key retail markets – supermarkets

As outlined earlier, most Australian retailers are engaged in rigorous competition and there are few public perceptions of any lack of competition in all but one of the sub-categories of retail trade identified by the Australian Bureau of Statistics ANZSIC.

The supermarket sector is clearly dominated by two major players and is often singled out in public commentary as a priority for competition policy reform. However, that focus can be a misguided distraction away from many other critical competition issues impacting upon the profitability and competitiveness of retailers right across the retail sector, including all of the non-food categories of retail. One of the key priorities for urgent action is identified earlier in this submission.

This submission notes the findings of the draft report regarding the supermarket category of retail and broadly supports those findings. The NRA believes that most concerns in this space would be better addressed through a more dedicated approach by the enforcement agencies in applying existing provisions outlawing anti-competitive behaviour, than through microeconomic regulation attempting to control outcomes in a particular market where there may be unintended consequences of regulation.

Furthermore, in a market recently characterised by price deflation and decreasing margins driven in part by supply chain efficiencies, it is hard to identify market failure without predicting some future capacity of major retailers to substantially increase margins. Given the low barriers to entry into this marketplace and the clear readiness of further multinationals keeping a close watching brief on the Australian market with a long-term goal of opening stores here, such predictions seem unlikely to be realised. In our view, one or more of these offshore chains would move quickly to establish a presence in Australia if they saw domestic margins increasing.

Conclusion

The retail sector is weighed down by a large degree of red tape and regulation, and is also in the midst of structural upheaval following advancements in technology, digitalisation and online shopping. Consumer product markets are now essentially global, meaning that Australian retailers are competing against offshore competition. In this context, widespread red tape and compliance burdens present an additional and unnecessary challenge for the sector, and in some cases a distinct competitive disadvantage.

This large amount of restrictive regulatory burdens including inconsistent, overly complex and archaic trading hours legislation and unnecessarily restrictive product standards and labelling compliance requirements present a set of obstacles unique to Australian retailers.

But the single issue that Australian retailers believe most threatens their competitiveness and productivity is the nation's complex, inflexible and anti competitive industrial relations regime. As a result of changes introduced in July 2010 tens of thousands of businesses are far worse off. Labour regulation is now the greatest cost burden on almost every Australian retailer, and is the single most important factor in determining success or failure for a large proportion.

Yet, this review has mostly overlooked the great opportunity to tap into one of the most significant factors impacting on business profitability, competitiveness, and, ultimately, the correct operation of the retail markets.

While generally supportive of the Draft Harper Report, the NRA wishes to ensure its positive intentions are brought to fruition through careful planning followed by strategic action from government agencies, to ensure a lasting competitive environment for all Australian businesses.

As retailers operate in a quickly evolving space which is at the coalface of changing customer trends, the NRA also urges caution that such changes avoid the creation of more regulation and red tape, which would lead to higher operating costs, and subsequently, reduced competitiveness.

The NRA is also calling for a Regulatory Impact Statement to accompany any changes resulting from this review.

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