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TREASURER

The Hon Annastacia Palaszczuk MLA
Premier of Queensland
PO Box 15185
CITY EAST QLD 4002

Dear Premier

I am writing to you in relation to the Harper Review of Competition Policy and the Commonwealth Government's response to the misuse of market power recommendation.

The Commonwealth Government's response to the Harper Review, released on 24 November 2015, indicated that the Government would consult further before reaching a final decision on amending the misuse of market power law (section 46 of the *Competition and Consumer Act 2010*). That consultation is now complete. Written submissions closed on 12 February 2016 and two roundtables were hosted by the Minister for Small Business and Assistant Treasurer. Almost 150 comments and submissions were received.

Following this process, the Commonwealth Government has decided to accept the Harper Review recommendation on section 46 in full.

- The new provision will prohibit firms from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in a market.
- To mitigate concerns about inadvertently capturing pro-competitive conduct, the provision will direct courts to have regard to specific factors when determining whether conduct has the purpose, effect or likely effect of substantially lessening competition.
- Amendments introduced since 2007 will be repealed.
- Authorisation will be made available for conduct that is likely to have net public benefits and the ACCC will issue guidance on its approach to enforcement of the new provision.

In accordance with clause 7 of the 1995 Intergovernmental Conduct Code Agreement, I am initiating consultation on the proposed amendments to the Act. I would appreciate receiving your responses within three months of the date of this letter. Following that, I will circulate draft amendments and initiate a 35-day voting period.

Should your officers require further information, my department's contact officer is Mr Scott Rogers at the Commonwealth Treasury ((02) 6263 3076 or scott.rogers@treasury.gov.au).

Yours sincerely

The Hon Scott Morrison MP

31 / 3 / 2016

Parliament House Canberra ACT 2600 Australia
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24 JUN 2016

The Honourable Scott Morrison MP
Treasurer
Parliament House
CANBERRA ACT 2600

Dear Treasurer Scott

Thank you for your letter of 31 March 2016 regarding the Harper Review of Competition Policy and the Federal Government's response to the misuse of market power recommendation.

I note the proposed changes to section 46 of the *Competition and Consumer Act 2010*. The Queensland Government will provide a formal response upon receiving the final draft amendments.

I look forward to working constructively with the Federal Government to develop and implement a competition policy framework that promotes growth and fairness and supports job creation.

Yours sincerely

ANNASTACIA PALASZCZUK MP
PREMIER OF QUEENSLAND
MINISTER FOR THE ARTS

TREASURER

The Hon Annastacia Palaszczuk MP
Premier of Queensland
PO Box 15185
CITY EAST QLD 4002

Dear Premier

I am writing to you in relation to the Harper Review of Competition Policy, and the Commonwealth Government's response.

The Commonwealth Government made an election promise early in 2013 that we would deliver the first root and branch review of Australia's competition laws in more than 20 years. Professor Harper's Final Report was released on 31 March this year. The Harper Review provided a far-reaching analysis of competition policy across the Australian economy and showed that reforming competition policy will be critical if Australia is to lift its long-term productivity growth.

The Commonwealth Government's response, released on 24 November 2015, outlines how it will implement the majority of the Harper Review's recommendations and is available at: www.treasury.gov.au/harperreview. Many of the recommendations are in areas of state and territory responsibility and the Government will work closely with the states and territories to advance reform.

The Government consulted widely with stakeholders in formulating its response to the Review. Written submissions closed on 26 May 2015. Around 140 submissions were received. This was in addition to the nearly 1000 submissions received during the Harper Review process. The Government also met with a range of stakeholders, including with the States and Territories via the Council on Federal Financial Relations.

I am writing to you in particular regarding the Commonwealth Government's plans to reform and update the competition provisions of the *Competition and Consumer Act 2010* (CCA) – a critical part of the Commonwealth's response to the Harper Review. The response outlines a range of proposed reforms, including introducing a prohibition on concerted practices, refining exclusionary conduct provisions, simplifying cartel laws, streamlining merger clearances, introducing a class authorisation process and establishing more flexible collective bargaining provisions. In relation to the Harper Panel's recommendation 24 (application of the law to government activities) the Commonwealth will be separately consulting states and territories on the implications of extending the CCA to apply to government activities in trade or commerce.

