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Competition Policy Review Secretariat
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To Whom It May Concern,

Australian Dairy Farmers (ADF) appreciates the opportunity to provide a submission in response to the discussion paper on Options to Strengthen the Misuse of Market Power Law.

ADF acknowledges the consultation and hard work that has been undertaken by the Panel and the Government on the goal of strengthening the misuse of market power provision.

Rather than addressing all questions raised in the discussion paper, ADF will once again concentrate on issues that are relevant to dairy farmers and the complex issues they face in domestic markets, as we did in our submissions to the Review.

The discussion paper outlines six options for amending the current misuse of market power provisions.

Options A to D are untenable as they do not countenance including the most important and effective measure canvassed in the discussion paper - an Effects Test.

ADF believes the closest to suitable option would be Option E, however ADF does not agree with the inclusion of the 'purpose' element due to the practical difficulties of proving this.

Inclusion of the purpose element and defence as outlined in the Harper Review recommendation 30 may make the Effects test unworkable in reality.

ADF agrees with the ACCC view that the legislative guidance proposed in the Harper Review is unnecessary and notes that the ACCC proposes to publish guidelines on its approach to the enforcement of section 46.

ADF's aim throughout the review of competition policy process has been to help balance market power, provide fairness in the market and end unjust practices such as the $1 per litre campaign.

If you wish to discuss this submission or require further information on this matter please do not hesitate to contact, ADF Senior Policy Manager, David Losberg on (03) 8621 4200.

Yours sincerely,

Simone Jolliffe
ADF President

Key Points:

- Discussion paper Options A to D are untenable as they do not countenance including the most important and effective measure canvassed in the discussion paper - an Effects Test.

- ADF believes the closest to suitable option would be Option E, however ADF does not agree with the inclusion of the 'purpose' element due to the practical difficulties of proving purpose.

- Inclusion of the purpose element and defence as outlined in the Harper Review recommendation 30 may make the Effects test unworkable in reality.

- Proving the purpose of commercial conduct is very difficult practically due to the fact it involves a subjective enquiry; whereas, proving anti-competitive effect is less difficult because it involves an objective enquiry.

- Australia's current laws, focusing solely on the purpose of the dominant firm to establish a contravention of unilateral conduct prohibitions, are rarely used due to purpose being almost impossible to prove.

- ADF agrees with the ACCC view that the legislative guidance proposed in the Harper Review is unnecessary and notes that the ACCC proposes to publish guidelines on its approach to the enforcement of section 46.

- In any policy and law a key principle is consistency. The proposed Option E provides an opportunity to make section 46 consistent with section 45 (anti-competitive arrangements) and section 47 (exclusive dealing) which apply if the purpose, effect or likely effect of the conduct is to substantially lessen competition and section 50 (mergers) which applies if the effect or likely effect of the conduct is to substantially lessen competition.

- An Effects Test is in line with competition policy around the world – the vast majority of developed nations have an Effects Test. Almost all western nations except for Australia and New Zealand.

- The proposed change to section 46 would move Australian law closer to international best practice, which prohibits unilateral conduct by a dominant firm that has a harmful effect on competition.

- ADF notes the support of competition experts for the proposed changes to Section 46, including the Harper Panel, the ACCC, former Chairmen of the ACCC and small businesses and suppliers across Australia.

Introduction

Australian Dairy Farmers (ADF) is a not-for-profit organisation that represents the interests of dairy farmers nationally. We are the collective voice to Government and the community on national issues affecting dairy farmers.

The ADF has a long history of successfully lobbying for the rights of dairy farmers on many fronts.

Australian dairy is a $13.5 billion farm, manufacturing and export industry, with an extremely positive future. Dairy's value to the Australian economy, jobs on farms, in manufacturing and service sectors, the towns and communities it supports, as well as the ongoing health and wellbeing of Australian families, are a compelling basis for Government attention and policy support.

Australia's 6,100 dairy farmers produced 9.7 billion litres of milk in 2014/15, and the industry has the potential to grow substantially over the next decade to meet growing international demand, particularly in South East Asia, China and the Middle East.

