

17<sup>th</sup> November 2014

Professor Ian Harper  
Competition Policy Review Secretariat  
The Treasury Langton Crescent  
PARKES ACT 2600

Dear Professor Harper,

## **COMPETITION POLICY REVIEW – DRAFT REPORT SEPTEMBER 2014 response**

We welcome your Draft Report September 2014 and the opportunity to comment on the findings to the draft recommendations. We would also thank you for the opportunity of being involved in the consultations throughout this process.

South Australian Independent Retailers (referred as 'SAIR') represents the independent supermarket owners of Foodland; IGA and Friendly Grocer stores in South Australia.

SAIR represents 115 South Australian owners that own between them 236 outlets and employ 15,000 people across the State, representing 13% of the total South Australian Retail workforce.

In our submission to the Competition Policy Review (submitted as Independent Supermarket Retailers Guild of South Australia), we raised the following issues which reflect our recommendations:

1. the Competition and Consumer Act (2010) needs to be amended to enable quick strong enforcement when abuse of market power is demonstrated.
2. accessibility to ACCC is difficult for small and medium sized businesses, in cases of misuse of market power needs to be improved. The process to be heard is cumbersome, is impossible to get quick decisions and is too costly. We therefore recommend that the Act be amended to provide for a simpler access and resolution process for small business. That this new process be a no cost regime.
3. market dominance by Coles and Woolworths is the major issue that needs in our view to be rectified by this review if fair competition is going to continue to exist in the marketplace in the years to come. We note and support the Panel's recommendation in relation to the 'effects test' but are concerned that the reverse onus of proof recommended is too broad. See our comments in relation to Draft Recommendation 25.

4. as an addition to the changes supported in '3' above there also needs to be a cap placed on the market dominance of the two major chains in the supermarket industry and a divestment policy implemented. In the event of a proven misuse of market power the court be instructed that the guilty corporation has to divest. It was our suggested recommendation ***that an urgent amendment is required to Section 46 to introduce a maximum market share cap for any company operating in its specific market. The review to establish this desired cap to include a divesting process if the cap is breached and/or when a company is found guilty by a court for the misuse of its market power. The intent is to put a stop to market domination at the specified level and to severely penalise breaches.***
5. it is important to note that Australia is the only country in the free world where competition policy allows market domination by two players to exist to the extent it currently does in the supermarket industry without strong rules to control market domination and the misuse of their market power.

Our responses to the Panel's Draft Report which directly affect our members are:

- Draft Recommendation 10 – Inclusion of competition principles in planning and zoning legislation  
*Currently in South Australia there is a major review of the SA Planning Act that is looking at all of the structures and the processes used to administer the Act. We do support the Panels' recommendation to include competition principles in the objects of planning and zoning legislation advanced by the Panel. Whilst we agree there should be no favour to existing operators their positions should not be ignored in making future planning decisions. It is interesting to note the Panel suggests that processes need to be in place to make sure new entrants can enter a new market at the expense of existing operators. We believe in supporting new entrants' access to markets. There should be no special favours to them as has happened in many occasions in regional SA.*
- Draft Recommendation 11 – Regulation review  
*In principle we support a continuous review of regulations at State level to enable a reasonable transition to their removal. In South Australia retail trading hours have been modified over the last few years and at the moment the level of regulation is considered to be satisfactory. It is our view that any change of regulations is adequately handled at State level as it recognises local intent.*
- Draft Recommendation 17 – Competition law concepts  
*In supporting the general form and structure put for the CCA we note that the existing market place does not receive as much attention as we believe it should when considering the long term welfare of consumers. We do agree with the Panel's*

*comments about competition law being too complex and would benefit from simplification.*

- Draft Recommendation 18 – Competition law simplification  
*We strongly support this recommendation.*
- Draft Recommendation 20 – Definition of market  
*We support this recommendation.*
- Draft Recommendation 25 – Misuse of market power  
*We support the recommended change by the Panel to introduce an ‘effects test’. As an associate of the MGA we strongly support their detailed comments submitted in their response re ‘Misuse of Market Power – Section 46’.*

With MGA’s support we have included their comments in full:

“The Panel has proposed an amendment to s.46 in its Draft Recommendation 25:

The Panel considers that the primary prohibition in section 46 should be re-framed to prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market.

The Panel also proposes that a defence be introduced so that the primary prohibition would not apply if the conduct in question:

- a) would be a rational business decision by a corporation that did not have a substantial degree of power in the market; and
- b) the effect or likely effect of the conduct is to benefit the long-term interests of consumers.

The onus of proving that the defence applies should fall on the corporation engaging in the conduct.

The introduction of an effects test into s.46 and a reversal of the onus of proof align with our recommendation to facilitate robust competition and eliminate anti-competitive conduct.