In accordance with clause 7 of the 1995 Intergovernmental Conduct Code Agreement, I am initiating consultation on the proposed amendments to the CCA, which are outlined in full in the attached Notice of Consultation. I would appreciate receiving your responses within three months of the date of this letter. Following that, I will circulate draft amendments and initiate a 35-day voting period.

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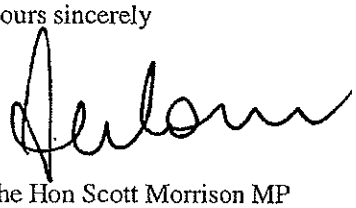
Telephone: 61 2 6277 7340 | Facsimile: 61 2 6273 3420

Should your officers require further information, my department's contact officer is Mr Scott Rogers at the Commonwealth Treasury (phone (02) 6263 3076 or e-mail scott.rogers@treasury.gov.au).

Yours sincerely



The Hon Scott Morrison MP

10 / 12 / 2015

Notice of consultation

Pursuant to the Conduct Code Agreement, the Commonwealth is consulting with States and Territories on proposed changes to the *Competition and Consumer Act 2010* (CCA) arising from the Harper Competition Policy Review Final Report.

The Commonwealth proposes to put forward a number of modifications to the CCA for parliamentary consideration.

1. LEGISLATIVE DEFINITIONS

1.1 COMPETITION

The Commonwealth proposes to amend the definition of 'competition' in section 4 of the CCA (including in relation to mergers) by explicitly recognising competition from goods imported or capable of being imported, or from services rendered or capable of being rendered, by persons not resident or not carrying on business in Australia.

Although the objective of the CCA is to protect and promote competition in Australian markets, frequently the sources of competition in Australian markets originate globally. The CCA has been framed to take account of all sources of competition that affect markets in Australia. However, the current definition of 'competition' in the CCA could be strengthened so there can be no doubt that it includes competition from potential imports of goods and services and not just actual imports.

2. CARTEL CONDUCT

The Commonwealth proposes to simplify the cartel prohibitions in Part IV, Division 1 of the CCA and broaden the exemption for joint ventures.

2.1 LIMIT TO AUSTRALIAN MARKETS

The CCA is concerned economic welfare of Australians, not citizens of other countries. The proposal is to expressly confine the application of cartel provisions to conduct affecting goods or services supplied or acquired in Australian markets in a similar manner to the other competition law prohibitions.

2.2 LIMIT TO ACTUAL OR LIKELY COMPETITORS

The current cartel prohibition sets too low a threshold for its application. Corporations that are not in competition with each other in their immediate markets commonly undertake joint or collaborative activities that produce consumer benefits. Under the current law, those activities would constitute cartel conduct and be subject to criminal sanctions if there is a possibility that they might compete in the relevant field of activity.

The amendments will confine cartel provisions to conduct involving firms that are actual or likely competitors, where 'likely' is on the balance of probabilities.

2.3 JOINT VENTURES

The narrow application of joint ventures in the legislation limits some legitimate commercial transactions and increase business compliance costs. The Commonwealth proposes to broaden the exemption for joint ventures.

2.4 VERTICAL TRADING

The exemption for vertical trading restrictions will be broadened to cover restrictions imposed by one firm on another in connection with the supply or acquisition of goods or services. If the conduct has the purpose or effect (or likely effect) of substantially lessening competition, it will be captured under the existing section 45 (which covers contracts, arrangements or understandings that restrict dealings or affect competition).

2.5 EXCLUSIONARY PROVISIONS

The Commonwealth proposes to repeal subparagraphs 45(2)(a)(i) and 45(2)(b)(i) of the CCA which prohibit exclusionary provisions (in contracts, arrangements or understandings). In practice, this conduct is materially the same as cartel conduct in the form of market sharing, making the prohibition of exclusionary provisions unnecessary.

Other amendments to the cartel provisions will address any remaining exclusionary provisions not covered by market sharing.

3. PRICE SIGNALLING AND CONCERTED PRACTICES

3.1 PRICE SIGNALLING

The current price signalling provisions contained in Part IV Division 1A (sections 44ZZS through 44ZZZB) apply only to the banking sector, and with exceptions. As there may be legitimate reasons for private price disclosure, the wider issue of anti-competitive conduct can be more adequately dealt with under an expanded Section 45 relating to 'contracts, arrangements or understandings that restrict dealings or affect competition'.

The Commonwealth proposes to repeal Part IV Division 1A of the CCA.