The industry directly employs 39,000 Australians on farms and in dairy processing, while more than 100,000 are employed in dairy service sectors.

Whole of supply chain approach

The Australian dairy industry needs to be viewed as an integrated supply chain. Milk is a perishable product, which must be processed before it can be sold commercially. As a result, dairy production is integrated across the supply chain: dairy farmers cannot operate without domestic processing capacity, nor can processors survive without domestic farm milk supply.

Significant regional differences continue to characterise the Australian dairy industry – based on market and product mix, farmer confidence as well as current and future growth prospects.

Like the national economy, the dairy industry continues to be characterised by "two speeds" – growth and consolidation in exporting regions, contrasted with faltering confidence and contraction in domestic milk regions.

For most farmers in south-eastern Australia, international conditions determine prices and industry confidence. In Queensland, Central and Northern New South Wales, and Western Australia, however, the industry is geared toward domestic fresh milk supply.

Ongoing intensity in retail competition, unsustainable pricing of milk at $1 per litre, disruptions caused by changes in private label supply contracts, impacts on proprietary brand sales and profitability, and uncertainty surrounding processor milk requirements have undermined farmer returns, investment, confidence and supply stability.

The use of fresh milk as a discount marketing agent by the major supermarkets, while at the same time seeking to increase the market share of their own private label brands, has seen a substantial negative impact on the margins and profitability of the domestic fresh milk supply chain. The impacts have directly affected small retailers, milk processors and farmers. Major supermarkets are no longer just retailers with dominant market share but now major brand owners.

These issues affect the food system within regions, and, ultimately, the sustainability of a local fresh milk supply at a regional level. Analysis at the national level fails to show this nuanced picture, particularly the de-linking of pricing in the 'drinking milk' states from international prices which is becoming apparent and is cause for concern.

Prices in Southern states are set in global markets due to the large amount of product exported (almost 40% of production is exported).

The domestic market is a mature market and any substantial growth in the Australian dairy industry is going to come through the export market.

Dairy ranks fourth in agricultural exports, with 6% of world dairy trade - valued at almost $3 billion in 2014/15.

The inequality of market and or bargaining power means that farmers are largely price-takers in the market and susceptible to, at times, questionable business practices of large corporate businesses with significant market and brand power. It also needs to be acknowledged that these same practices will have implications for consumer choice and costs nationally in the longer term if left unchallenged and may already be impacting the viability of maintaining consumer choice in regional areas.

ADF seeks recognition of the competitive disadvantage faced by farmers which places them in a uniquely vulnerable position. This disadvantage is particularly heightened due to the time pressures and logistical disadvantages in supplying perishable goods, in particular fresh milk which is the most commonly purchased staple by Australian consumers and one which Australian's expect to be able to purchase in a wide range of retail outlets right across the nation.

Competition Policy Review report – March 2015
Recommendation 30 – Misuse of market power
(Section 19.1, Page 348)

Recommendation 30 — Misuse of market power

The primary prohibition in section 46 of the CCA 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.

To mitigate concerns about inadvertently capturing pro-competitive conduct, the legislation should direct the court, when determining whether conduct has the purpose, effect or likely effect, of substantially lessening competition in a market, to have regard to:

- the extent to which the conduct has the purpose, effect or likely effect of increasing competition in the market, including by enhancing efficiency, innovation, product quality or price competitiveness; and
- the extent to which the conduct has the purpose, effect or likely effect of lessening competition in the market, including by preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market.

Such a re-framing would allow the provision to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing, and amendments clarifying the meaning of 'take advantage' and how the causal link between the substantial degree of market power and anti-competitive purpose may be determined.

Authorisation should be available in relation to section 46, and the ACCC should issue guidelines regarding its approach to the provision.

This recommendation is reflected in the model legislative provisions in Appendix A.