MGA/LRA completely supports an “effects test” as it will ensure that whatever type of power is exercised – market power, financial power, or some other power – if it causes the prohibited effect, it will be captured by the provision. It is also anticipated that the breadth of the provision will capture a range of anti-competitive behaviours, such as predatory pricing, predatory capacity and anti-competitive price discrimination.

We note however that the reframing of s.46 centres on conduct that has the purpose, effect or likely effect of “substantially lessening competition.” This derogates significantly from the current wording which, despite requiring intent/purpose, is directed at proscribing purposes which are:

- a) eliminating or substantially damaging a competitor or the corporation or of a body corporate that is related to the corporation in that or any other market;
- b) preventing the entry of a person into that or any other market; or
- c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

The premise of this realignment according to the Panel is to bring s.46 into line with other prohibitions by focusing on protecting competition and not competitors, and to enhance the long-term interests of consumers. Therefore the focus of inquiry is shifted away from the “misuse” of market power, and onto the effect of specific conduct on competition in the relevant market. MGA/LRA notes however that subsections (b) and (c) are already focused on competition rather than individual competitors, and therefore there is no need to remove this wording.

The term ‘substantial’ has been variously interpreted as meaning real or of substance<sup>1</sup>, not merely discernible but material in a relative sense<sup>2</sup> and meaningful. In applying the concept of ‘substantially lessening competition’, Justice Smithers held<sup>3</sup>:

‘To apply the concept of substantially lessening competition in a market, it is necessary to assess the nature and extent of the market, the probable nature and extent of competition which would exist therein but for the conduct in question, the way the market operates and the nature and extent of the contemplated lessening.’

From the standpoint of s.50, the ‘substantially lessening competition’ (‘SLC’) test has generated significant evidentiary issues, particularly in light of the standard of proof required to establish the counterfactual. In the first instance decision of Emmett J in the Metcash case, his Honour established a two stage process for the SLC test:

1. it is more probable than not that a particular counterfactual will emerge if the acquisition does not proceed; and
2. compared to that counterfactual, there is a real chance (which may be less than 50%) that there will be a substantial lessening of competition if the acquisition proceeds.

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<sup>4</sup>Trade Practices Legislation Amendment Bill 1992, explanatory memorandum, paragraph 12

<sup>5</sup>Australia Senate 1992, Debates, vol. S157, p 4776

<sup>2</sup> Dandy power Equipment Pty Ltd v. Mercury marine Pty Ltd (1982) ATPR 40-315 at 43 688 Australia, Senate 1992, Debates, vol. S157, p. 4776.

<sup>3</sup> Ibid at 43,887

On appeal, Buchanan J noted that the application of a “real chance” standard, being less than the “balance of probabilities” standard, seemed ‘a strange, and unsatisfactory, result’ as ‘the Court may be required to find the statutory prohibition operative when, in all likelihood, the suggested possible effect on competition will not occur.’

He expressed the view that both stages of the test should involve proof on the balance of probabilities, rather than the “real chance” test.

Yates J noted that if “likely” is taken to mean “a real chance” in the context of s.50, then it is difficult to see why that standard should not apply to all elements of the test, rather than having different standards of proof for the first and second limbs, as is the case in Emmett J’s test.

The difficulty associated with the SLC test, and therefore a potential issue with the revised s.46 is being required to assess the future likelihood of something occurring in entirely hypothetical circumstances, and determining the extent of market power in circumstances where market power is already being exercised and has altered the observed market responses from what they would have been under normal ‘competitive’ conditions.

Additionally, this deviation from competitor to competition presents a number of practical issues:

1. if a corporation with a substantial degree of market power enters a market which has one supermarket, and the corporation’s presence results in the closure of that supermarket such that there has been a replacement of one supermarket for another, is this behaviour captured by the proposed new s.46?
2. Does s.46 cover the “means” of obtaining market power, rather than the result? This is particularly critical in the supermarket and liquor store sector where land-banking is a serious issue in respect of growing market share.
3. What is considered to be the specific “conduct” that lessens competition? Creeping acquisitions are major concern in this industry, and therefore will each acquisition need to be assessed individually, or can systematically buying sites or acquiring the leasehold/freehold be treated as a single course of conduct?

MGA/LRA therefore would like to see the inclusion of the term ‘substantially damaging a competitor’ so that the provision reads:

‘if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition or substantially damaging a competitor in that or any other market.’

MGA/LRA notes the Panel's request for further submissions on the scope of the proposed defence. Although an introduction of an effects test into s.46 is a welcomed proposal, the strength of this prohibition will rely on the nature and extent of the defence. The Panel has introduced the defence to mitigate concerns about over capture and to minimise unintended impacts from any change to the provision that would not be in the long term interests of consumers.

MGA/LRA understands through its attendance at the various public forums throughout Australia that the Panel's intention is to make the defence as broad as possible to avoid legal "loopholes" or technicalities being argued to circumvent the prohibition.