3.2 CONCERTED PRACTICES

Concerted practices including price signalling can be more adequately dealt with by expanding Section 45. The competition law would then apply equally across all sectors of the economy, prohibiting practices like anti-competitive price signalling for all businesses.

The Commonwealth proposes to introduce the concept of 'concerted practice' that has the purpose, or has or is likely to have the effect of substantially lessening competition, into section 45.

4. THIRD LINE FORCING

The Commonwealth proposes to amend sections 47(6) and (7) of the CCA to prevent third-line forcing only where it has the 'purpose, effect, or likely effect of substantially lessening

competition'. The current, blanket prohibition restricts the freedom of suppliers, and third-line forcing does not, in itself, produce anti-competitive results.

While exemptions from the application of the subsections can be sought from the ACCC, this can be a timely and costly process for applicants and the ACCC. The ACCC receives large numbers of notifications, and only in rare circumstances will it seek to take action. As such, there is a lack of proof that a per se test is required.

By replacing the current per se test with a 'substantial lessening of competition' test, the onus will be placed on the ACCC to prove that competition has been lessened. The ACCC will still be able to act on complaints received and investigate as it would other matters.

5. RESALE PRICE MAINTENANCE

5.1 NOTIFICATION

Amendments to section 48 will allow businesses to seek exemption from the resale price maintenance (RPM) prohibition via the ACCC's notification process.

Exemptions for RPM are currently available for a business through an authorisation process. To date only one exemption has been granted through this process. The Commonwealth understands the cost and length of the procedure prevent its use by businesses and industry.

Introducing a notification process for RPM, such as the one available under third-line forcing, would encourage uptake as it is quicker and less expensive. The ACCC would still have the ability to revoke the notification should it be deemed that the costs to the public outweigh the benefits. The ACCC would also be allowed to assess RPM trading strategies more frequently. This would improve the understanding of RPM trading practices in Australia, particularly with the adoption of the practice by digital companies.

5.2 EXEMPTION

The Commonwealth proposes to introduce an exemption from RPM between related bodies corporate by amending Section 48.

Related bodies corporate are not usually considered to be in competition with each other for the purpose of competition law (as is the case in sections 45 and 47 of the CCA). Currently there is no exemption for related bodies corporate for RPM conduct which is inconsistent with the rest of the law. This amendment would remedy that.

6. PRIVATE ACTIONS

The Commonwealth proposes to amend section 83 so that it extends to *admissions* of fact made by the person against whom the proceedings are brought, in addition to *findings* of fact made by the court.

The arbitrary distinction in the section between findings and admissions of fact is an impediment to exercising the right of private enforcement. In practice the two are hard to separate at court and the amendment will remove the need to make such a distinction for the purposes of section 83. This would help reduce the cost of private 'follow-on' proceedings and would assist small

business litigants to secure compensation for any harm suffered as a result of breaches of the CCA.

7. SIMPLIFICATION OF PART VII

Under the current structure of Part VII of the CCA, there are general notifications and authorisation divisions, as well as a specific merger division. All of these divisions are designed to grant an exemption from the application of Part IV of the CCA.

The use of multiple divisions to provide specific exemptions from Part IV creates complexity in and generates excessive regulatory and administrative costs. Further, the ACCC is not the decision maker in the first instance for all exemption decisions. The Australian Competition Tribunal (ACT) is currently the decision maker in the first instance for merger authorisations.

With the repeal of Part IV Division 1A and the other amendments above, the ACCC will have the power to grant authorisation for all parts of Part IV (except section 46), meaning the current Part VII Division 1 can be streamlined and simplified. This will reduce the costs involved in complying with the CCA.

7.1 MERGERS

The ACCC's formal merger clearance process has not been used since its introduction in 2007. The Commonwealth proposes to repeal the current formal merger clearance and authorisation processes in Part VII Division 3, and replace them with a provision for merger authorisation in Part VII Division 1 which deals with authorisation for the other provisions in Part IV.

Currently, the ACCC is empowered to provide formal merger **clearances** if it is satisfied the merger would not substantially lessen competition. Clearance decisions are subject to review by the ACT. Merger **authorisations** can only be granted by the ACT, and the test for authorisation is that the public benefits are expected to outweigh anti-competitive detriments. There is no avenue for review of authorisation decisions.

The ACT is not well suited to fulfil the role of decision maker in the first instance. The ACCC is better suited to investigation and decision making, while the ACT is better suited to the review role. Allowing the ACCC to apply both tests (lessening of competition; or benefits outweigh detriments) will enable merger parties to make a single application for approval, and maintain the role of the Tribunal as merits reviewer.