Key Points

- ADF welcomes the Panel's recommendation for an Effects Test, however has concerns that the inclusion of the purpose element and defence as outlined above may make the Effects test unworkable in reality.
- Proving the purpose of commercial conduct is very difficult practically due to the fact it involves a subjective enquiry; whereas, proving anti-competitive effect is less difficult because it involves an objective enquiry
- ADF agrees with the ACCC view that the legislative guidance proposed in the Harper Review is unnecessary and notes that the ACCC proposes to publish guidelines on its approach to the enforcement of section 46.

Background

The considerable amount of work, investment, planning and risk required to produce, transport,

process, distribute and deliver a perishable product, fresh milk, on a daily basis is not reflected in the current discount price of milk by major retailers at $1 per litre and is distorting the market.

The supermarket duopoly in Australia benefits from unprecedented market share, including for their own private label brands, and market power. The unique nature of milk provides retailers with an effective means to grow their market share and power, however the consequences for the sustainability of the domestic fresh milk supply chain and consumer choice and cost longer term is significant.

If left unchecked, the actions of the major retailers in squeezing the supply chain ultimately will lead to a substantial lessening of competition in the market place, a significant impact on the viability of branded dairy products, less product variety on supermarket shelves, less choice for customers and in the long term, higher prices for consumers.

Why we need an Effects Test

The clear intent of the major retailers' strategy is to extract as much value as possible from the supply chain with consequent pressure on those at the start of the chain who actually produce the food we eat - farmers.

They are also seeking to increase their own market share and the share of home brand products in a store to the detriment of competitors, like the family corner store, independent petrol stations and other small businesses.

Major retailers set the price of both their store brand and proprietary brands on the supermarket shelf and discount their store brand, in some cases, below the cost of goods sold to unfairly advantage their store brand over proprietary brands. This tactic combined with the strategy of 'national cost averaging' is predatory and is damaging competition in the market place with medium and long term consequences for dairy farmers and the fresh milk supply chain and consumers.

The major retailers use their market power to implement a wide range of tactics to gain an advantage and to secure greater margins and market share from supply chains. We have observed over the last five years that the major retailers are continually adapting these tactics.

The objective of the "CCA is to enhance the welfare of Australians through the promotion of competition and fair trading, and provision for consumer protection."

Given this, it is important that the ACCC has the ability to examine the effect of such strategies of the major retailers, with particular emphasis on the impact on competition and fair trading (including small businesses), consumer choice, farmer viability, the supply chain and future prices.

ADF agrees with the Harper Review, and a raft of other competition experts, that change is needed to make our competition laws fit for purpose.

The proposed change to section 46 would move Australian law closer to international best practice, which prohibits unilateral conduct by a dominant firm that has a harmful effect on competition.

Australia's current laws, focusing solely on the purpose of the dominant firm to establish a contravention of unilateral conduct prohibitions, are rarely used due to purpose being almost impossible to prove.

It is worth noting that the proposed amendment includes the key term substantial lessening of competition - how can any reasonable person or organisation oppose this?

Australian Government Discussion Paper
Options to strengthen the misuse of market power law
(December 2015)

ADF will now take the opportunity to comment on various aspects of the Australian Government Discussion Paper, *Options to strengthen the misuse of market power law*.

ADF include comments from the text of the discussion paper and the final Harper Review report to provide context and supportive evidence for positions proposed. Additional comments from other organisations and individuals will also be included for the same reasons.

International

An Effects Test is in line with competition policy around the world – the vast majority of developed nations have an Effects Test. Almost all western nations except for Australia and New Zealand have an effects test or an arrangement that is effectively an effects test.

The proposed change to section 46 would move Australian law closer to international best practice, which prohibits unilateral conduct by a dominant firm that has a harmful effect on competition.

The discussion paper notes that:

"The Harper Panel found that international competition laws in the EU, US, UK and Canada have been framed so as to examine the effects on competition as well as the purpose." (page 6)

and

"Australia is almost unique (save for New Zealand, whose analogous law substantially follows the approach in section 46) in adopting both the 'take advantage' limb and a test based only on anti-competitive purpose." (page 6)

and

"Internationally, competition laws have been framed so as to examine the effects on competition of commercial conduct as well as the purpose of the conduct. In Australia, section 45 (anti-competitive arrangements) and section 47 (exclusive dealing) apply if the purpose, effect or likely effect of the conduct is to substantially lessen competition; section 50 (mergers) applies if the effect or likely effect of the conduct is to substantially lessen competition." – page 13

The 'Purpose' element

As indicated earlier ADF believes the closest to suitable option would be Option E, however ADF does not agree with the inclusion of the 'purpose' element due to the practical difficulties of proving purpose.

