Winemakers' Federation of Australia

leadership strategy advocacy support

12 February 2016

General Manager
Market and Competition Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Treasurer

The Winemakers' Federation of Australia (WFA) welcomes the opportunity to contribute to the Government's further consideration of options to strengthen the misuse of market power law following the Final Report of the Competition Policy Review.

As stated in our submission to the Review, WFA believes that attempts to use the existing section 46 (misuse of market power) provisions to deal with small and medium business concerns about the behaviour of dominant players have not worked. This is because section 46 was not designed to deal with unfair and ultimately anti-competitive behaviour from dominant players. Further, the sheer difficulty for the regulator (let alone small and medium businesses) to mount actions under section 46 means that these provisions can never be tested and the fear of reprisal for small and medium businesses (irrespective of whether it is real), not to mention prohibitive costs consequences, adds to this difficulty. The use of industry codes of conduct regulated under the Act would assist. There has been talk of using unconscionable conduct provisions as in the ASIC Act but this area of the law is far less certain than section 46. Extension of the unfair contract terms will also be of some assistance.

A re-think is needed in the way these provisions operate. What is missing in the current debate is a set of proscribed unfair or undesirable commercial practices where the business is dealing with a party that exercises a substantial degree of market power.

If the Government pursues amendments to S. 46 of the CCA with the removal of the 'misuse of market power test' in favour of 'effects test', WFA would support the stated draft goal to "capture unilateral conduct by a firm with substantial market power that has, or is likely to have, the effect of substantially lessening competition in the market." WFA believes this would help address the current inconsistency in s. 46 as recently outlined by ACCC Commissioners Walker and Featherstone:

> *"(There is) an inconsistency in the current section 46 which has long been recognised. Unlike the competition tests in other sections, section 46 focuses on conduct that has the purpose of damaging a competitor or deterring a competitor from engaging in competitive conduct, rather than focusing on the process of competition or competition more generally in the market… (we need to focus) on the competitive process and not on individual competitors."*

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In this regard, Recommendation 30 of the Harper Review to remove the 'take advantage test' and move from the current 'purpose test' to an 'effects test' will be important to shift the current focus from damage to competitors to the competitive process itself and behaviours that substantially lessen competition. WFA agrees that the current 'take advantage test' is particularly ineffective as unfair practices undertaken by companies with significant market power will have substantially more impact than the same activities undertaken by smaller businesses. An example from the wine industry would be one of the national chains charging the producer for the margin which they have had to give away to meet a competitor's price (who may be a small single owner-operator operating in a regional market) on a similar product sold to that competitor by the same producer.

Moving to an 'effects test' will also bring Australian competition law into alignment with international practice which considers both the purpose and outcomes of competitive behaviour. It will also provide greater consistency within the CCA with the tests for contacts, exclusive dealings and mergers.

Yours sincerely

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