From the perspective of the supermarket and liquor store industry, the defence is riddled with unknown variables. The notion of 'rational business decision' is a nebulous concept which needs to be given significant consideration. In particular, the following comments are made:

1. Would it be "rational" for a corporation to open a store but have it operate at a loss initially, with the expectation that the gross profits will improve?
2. Will an assessment be different with a corporation with one store as compared to a corporation which has multiple stores?
3. Is a corporation's capacity to cross-subsidise its stores a factor for consideration?
4. What is considered to be a "good" investment, and what individual factors will be taken into account? That is, will there be a criteria for 'model' and rational' business decisions in respect of each situation?
5. Will a corporation with some market power, be treated differently from a corporation with no existing market power?

The "long-term interests of consumers" is another amorphous concept which may involve an assessment of the future likelihood and effect of something occurring in entirely hypothetical circumstances, and, standing in the shoes of the objective consumer to judge whether or not the conduct is in the consumer's best interests. This, it appears, will require a distinction between short-term anti-competitive purposes and long-term pro-competitive objectives, and achieving a careful balancing act. Additionally, questions are raised as to whether or not the assessment is solely based on the economic efficiency of the conduct in question.

In consideration of the Panel's comments in the public forums, and the specific issues which are directly pertinent to the Australian supermarket and liquor store landscape, MGA/LRA submits that the proposed mandatory Code can provide additional clarity on the meaning of some of these concepts in the reformed s.46. In doing so, with respect to a.46, the Code can outline the following items:

1. An industry specific definition of 'rational business decision'
  2. A provision (or clearer guidance) as to the limitations of the corporation that does not have a substantial degree of power in the market (the smaller competitor). This should include clear provisions stating the limitations of the 'smaller competitor' such as their inability to rely on cross-subsidisation and that they can only run at an operating loss for a limited period of time.
  3. The capacity of the 'smaller competitor' should also be considered in light of planning considerations. That is the presumption that any new store could not significantly alter existing pedestrian and vehicular traffic away from existing shopping precincts. Greater clarity as to the 'long term interests of consumers.' For example whilst the duopoly may be providing products at heavily discounted prices, there is an insurmountable detriment incurred as a result of such conduct; namely to the quality, range and service levels in the local area. With the diminishment of independent supermarkets, diversity suffers and customer satisfaction declines.
  4. A guideline as to the markets that will be the subject of inquiry – in the supermarket context, if an entity is buying up sites, must all possible markets for all other possible uses for those sites be considered?
  5. Given the assessment of the 'long-term interests of consumers' is susceptible to subjective impressions and reasoning,, the Code can include a non-exhaustive list of factors to consider when assessing this concept which are not limited or confined to economic efficiency considerations"
- Draft Recommendation 41 & 42 – Undertaking market studies  
*We support the role of the new Australian Council for Competition Policy to have the power to undertake studies of competition policy in Australia. They should have all the mandatory information gathering powers required to enable them to complete these studies. We also support all governments having the capacity to ask this body to undertake particular market or competition issues.*
  - Draft Recommendation 49 – Small business access to remedies  
*We highlighted in our submission and above that there needs have a simpler and no cost system for small business. There are several administrative tribunals that are used by the Federal Government in resolving matters for small business. The working basis of these tribunals should be investigated as a possible structure to enable small business to get quicker access and resolution to their concerns. It is important to note that quick resolution that does not involve long drawn out court procedures will give small business confidence that their issues are important to the ACCC. Small businesses need easier access, rapid turn-around and a no cost regime.*
  - Draft Recommendation 51 – Retail trading hours  
*Retail trading hours in South Australia are continually being reviewed and at the moment the State Government, employers and employees believe there should be no change. However the debate is a continuing political process.*

In reading the report you would get the impression that Competition Policy is the supreme policy that should override all other policies of the government.

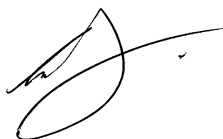
In reality there are many community views that need to be considered as well as Competition Policy outcomes. Unbridled competition without rules is a disaster, particularly when those that have dominant market power are not checked. That is the reason why we strongly support the need for Section 46 of CCA to be amended and to be able to quickly and strongly penalise abuse of market power by any market operator. As stated earlier we also believe that there should be an added strong penalty of divestiture when there is a proven breach of market power.

The Panel suggested in its report that the current dominance by Coles and Woolworths in the supermarket area was acceptable. We do not agree with this position as the Report used data from 2008 which is now 6 years old. At that time the two market leaders had a combined 65% share of the market whereas today the agreed estimated share is close to 80%. As mentioned above there is no other free world country where this domination would be considered acceptable. In USA for example the Sherman Act would already be used to consider divestment.

We hope the Panel will re-consider its position in relation to this matter of excessive market share. It is a well-known view that when a corporation is in such a market dominant position. The misuse of market power often occurs.

We look forward to your final report.

Yours sincerely,



**Colin Shearing**  
Executive Spokesperson



**Hon Graham Ingerson**  
Government Relations Adviser