Inclusion of the purpose element and defence as outlined in the Harper Review recommendation 30 may make the Effects test unworkable in reality.

Proving the purpose of commercial conduct is very difficult practically due to the fact it involves a subjective enquiry; whereas, proving anti-competitive effect is less difficult because it involves an objective enquiry.

Australia's current laws, focusing solely on the purpose of the dominant firm to establish a contravention of unilateral conduct prohibitions, are rarely used due to purpose being almost impossible to prove.

The discussion paper notes that:

"The 'purpose' test and whether it should be amended to include an 'effects' test has been the primary focus of debate concerning the provision. Submissions to the Harper Review advanced two main arguments for the inclusion of an effects test:

- As a matter of policy, competition law ought to be directed to the effect of commercial conduct on competition, not the purpose of the conduct, because it is the anti-competitive effect of conduct that harms consumer welfare.
- As a matter of practicality, proving the purpose of commercial conduct is difficult because it involves a subjective enquiry; whereas, proving anti-competitive effect is less difficult because it involves an objective enquiry." (page 5)

It is also worth noting the following comments from the Harper Panel final Competition Policy Review report:

"The 'purpose' limb, that prohibits conduct if it has the purpose of harming competitors, is misdirected as a matter of policy and out of step with equivalent international approaches." (page 347)

and

"The Panel considers that the current form of section 46, prohibiting conduct if it has the purpose of harming competitors, is misdirected as a matter of policy and out of step with equivalent international approaches. The prohibition ought to be directed to conduct that has the purpose or effect of harming the competitive process." (page 340)

<u>Effects Test in Competition and Consumer Act – make consistent as a policy principle</u>

In any policy and law a key principle is consistency to provide certainty to business, suppliers and consumers.

The proposed Option E provides an opportunity to make section 46 consistent with section 45 (anti-competitive arrangements) and section 47 (exclusive dealing) which apply if the purpose, effect or likely effect of the conduct is to substantially lessen competition and section 50 (mergers) which applies if the effect or likely effect of the conduct is to substantially lessen competition.

The discussion paper notes that:

"In Australia, section 45 (anti-competitive arrangements) and section 47 (exclusive dealing) apply if the purpose, effect or likely effect of the conduct is to substantially lessen competition; section 50 (mergers) applies if the effect or likely effect of the conduct is to substantially lessen competition." (page 6)

and

"However, an important question arises whether section 46 ought to be directed at conduct that has the purpose of harming individual competitors (under the existing purpose test) or whether it ought to be directed at conduct that has the purpose or effect of harming the competitive process (consistent with the other main prohibitions in sections 45, 47 and 50 of the CCA)." (page 16)

<u>Transitional Costs/Uncertainty</u>

ADF questions the continued focus by some sectors on cost and uncertainty when very little detail has been supplied on what these costs may be and what has been supplied is questionable.

A prime example is the Business Council of Australia's letter of 25 August 2015 which ADF understands was sent to all Federal Cabinet Ministers.

The letter cited several examples of cost or innovations that may be at risk from possible changes to section 46 of the Competition and Consumer Act, such as the iphone or companies expanding in order to export into China, which is patently absurd.

The discussion paper notes that:

"The Panel's proposed reform to section 46 is an important change, which will (like all regulatory change) involve some transitional costs, as firms become familiar with the prohibition and as the courts develop jurisprudence on its application. In the Panel's view, the change is justified as transitional costs should not be excessive and will be outweighed by the benefits.

