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# COMPETITION & REGULATION UPDATE

## HARPER REVIEW: A SMALL VICTORY FOR BUSINESSES DEALING AND COMPETING WITH SUPERMARKETS

**The Harper Review Final Report was released last week. This update highlights the Panel's key views and recommendations that affect businesses supplying to or competing with supermarkets.**

### MISUSE OF MARKET POWER

The Harper Review has made recommendations regarding the misuse of market power prohibition, which if implemented would expand the reach of section 46 and make it easier to prove a contravention, primarily because of the removal of the "take advantage" limb and the addition of an "effects" test.

The Australian Competition and Consumer Commission (ACCC) has long advocated for the addition of an effects test on the basis that it is difficult for it to prove the subjective purpose of an accused.

The taking advantage limb has traditionally provided comfort to firms engaging in conduct that would be a rational business strategy even for a firm without substantial market power. The Harper Review initially proposed including an express defence to this effect. The removal of this limb would expand the reach of the prohibition and place significant importance on the interpretation of the substantial lessening of competition test, which the Harper Review recommends inserting in place of the existing proscribed anti-competitive purposes. The Harper Review recommends requiring Courts

to have regard to specific factors that increase or lessen competition including efficiency, innovation, product quality or price competitiveness. In our view, the inclusion of those factors would not alter the nature of the test. Existing jurisprudence establishes that the test requires a comparison of the state of competition in the relevant market with and without the conduct, including pro-competitive and anti-competitive factors.

The Harper Review also recommends allowing the ACCC to authorise conduct which satisfies a public benefit test. However, the time and cost associated with an authorisation application means that significant forward planning and investment would be required by firms with substantial market power seeking to rely on authorisation as a basis to engage in conduct that could lessen competition.

Supermarkets may have been hoping that the Harper Review would recommend that an express defence be created for contraventions of section 46. However, if the final recommendations are implemented, supermarkets engaging in conduct that previously may not have breached section 46 will not only need to question their purpose for engaging in the conduct, but also whether the

conduct has the effect or likely effect of substantially lessening competition.

## UNCONSCIONABLE CONDUCT AND UNFAIR CONTRACT TERMS

Throughout consultation, several small businesses and suppliers expressed concerns regarding the effectiveness of the unconscionable conduct provisions as a means of protecting them in their commercial dealings with larger businesses.

The outcome of the Coles decision in December last year suggests that the current unconscionable conduct provisions work despite them yielding arguably small penalties for businesses with high annual revenue. In its Final Report the Panel notes the ACCC's recent actions in the supermarket sector regarding unconscionable conduct in dealings with suppliers and states that the Coles decision indicates that the provisions appear to work. The Panel's view is that active and ongoing review of the provisions should occur as matters progress through the courts to ensure the provisions meet their policy goals. The Panel does not make any recommendations regarding unfair and unconscionable conduct in business transactions.

Although the provisions appear to work, the Coles decision does not provide any clear guidance on what constitutes unconscionable conduct. The ongoing uncertainty regarding what constitutes unconscionable conduct will continue to raise a risk to businesses that are in superior bargaining positions compared to other businesses in their commercial dealings. However, the absence of a definition for what constitutes unconscionable conduct will also create uncertainty for smaller businesses that are unsure of whether the conduct they are experiencing in their commercial dealings constitutes acceptable standards of business behaviour.

## THE EFFECT OF MARKET POWER ON COMPETITION NOT INDIVIDUAL COMPETITORS

Despite many businesses expressing concerns regarding the market shares of the major supermarkets and the effects of low pricing of products, fuel discount shopper docket, low prices paid to suppliers and land banking, the Panel found that Australia's competition laws contain provisions that are designed to address such issues. It noted

that the important issue for competition is not whether the market is concentrated but whether businesses engage in anti-competitive conduct.

If the Harper Review's recommendations are implemented, suppliers to and competitors of supermarkets should consider whether the conduct they are experiencing or observing constitutes a misuse of market power, unconscionable conduct or, if applicable, a breach of the Food and Grocery Code of Conduct. The Harper Review's comments confirm that businesses querying whether particular supermarket conduct is prohibited should focus on whether the conduct breaches one of the provisions under the *Competition and Consumer Act 2010* (CCA) rather than whether it harms an individual competitor.

Other recommendations relevant to businesses in the food, beverage and retail sector include the Harper Review's suggested changes to allow notification of resale price maintenance conduct and changes to the vertical restriction prohibitions under the CCA.

## MORE INFORMATION

If you would like to know more about how the Harper Review's recommendations could affect your business, please contact us.



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