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Options to strengthen the misuse of market power law

Fresh Markets Australia (FMA) is the national industry body representing each of the six Market Chambers, which themselves are organisations which represent wholesalers and supporting businesses in each of Australia's six central fresh fruit and vegetable Markets (Brisbane, Sydney, Melbourne, Adelaide, Perth and Newcastle). In total, these organisations represent in excess of 400 Market wholesaling businesses.

More than 90% of Australia's estimated 17,000 commercial fruit and vegetable growing establishments do business with a Central Market wholesaler. In fact, more than 50% of fresh fruit and vegetables consumed in Australia is handled by a market wholesaler.

The economic contribution of the Central Markets – directly and indirectly is significant.

On their own, the six Central markets turnover in excess of $7 billion a year at wholesale prices. They are also significant employment hubs with more than 17,500 people employed directly or working on-site to buy fresh produce every day.

In addition to that, across Australia more than 2,700 independent fruit and vegetable retailers and 18,700 food service businesses (IBISWorld 2015) directly or indirectly rely on Central Markets for their fresh fruit and vegetable needs. These sectors employ 17,800 and 139,700 staff respectively, with a turnover of $3.7 billion and $17.3 billion annually.

FMA agrees with the view formed by Harper Panel that *the current provision is not fit for purpose, as it is not reliably enforceable and permits conduct that undermines the competitive process.*

FMA is strongly of the view that Option E be used to amend the misuse of market power provision.

Australian business deserves Competition laws with predicable, unambiguous market power provisions that rely on the literal meaning rather than having to sift through the intent of the provisions.

The current provision has been used in only seven cases bought before the courts over the last 15 years. This is a clear indicator that the current law makes it improbable for cases to be brought to the Federal Court or the High Court even though S46 is highly emotive and is the centre of so much debate.

Independent retailers of fresh produce have withstood the contraction of their market share as well as the failure of a number of businesses (all Australian small businesses) over the last decade. These retailers are only trying to start-up or stay in business by getting the best result for their customer within the competitive process within the current environment where major supermarkets with substantial market power may be acting in a manner to prevent, restrict or damage competition. If the failure of businesses continues the major supermarkets will dominate to an even greater degree – how can this strengthen competition?

Those organisations with the market power will no doubt be able to promote the idea that there are any number of examples of conduct that may be pro-competitive that would be captured under the proposed measures. It is fair to

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say however that an organisation with a substantial amount of market power has a higher probability to distort the competitive process.

Take advantage test

The *take advantage* test must be removed. It is confusing and hinders the 'intent' of the law. It is not a clear or predictable test as highlighted in the *Competition Policy (Harper) Review Final Report.* Its removal should diminish uncertainty as to the conduct being pro-competitive or anti-competitive. Its removal would also bring Australian competition laws in line with the general position taken in OECD countries where there is no proof required for a connection between market power and the conduct.

Purpose or effect (or likely effect) test

Few countries in the world rely only on *a 'purpose'* test, rather they rely on an effect-based approach and/or a form-based approach. According to the International Competition Network[1] '*the effects-based approach allows for an analysis of the circumstances in the particular case, and is therefore particularly suitable where neither economic theory nor empirical research predicts ex-ante a procompetitive or exclusionary explanation for a certain type of conduct with a high degree of certainty.*'

Australia must take this opportunity to harmonise competition laws with those of OECD countries.

According to ACCC Chairman Rod Simms[2] Professor Harper has asked the question referring to multinational firms who are detractors of the Section 46 recommendation; "*How can they reconcile operating within other jurisdictions that do not require any 'take advantage', and that focus directly on the effect on competition, while saying they cannot do so here?*"

Substantially lessening competition

It is FMA's view that the case law definition of *substantially lessening competition* as determined in other sections of the Act requires that the term must be used in S46. All organisations both large and small have operated under in this current legislative setting which requires them to determine if their conduct is possibly going to *substantially lessening competition.* Rod Sims[3] states that *'There is little or no evidence that I am aware of that operating within this law is deterring firms, large or small, from competing aggressively.'* He goes on the state, *'Some may ponder why do we need section 46 if sections 45 or 47 can do the work. Courts have often found breaches of section 45 or*

[1] International Competition Network (Unilateral Conduct Working Group), 'Unilateral Conduct Workbook Chapter 1: The Objectives and Principles of Unilateral Conduct Laws', p14 (Presented at the 11th Annual ICN conference Rio de Janeiro, Brazil, April 2012) http://www.internationalcompetitionnetwork.org/uploads/library/doc827.pdf

[2] R Simms, 'Section 46: The great divide' (Presented at the Hodgekiss Competition Law Conference, Sydney, May 2015) https://www.accc.gov.au/speech/section-46-the-great-divide#_ftn1

[3] R Simms: May 2015

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47 but no breaches of section 46. Cement Australia and Rural Press are two cases in point, as was Universal Music.

There are at least two reasons why we need a monopolisation provision.

First, there are circumstances where a firm with a substantial degree of market power may engage in conduct that is likely to substantially lessen competition that does not involve a contract, arrangement or understanding. For example, a firm engaging in predatory pricing to limit new entry and protect its monopoly position in a market may breach a monopolisation provision, but not section 45.

Second, it should be made clear that different rules govern behaviour of firms with a substantial degree of market power. As noted by the OECD:

> *"Unilateral acts by a firm with a high degree of market power are much more likely to distort the competitive process and ultimately harm consumer welfare than conduct by a firm that has no or little market power".*[4]

Put simply, a firm with a substantial degree of market power has greater ability and more to gain from conduct that restricts competition. Effective enforcement of laws targeting anti-competitive conduct by firms with substantial market power are a necessary foundation for the efficient functioning of our market economy.'

Mandatory factors

It is FMA's view that the *substantially lessening competition* test like the other sections of the Act, should not include mandatory factors that the courts must consider.

Authorisations

It is FMA's view that the *authorisations* should be available for conduct that might otherwise be captured by S46.

Guidelines

FMA supports the ACCC issuing guidelines to assist business to understand the ACCC's approach to the provision.

Summary

FMA agrees with the view formed by Harper Panel that *the current provision is not fit for purpose, as it is not reliably enforceable and permits conduct that undermines the competitive process and* **is strongly of the view that Option E be used to amend the misuse of market power provision.**

FMA calls on the Australian Government to take this opportunity to harmonise Australia's misuse of market power provisions with those in OECD countries.

12 February 2016

[4] OECD Policy Roundtables, *Evidentiary Issues in Proving Dominance*, 2006, page 7.

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