The Panel agrees with the Australian Competition and Consumer Commission (ACCC) that the uncertainty 'should not be unduly significant as the change is to an existing test with which businesses are already familiar' - that is, the substantial lessening of competition test used in other provisions of the CCA. This incorporates 'standards and concepts … at least well enough known as to be susceptible to practically workable ex ante analysis' (Minter Ellison, DR sub, page 5)." (page 18)

It is also worth noting comments from the ACCC Chairman, Mr Rod Sims, in an article in the Sydney Morning Herald on 27 April 2015 titled, *ACCC boss Rod Sims rejects supermarket claims effects test will hurt shoppers*.

"Supermarkets' claims that shoppers will be charged higher prices and be deprived of new stores under a proposed change to misuse of market power rules are false, the competition watchdog boss says.

Australian Competition and Consumer Commission Chairman Rod Sims said claims by Woolworths and Coles, as well as the peak retailer's body, that the adoption of the Harper review panel's "effects test" would, ultimately, hurt consumers, were symbolic of the "very confused" and "strange" nature of the debate.

He also said the change to section 46 would lift Australia to the world's competition policy standards."

http://www.smh.com.au/business/retail/accc-boss-rod-sims-rejects-supermarket-claims-effects-test-will-hurt-shoppers-20150427-1mubcl.html#ixzz3yrxZSlqL

ACCC – Submission to the Competition Policy Review – response to the draft report – 26 November 2014

"The ACCC strongly supports the Review Panel's recommendation to re-frame section 46 in line with the 'standard test' in Australia's competition law – an assessment of whether the conduct has the purpose, effect or likely effect of substantially lessening competition." – page 49

ACCC – Submission to Treasury on the findings of the Competition Policy Review – 29 May 2015

ACCC view on Final Recommendation 30

"The ACCC strongly endorses the proposed, simplified reformulation of section 46 to prohibit unilateral conduct of a firm with substantial market power where that conduct has the purpose, effect or likely effect of substantially lessening competition in any market." – page 14

It is also worth noting that two former Chairmen of the ACCC, Professor Allan Fels* and Graeme Samuel**, have both indicated their support for an effects test.

*The Australian, 5 August 2015 – Billson, Fels back effects test
**AFR, 13 January 2016 – Why section 46 is the best for competition, Graeme Samuel & Stephen King

The United Kingdom situation

The United Kingdom has already experienced the type of discounting, and major supermarket tactics and strategies, experienced in Australia since 2011 and the ensuing impacts on farmers and processors. This led them to develop measures to bring about more fairness and transparency in the market.

ADF believes these measures, particularly the UK Groceries Supply Code of Practice (the Groceries Code) provide a good starting point for the basis of Australian legislation establishing a mandatory code of practice and an ombudsman or commissioner.

The United Kingdom Competition Commission (CC) has found that one of the features that adversely affected competition in the market was the exercise of buyer power by certain grocery retailers with respect to their suppliers of groceries, through the adoption of supply chain practices that transfer excessive risks and unexpected costs to those suppliers.

The CC found that there was a detrimental effect on customers resulting from the adverse effect on competition and published its final report on 30 April 2008. In the report the CC considered that a package of remedies consisting of the following key elements would be effective and proportionate in remedying the various features of the market identified as having an adverse effect on competition:

(a) the establishment of a Groceries Supply Code of Practice (GSCOP); and
(b) the establishment of a GSCOP Ombudsman (or Adjudicator) to monitor and enforce compliance with the GSCOP.

A major issue the report raised was that some practices by big supermarkets were still having an anti-competitive effect, harming the long term interests of consumers. The new UK Code of Practice (the Groceries Code) was designed to improve the relationship between big retailers and their suppliers by preventing certain practices from occurring.

The Groceries Code came into force on 4 February 2010 and applied to all retailers with an annual turnover of more than £1 billion in groceries in the UK (there are ten such retailers in the UK). It must be incorporated into contracts with suppliers.

In the United Kingdom's Groceries Code Adjudicator (GCA) Annual Report and Accounts 2014-2015* there is a summary of the GCA's annual survey.