7.2 CLASS EXEMPTIONS

The Commonwealth proposes to insert a new Division in Part VII granting the ACCC the power to exempt a class of conduct covered by Part IV of the CCA (restrictive trade practices).

Some common business practices may be captured under Part IV even though they raise no competition or public interest concerns. Businesses can seek authorisation for individual practices, but with the number of potential applications an individual exemption process is costly for businesses and the ACCC. Granting the ACCC the power to issue class exemptions for common business practices that do not generate competition concerns will reduce compliance costs, increase certainty, and create 'safe harbours' for business.

7.2.1 Time limitation

A requirement will be created imposing a time limit on the operation of block exemptions. The time limit imposed will be at the discretion of the ACCC, but no longer than five years.

A time limit will prevent exemptions continuing indefinitely without review and prevent a stock of exemptions building up that are no longer relevant, that apply to conduct that has ceased having a public benefit, or that begin to lessen competition.

Once the exemption has expired the ACCC will have the option to let the exemption lapse, or reapply it. Reapplication of the exemption would require the ACCC to follow the same process as for implementation. This will ensure that the conduct being exempted from Part IV of the CCA continues to either create a net public benefit, or not substantially lessen competition.

7.2.2 Register

To prevent public perceptions that the ACCC may be behaving in an opaque fashion, or favouring certain interest groups, the ACCC will be required to maintain a public register of class exemptions.

A public register will allow public scrutiny of the ACCC's decisions, helping to create a clear and transparent process. The register will also act as a source of information for industry participants of the current exemptions that apply.

7.3 REVIEW

The powers of the ACT under Part IX of the CCA will be extended to allow it to review the decisions by the ACCC to issue class exemptions, and to grant merger authorisations.

The powers of the ACT to review decisions by the ACCC to issue block exemptions and merger authorisations will maintain the integrity of the processes. Independent statutory review of decisions will also assure applicants that decisions reached are reasonable, fair, and impartial.

8. ENFORCEMENT

8.1 PENALTIES FOR SECONDARY BOYCOTTS

The Commonwealth proposes to increase the maximum pecuniary penalty for contravention of secondary boycott provisions (sections 45D – 45DE) to the same level as that applying for other breaches of the competition law.

As such, the Commonwealth proposes to repeal 76(1A)(a) which provides a specific penalty amount of $750,000 for secondary boycott provisions.

9. COLLECTIVE BARGAINING

In certain circumstances allowing collective bargaining and collective boycotting can be beneficial. For example, small businesses negotiating the supply of products from one large supplier will have substantially less bargaining power and will be at a disadvantage in the negotiations. By negotiating as a collective, small business would be able to negotiate with equal bargaining power, and achieve a more efficient outcome. As these actions are generally

considered anti-competitive, small business must seek an exemption from the ACCC for such conduct.

Small business can seek an exemption from the ACCC through either a notification or authorisation process. The ACCC notes that currently small business fails to effectively utilise the notification provisions, being more likely to utilise the authorisation process. Reducing complexity and creating more flexibility in their application would encourage small business to take advantage of the notification process as originally intended.

9.1 NOTIFICATION PROCESS

Section 93AB will be amended to broaden the meaning of contracting parties to allow the inclusion of future, unnamed members, when lodging a notification. In addition, the word 'target' defined as another person, will become 'target(s)' referring to another person or persons.

The requirements for a notification set out in section 93AB currently limit a notification to only applying to action undertaken by known, clearly defined contracting parties against a sole target. A small business collective would have to lodge a notification for each party they intend to take action against, regardless of whether the parties are all part of the same negotiation, and businesses originally excluded from the notification would be required to lodge a new notification with the ACCC to take the same action against the same target that the small business collective has already notified for.

These requirements are constrictive for small business, and reduce the usefulness of any notifications.

9.2 CONDITIONS

Section 93AC of the CCA will be amended to empower the ACCC to impose conditions on notifications involving collective boycott activity.

In administrating the notification approval process, the ACCC currently has no discretion and can only accept the notification or object to it in its entirety. This creates situations where the ACCC must object to notifications due to concerns it may have. This is to the detriment of both the ACCC and small business community.

Amending section 93 AC to allow the ACCC to impose conditions on collective bargaining notification involving collective boycott activity will allow it to ease its concerns without objecting to the notification. This reduces administration costs and complexity by preventing the lodger from submitting several notifications until it finally meets the requirements of the ACCC, saving both parties time and money.

