WOOLWORTHS GROUP

Committee Secretary
Economics Legislation Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

9 January 2017

Dear Committee Secretary,

Woolworths Limited (**Woolworths**) welcomes the opportunity to provide this submission to the Committee's Inquiry on the *Competition and Consumer Amendment (Misuse of Market Power) Bill 2016.*

Throughout the discussion about reforming Australia's competition policy framework, Woolworths has consistently argued, through its several submissions, that there is no compelling case for change to the 'misuse of market power' legislation, particularly as it relates to the already highly competitive and regulated retail sector in Australia. This position has been articulated by Woolworths in the context of the development of technology and online retail channels, and the strong growth in Australia of international retailers such as ALDI. Woolworths remains concerned that changing the well-established misuse of market power provisions, which are in line with equivalent provisions in overseas jurisdictions (albeit expressed in different terms), has the potential to jeopardise economic benefits to Australian consumers.

While Woolworths remains strongly opposed to what it considers to be unnecessary changes to section 46 (**s46**), we understand that the Government intends to amend the section by introducing the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016 (the **Bill**) to remove the 'take advantage' limb of s46 and replace the existing provision with a 'substantial lessening of competition effects test'.

That being the case, this submission is focused on the need for legislation that is clear in its object and on its face, in order that the businesses it regulates can readily make assessments with sufficient certainty concerning compliant conduct from both a public and private enforcement perspective. Presently, the Bill lacks sufficient clarity to facilitate efficient compliance.

As we argued in our submission to Treasury and to the ACCC dated 4 October 2016 on the exposure draft of the Competition and Consumer Amendment (Competition Policy Review) Bill 2016 (**Exposure Draft**), it is critical that the new law does not impose on

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businesses unintended consequences that may adversely impact investment, the economy and jobs.

To assist the Committee, below is a short explanation of Woolworths' position that:

- the Bill as it currently stands lacks sufficient clarity to allow for practical day-to-day application within our business;
- key elements of the ACCC's draft framework for guidelines on s46 of the Exposure Draft (**s46 Framework**) should be built into the Bill; and
- if the Bill is passed, there should be a commitment to a post-implementation review of the legislation in the short to medium term, to assess its impact and whether or not it is achieving its objectives.

Need for clear drafting capable of practical application

Woolworths is committed to remaining compliant with its responsibilities under the *Competition and Consumer Act 2010*, and continuously invests to drive a culture within our business of 'doing the right thing'. Problematically, however, the Bill if enacted will require our diversified business to assess all relevant possible pro-competitive and anti-competitive effects of conduct in all the economic markets in which Woolworths supplies or acquires goods or services. Such an assessment has inherent difficulties and analytical complexities and may not be substantively possible. Moreover, such an assessment will often not be feasible in a commercially timely fashion due to the time pressures of fast moving consumer goods markets (**FMCG**).

The established common understanding of the current s46, as tested and clarified by the Courts, would be lost under the proposed new s46, resulting in severe delays and restrictions on businesses' legitimate commercial decision-making. Delays will occur as businesses will be required to complete full competition analyses before undertaking potential investments. Businesses will incur increased compliance costs when undertaking additional internal investigations with a view to seeking to minimise risk in the face of the uncertain boundaries of the new law as broadly drafted.

As indicated above, these delays are not workable in an FMCG context, and could be solved by much clearer compliance guidance in the law itself. The Bill will also restrict legitimate commercial decision-making because it will remove the causal connection in s46 between the possession of substantial market power and any anti-competitive conduct. This is discussed further below.

Clearer drafting of any new s46 is critical to enable businesses to assess their conduct both with respect to the ACCC's or the Court's interpretation of a new s46, and from the viewpoint of private litigants. Without this clarity, we are faced with the very real potential of slowing legitimate commercial decision-making and chilling competition, with consumers the least likely to win in such a scenario.