Given the parallels between the discounting experienced in Australia and the transfer of risk and costs to suppliers it is worth noting several key points of the survey:

Key findings:

- 8 out of 10 suppliers stated they had experienced issues that could be breaches of the Code in the previous 12 months;
- Only 38% of direct suppliers said they would consider raising an issue with the GCA; and
- When asked why they would not raise an issue with the GCA 58% stated they feared retribution should the retailer establish who they were and 41% though the GCA would not act on their evidence.

*Groceries Code Adjudicator Annual Report and Accounts 2014-15, pages 17 & 18

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/446470/Final_-_10364-TSO-GCA-Annual_Report_2015-ACCESSIBLE-01.pdf

Major Retailers – Recent ACCC/Federal Court Proceedings - Background

On 26 January 2011 Coles dropped the price of its home brand milk to $1 per litre. This price is unsustainable.

The considerable amount of work, investment, planning and risk required to produce, transport, process, distribute and deliver a perishable product, fresh milk, on a daily basis is not reflected in the current discount price of milk by major retailers at $1 per litre and is distorting the market.

If left unchecked, the actions of the major retailers in squeezing the supply chain ultimately will lead to a substantial lessening of competition in the market place, a significant impact on the viability of branded dairy products, less product variety on supermarket shelves, less choice for customers and in the long term, higher prices for consumers.

The supermarket duopoly in Australia benefits from unprecedented market share and market power. The unique nature of milk provides retailers with an effective means to grow their market share and power, however the consequences for the sustainability of the domestic fresh milk supply chain is significant.

Coles has continually tried to claim that farmers are not being impacted by the pricing of milk at an unsustainable $1 per litre. This is simply not true. Dairy farmers in the key drinking milk markets are being affected.

A key claim of Coles' was that they were "fully absorbing the price cut", i.e., the cost of the discounting of milk to $1 per litre.

Coles Video and Cartoon – contravention of Australian Competition Law

In early April 2014 the found that the 'Our Coles Brand Milk Story' video and cartoon are likely to have contravened Section 18 of the Australian Competition Law which contradicts Coles' key claim of "fully absorbing the price cut."

Section 18 prohibits misleading or deceptive conduct, and Coles admitted it is likely to have contravened this part of the act.

The 'Our Coles Brand Milk Story' video and cartoon were a cynical exercise by Coles to convince consumers that farm gate prices had increased for dairy farmers when they had actually decreased.

The ACCC's investigation followed complaints from dairy farmer organisations, including ADF and the Queensland Dairyfarmers' Organisations (QDO), about the misleading nature of the video and cartoon; which was published on social media. Coles has also claimed that their own margins decreased on Coles-brand milk – something that the ACCC has said could not be substantiated.

The ACCC found that Coles had, in the video and cartoon, represented the farm-gate milk price increasing from 86 cents per two litre bottle of Coles-branded milk in 2010-11 to around 90 cents in 2011-12, when in fact this was an estimate with the final industry figures showing the 2011-12 farm-gate milk price actually decreasing to 84 cents.

The ACCC's ruling is an indictment of Coles and their key claim that they have absorbed the cost of $1 per litre milk. Pleasingly, the ACCC recognised this and compelled Coles to take action, including via social media, to correct the record and to avoid making misleading or deceptive claims around the retail price of milk in future.

As Coles themselves stated in their 'Corrective Notice on our Milk Story – Coles' video on YouTube: "We made representations about facts that were actually only estimates or opinions". In the corrective notice Coles also admitted that it has now only funded the "majority of the price cuts".

ADF has, since January 2011, consistently said that milk priced at $1 per litre is simply unsustainable and does not give a fair return for dairy farmers and others in the supply chain.

Another case of interest was the announcement of ACCC Federal Court proceedings against Coles and the subsequent Federal Court decision on 22 December 2014.

ACCC Federal Court proceedings, decision and action against Coles

The ACCC announced on 5 May 2014 that it would take Federal Court action against Coles for alleged unconscionable conduct towards 200 of its smaller suppliers.

The ACCC said that Coles' alleged behaviour towards suppliers includes providing misleading information and taking advantage of their superior bargaining position.

On 22 December 2014 the Federal Court handed down its judgement in the case.