9.3 TIMEFRAME

Under section 93AD the period allowed for the ACCC to review notifications will be extended from 14 days to 60 days. The default timeframe of three years will be retained. The ACCC will also be granted the discretion to alter the timeframe for which a collective bargaining notification applies.

9.3.1 Coming into force

The time allowed for the ACCC to assess the impact of collective boycott will be extended from 14 days to 60 days.

Under the current provisions for collective bargaining notifications involving collective boycott activity, the ACCC has 14 days to assess the impact of the activity. This timeframe is generally considered inadequate for the ACCC to conduct a proper assessment. Extending the period to 60 days will provide the ACCC with time to consult the counterparty, and properly assess the impact of the collective boycott activity, including its impact on the broader community.

9.3.2 Ceasing to be in force

Allowing small businesses to continue operating as a collective beyond the end of negotiations for which notification has been provided would allow small businesses to act as cartels. This would lead to uncompetitive outcomes, and reduce the welfare of consumers in the market. However, negotiations between parties can be complex and a set three-year period in law can prevent the notification from running as long as required, resulting in situations where parties need to lodge new notifications while still undertaking the same negotiation.

A sunset clause on the lifetime of collective bargaining notifications prevents them from continuing indefinitely and prevents small businesses taking advantage of the notification beyond the negotiation period. By granting the ACCC the discretion to alter the sunset time, the ACCC can ensure that the notification lasts as long as necessary for the negotiations to continue effectively.

9.3.3 Collective boycotts

The Commonwealth proposes to grant the ACCC the power to stop collective boycott conduct where it is causing imminent serious detriment to the public.

In some circumstances the benefits of collective boycott activity may not outweigh its costs to the public. In such circumstances this provision will allow the ACCC to stop small businesses engaging in the activity, regardless of a notification being in force.

The amendment is in line with the intent of Part VII which provides for exemptions from the application of Part IV where the business conduct has a net public benefit or does not substantially lessen competition. If collective boycott activity by small business does not meet these standards then it should be prevented from continuing.

10. COMPULSORY INFORMATION GATHERING

The ACCC's primary investigative power is contained in section 155, which includes powers to compel corporations and individuals to provide information and produce documents to the ACCC – if it believes that the person or corporation is capable of giving evidence, information or documents relating to a possible contravention of the CCA.

10.1 COVERAGE

The provisions of section 155 will be extended to allow the ACCC to use its compulsory information gathering powers to investigate alleged contraventions of court-enforceable undertakings.

The ACCC may choose to settle matters administratively by accepting formal, court enforceable undertakings under section 87B of the CCA. In these public undertakings, companies or individuals generally agree to: remedy the harm caused by the conduct; accept responsibility for their actions; establish or review and improve their trade practices compliance programs and culture.

Extending the ACCC's information gathering powers to cover alleged contraventions of court-enforceable undertakings will help improve the integrity of undertakings and the enforcement framework of the CCA more broadly.

10.2 FINES

The Harper Review found that the current fines for non-compliance with notices under section 155 are inadequate. Fines associated with similar notice based gathering powers, such as those in the *Australian Securities and Investments Commission Act 2001* (ASIC Act) are in some instances 10 times larger than those applying under the CCA. For example, a fine of 200 penalty units may be issued under the ASIC Act, whereas it is only 20 units currently for a breach of a Section 155 notice.

The Commonwealth proposes increasing fines to align with other provisions, to improve the integrity of the enforcement framework and create a strong deterrent to non-compliance

10.3 REASONABLE SEARCH

A reasonable defence clause will be introduced for notices issued under section 155. The courts have recognised the cost of documentary searches, for example, Federal Court Rules 2011 (20.14) now require a party to undertake a reasonable search for documents. In determining what is a reasonable search, the party make take into account factors such as the number of documents involved and the ease and cost of retrieving the documents.

The introduction of a 'reasonable search' defence under section 155 would reduce this cost and bring the provision in line with other areas of the law, such as the rights to discovery under the Federal Court Rules 2011.

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4 MAR 2016

The Honourable Scott Morrison MP
Treasurer
Parliament House
CANBERRA ACT 2600

Dear Treasurer Scott

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I acknowledge the proposed changes to the *Competition and Consumer Act 2010*. The Queensland Government will provide a formal response upon receiving the final draft amendments.

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