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Build elements of the ACCC's s46 Framework into the Bill

Woolworths believes that elements of the ACCC's s46 Framework should be built into the wording of any amended s46 legislation. The ACCC's s46 Framework outlines the objective of s46 as the effective prohibition of exclusionary conduct that interferes with the competitive process 'by preventing or deterring rivals or potential rivals from competing on their merits'. However, the Bill does not reference the well-understood concept of exclusionary conduct, despite its Explanatory Memorandum stating that the objective of s46 is to 'prevent firms from engaging in unilateral conduct that harms the competitive process.'

While Woolworths accepts the view that the current drafting of the Bill is designed to allow for flexibility, we are greatly concerned this broad scope provides for serious regulatory over-reach and will force businesses to adopt risk-averse behaviours, to the ultimate detriment of Australian consumers.

The Bill does not take up the obvious suggestions made by Woolworths (and others such as the Business Council of Australia) in relation to the Exposure Draft of s46, to ensure a causal nexus between substantial market power and any anti-competitive conduct. A specific key difficulty with the Bill is illustrated by the following example.

> Example
> For a large diversified business, if substantial market power is established in relation to one business unit in any one of the markets in which it may operate, then the first limb of the proposed new prohibition is immediately satisfied. In practice, the question of whether the proposed new prohibition has been contravened therefore starts half-way through the analysis contemplated by the Bill.
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> Larger corporations with substantial market power somewhere within their businesses will consequently be discriminately and irrationally disadvantaged by the proposed new s46. This is the case even when there is no suggestion that the corporation's market power has been used in carrying out the relevant conduct. Such corporations will more frequently be compelled to undertake a complicated and difficult balancing of the unclear pro-competitive and anti-competitive factors, at a significant cost to them, in order to make commercial decisions.
>
> Conglomerates will also be obliged to take on significantly greater legal and reputational risk than smaller companies without substantial market power, where they decide to proceed with conduct that may later be evaluated unfavourably by the ACCC or a Court, under a broad test that allows for wide discretion as to whether a "substantial lessening of competition" is, or may be, in play.
>
> In addition, larger corporations will take on disproportionately greater compliance, legal and administrative burdens in their efforts to ensure their

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conduct remains within the boundaries of the law - including because they will likely be subject to more ACCC investigations, which may often be entirely exploratory, requiring them to produce extensive information and documents (at their cost).

Ultimately, the above handicaps will likely slow and deter innovation, and result in harm (including higher prices) to end-consumers at a time of significant challenge for the Australian economy.

Need for post-implementation review

The proposed reform of s46 replaces legislation that has been in place for over 30 years, during which time case law has developed to give clear guidance on its application.

Given a comprehensive regulatory impact assessment has not been completed in relation to the Bill, Woolworths recommends that a post-implementation review be conducted within two years of any enactment of the Bill. This would provide an opportunity to assess the impact of the reform and to address any unintended consequences that arise from the implementation of the proposed new s46.

The Government has stated that competition policy change 'provides the best foundation for an innovative, competitive and agile economy'. However, it is our view that their policy objective would not be achieved, or at the very least would be seriously compromised, given the lack of clarity and the uncertainty that the proposed Bill would impose on business.

Woolworths also remains strongly of the view that the proposed changes to s46 would have no demonstrated impact that is in the interest of Australian consumers (by way of lower prices, greater choice and continued innovation).

As one of Australia's largest businesses, Woolworths strongly supports competition reform where it is clear and benefits Australian consumers. But we remain far from convinced that this legislation is either necessary or desirable for consumers, business or the broader economy, or that it will promote rather than impede vigorous competition. Therefore, we urge the Senate Economics Legislation Committee to reject the Bill in its current nebulous form and consider ways in which any adopted legislation could include greater definition of conduct that would offend the new section 46 to minimise uncertainty for business, regulatory over-reach, and undesirable impacts on the economy.

Yours sincerely,

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