The Federal Court made declarations in two proceedings instituted by the ACCC that Coles Supermarkets Australia Pty Ltd engaged in unconscionable conduct in 2011 in its dealings with certain suppliers.

The Court ordered Coles pay combined pecuniary penalties of $10 million and costs.

Coles also had to enter a court enforceable undertaking to the ACCC to establish a formal process to provide options for redress for over 200 suppliers referred to in the proceedings.

In her judgment, Justice Gordon said:

"Coles' misconduct was serious, deliberate and repeated. Coles misused its bargaining power. Its conduct was 'not done in good conscience'. It was contrary to conscience. Coles treated its suppliers in a manner not consistent with acceptable business and social standards which apply to commercial dealings. Coles demanded payments from suppliers to which it was not entitled by threatening harm to the suppliers that did not comply with the demand. Coles withheld money from suppliers it had no right to withhold."

"Coles' practices, demands and threats were deliberate, orchestrated and relentless."

ACCC Federal Court proceedings against Woolworths

On 10 December 2015 the ACCC instituted proceedings in the Federal Court against Woolworths Limited, alleging it engaged in unconscionable conduct in dealings with a large number of its supermarket suppliers, in contravention of the Australian Consumer Law.

Text from the ACCC media release dated 10 December 2015:

The ACCC alleges that in December 2014, Woolworths developed a strategy, approved by senior management, to urgently reduce Woolworths' expected significant half year gross profit shortfall by 31 December 2014.

It is alleged that one of the ways Woolworths sought to reduce its expected profit shortfall was to design a scheme, referred to as "Mind the Gap". It is alleged that under the scheme, Woolworths systematically sought to obtain payments from a group of 821 "Tier B" suppliers to its supermarket business.

The ACCC alleges that, in accordance with the Mind the Gap scheme, Woolworths' category managers and buyers contacted a large number of the Tier B suppliers and asked for Mind the Gap payments from those suppliers for amounts which included payments that ranged from $4,291 to $1.4 million, to "support" Woolworths. Not agreeing to a payment would be seen as not "supporting" Woolworths.

The ACCC also alleges that these requests were made in circumstances where Woolworths was in a substantially stronger bargaining position than the suppliers, did not have a pre-existing contractual entitlement to seek the payments, and either knew it did not have or was indifferent to whether it had a legitimate basis for requesting a Mind the Gap payment from every targeted Tier B supplier.

The ACCC alleges that Woolworths sought approximately $60.2 million in Mind the Gap payments from the Tier B suppliers, expecting that while many suppliers would refuse to make a payment, some suppliers would agree. It is alleged that Woolworths ultimately captured approximately $18.1 million from these suppliers.

“The ACCC alleges that Woolworths’ conduct in requesting the Mind the Gap payments was unconscionable in all the circumstances,” ACCC Chairman Rod Sims said.

“A common concern raised by suppliers relates to arbitrary claims for payments outside of trading terms by major supermarket retailers. It is difficult for suppliers to plan and budget for the operation of their businesses if they are subject to such ad hoc requests.”

Conclusion

The ACCC’s actions and the Federal Court’s decisions in the above cases are an important vindication of the concerns raised by ADF about the excessive market power of the major retailers and the ways in which they have exercised this power.

It is worth noting that a lack of complaints against the major retailers does not mean there is an absence of market failure but instead represents evidence of significant market failure as suppliers are extremely reluctant to take action or give evidence.

The need for an Effects Test to provide a further measure to show the effect of commercial conduct on competition is also highlighted by these activities, the reluctance of suppliers to come forward and the difficulties experienced in gathering evidence.

ADF acknowledges that the Federal Court proceedings against Woolworths are yet to be finalised.

ADF will continue to strongly lobby the Federal Government for an Effects Test and also and advocate for a Mandatory Code of Conduct, including a Supermarket Ombudsman ‘with teeth’ to balance the market power of the major retailers.

Finally, it should be noted that ADF supports the work done by the National Farmers’ Federation (NFF) in this area and endorses their initial submission to the Review and the attached work by Minter Ellison lawyers.